For docket see 10-0353

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Supreme Court of Texas.
Prairie View A and M University
v.
Diljit K. Chatha.
No. 10-0353.

September 15, 2011.

Appearances:

Beth Klusmann, from the Office of the Attorney General, for Petitioner.
Ellen Sprovach, of Rosenberg & Sprovach, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Court is ready to hear argument in the first cause 10-0353 Prairie View A&M University v. Diljit Chatha.

MARSHAL: May it please the Court, Ms. Klusmann will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF BETH KLUSMANN ON BEHALF OF THE PETITIONER

ATTORNEY BETH KLUSMANN: May it please the Court, after the Supreme Court's decision in Ledbetter that Title VII does not make the routine issuance of paychecks an unlawful employment practice, Congress amended Title VII to bring paychecks within that statute. The Texas Legislature has not similarly amended the TCHRA. Ms. Chatha is asking this Court to act as if it did. By agreeing with Chatha, the Court of Appeals stepped into the issues of the Legislature by incorporating federal law into state law, but Chatha's claims are untimely under the TCHRA. Therefore, this Court should reverse the decision of the Court of Appeals and dismiss the claims against the university. It is undisputed that this Court can and should consider federal law when deciding how to interpret the TCHRA. The question in this case is which law should the Court consider. On the one hand, you have the Ledbetter decision in which the Supreme Court construed provisions of Title VII nearly identical to those found in the TCHRA. And on the other hand, you had the Ledbetter Act, substantive amendments to Title VII that have never been enacted by Texas Legislature and never made part of the TCHRA. The court should follow the Ledbetter decision as, again, that follows the language of the TCHRA, the plain lan-

guage of the statute as well as this Court's prior precedent interpreting the TCHRA. Chatha's arguments regarding the Ledbetter Act are insufficient for three reasons. First, the purpose provision of the TCHRA does not require the incorporation of federal law into state law. Second, the Legislature has demonstrated that it will amend the TCHRA to follow Title VII when it wants to do so and it has not done so in this case. And third, the TCHRA itself recognizes in Section 21.006 that federal law and state law may be different under the act and it has reserved to the Legislature the right to decide what to do in that circumstance. Turning first to the purpose section, 21.001 of the TCHRA says, one of the general purposes of the chapter is to provide for the execution of the policies of Title VII. This is simply a purpose section. If you read the entire provision, it is not creating enforceable rights against employers within the State of Texas. It's merely describing what the Legislature was thinking in 1983 when they decided to enact the TCHRA. There is no language in the purpose section that requires the incorporation of federal law into state law; rather it refers only to purposes and policies in general and the TCHRA's policies are in line with the policies of Title VII.

JUSTICE EVA M. GUZMAN: This issue of the difficulty for employees to discover discrepancies in pay, if you will, such that you can really draw that distinction between this being a limitations issue and more of a substantive issue, that's a serious concern isn't it?

ATTORNEY BETH KLUSMANN: It is a concern, obviously, for employees to figure out if their -- when they can figure out if their pay is different, but the statute doesn't provide for that. If the Court wishes to apply a discovery rule, for example, from common law, it is welcome to do so but in this case, there is no question that Chatha found out what her pay decision was in 2004 and even complained about it earlier according to that time, asking the university to raise her pay and it was denied. So therefore, in this case, the Court need not be concerned that Chatha was simply unaware that her pay was perhaps different than others within the university.

JUSTICE DALE WAINWRIGHT: Following your statement of the purpose section of the TCHRA, we said, in Autozone v. Reyes that by adopting the act, the Legislature intended to correlate state law with federal law in employment discrimination cases. And that follows the dictate of the Legislature to "provide for the execution of the policies of Title VII in our state action, our state act." Doesn't that mean more than just saying we're intending that we're going to be similar? The specific question I have for you is how is that dictate going to be played out when we're looking at deciding how to make our state act correlate with the federal act. How do we use that purpose section in interpreting the TCHRA? It's more than just a bland statement that we're going to be similar, right?

ATTORNEY BETH KLUSMANN: Correct. It encourages the Court to look to federal precedent, but it also encourages the Court to look to federal precedent not to the language. It refers to policies of Title VII not the language of Title VII.

JUSTICE DON R. WILLETT: Well, to put a finer point on it, I mean looking at what Justice Wainwright just read, provide for the execution of the policies of Title VII and its subsequent amendments, what meaning should we attach to that phrase? I mean it seems to expressly recognize that we should align with subsequent amendments to Title VII. What do we do with that? Isn't the Ledbetter Act such an amendment?

ATTORNEY BETH KLUSMANN: It is a subsequent amendment to Title VII, but it is not a subsequent amendment to the TCHRA. The Court should look to the TCHRA's plain language and interpret the plain language of the TCHRA.

JUSTICE DON R. WILLETT: We should provide for execution of the policies of Title VII and its subsequent amendments?

ATTORNEY BETH KLUSMANN: Yes, Your Honor, but at the time this was enacted in 1983, the TCHRA did not mirror Title VII in every respect. There were differences from that very point forward so we know that in 1983 when the Legislature enacted those words, it did not intend Title VII to be identical to the TCHRA. And if

we look at subsequent actions of the Legislature, specifically the amendments it made to the TCHRA in 1993 and 2009, we know that the Legislature is not interpreting the reference to subsequent amendments or the execution of policies to mean it just gets to sit by and wait for this Court to incorporate provisions of Title VII into the act.

JUSTICE DEBRA H. LEHRMANN: Well, what about Caballero? I mean in that case, didn't we do just that? I mean didn't we, in fact, I mean wasn't that a situation where the State had not amended in accordance with the federal amendment; however, we followed the federal amendment, isn't that right?

ATTORNEY BETH KLUSMANN: Actually in Caballero, Your Honor, the Court first considered the plain language of the TCHRA and concluded that it did not require parties to first seek an injunction before they could seek damages. They said that, construction of the statute was incorrect. Then they looked at federal law and that confirmed their reading of the statute. So I don't believe in Caballero the Court just simply blindly followed federal law. It began with the language of the TCHRA itself.

JUSTICE EVA M. GUZMAN: There are two federal district court cases that applying Texas law concluded that the Ledbetter Act applies and they may guide us in our decision. Can you articulate why we shouldn't look to, I guess it was Lohn and Klebe.

ATTORNEY BETH KLUSMANN: Yes, the courts in that case did what the Court of Appeals in this case did. They looked to the purpose provision and said, well, we should just apply federal law to this. Federal courts are applying the Ledbetter Act to Title VII so therefore, we should apply the Federal Act or the Ledbetter Act to the TCHRA and didn't bother to consider whether the Legislature intended the Ledbetter Act to be part of the TCHRA because it never enacted the Ledbetter Act despite having several opportunities to do so.

JUSTICE EVA M. GUZMAN: But they looked at this Court's reliance on Ricks in Specialty Retailers and then the U.S. Supreme Court's reliance, or not reliance, but discussion of that reasoning and why isn't that important and significant in deciding whether we should be guided by them.

ATTORNEY BETH KLUSMANN: Well, I think that's important because this Court has followed the Ricks decision and the Ricks decision remains good law. The Ledbetter Act did not overturn the Ricks decision and that's the decision that drew that line between a discriminatory act and then the eventual effect of that act.

JUSTICE EVA M. GUZMAN: Did the U.S. Supreme Court rely on Ricks though in deciding Ledbetter?

ATTORNEY BETH KLUSMANN: Ricks was one of the cases. It relied on a line of precedent for cases that had, again, recognized that line and drawn that line and so in this Court in Specialty Retailers also drew that line and said, there is going to be a difference between when the discriminatory act occurs and when the consequences of that act become most painful and the 180-day deadline starts from the moment of discrimination. In this case--

JUSTICE NATHAN L. HECHT: So then is Specialty Retailers really our Ledbetter case?

ATTORNEY BETH KLUSMANN: It sets forth the principle that was relied on in Ledbetter. It did not discuss paychecks, but the principle relied on in that case is the same principle relied on by the court in Ledbetter. And again, Congress has not overturned that principle entirely only with respect to paychecks under the Ledbetter Act.

JUSTICE DALE WAINWRIGHT: Back to Caballero, as Justice Lehrmann pointed out, there may be a little tension between Caballero and your position. In Caballero, we addressed where the federal statute had been changed to provide for right of jury trial. No such amendment was made to the State act, but we held there is a right to a jury trial under the State act. How does that sync with your position? It's in some tension with it. Isn't

it?

ATTORNEY BETH KLUSMANN: I think the Court interpreted the TCHRA according to state law in Caballero. It may not have not looked exactly like federal law at that moment, but I don't believe the Court simply incorporated what federal law said, and said, even though the Legislature hasn't enacted this and even though our law might not reflect this explicitly, that's what we're going to do. However, in this case, we have the specific language of the Legislature, which says, you must have a discriminatory intent in order to start that 180-day deadline. There are no exceptions for paycheck decisions. Congress has created an exception in the Ledbetter Act for decisions regarding paychecks; the Texas Legislature has not.

JUSTICE DALE WAINWRIGHT: I understand that and I understand you're focusing on your case. In writing this opinion, we're going to try to write not just to resolve your case, but a principle to apply about when we make the state act consistent with the Federal Act hopefully under what circumstances. In Caballero, we made them consistent even though the language of the two was not identical. When do we and when do we not? That's my question? What's the principle you would draw?

ATTORNEY BETH KLUSMANN: Certainly, Your Honor. I think you have to look what is most analogous. I mean the Court doesn't always say look to the analogous case law, but that's implicit whenever the Court says, we're going to look to analogous federal case law. And so if there is analogous federal case law interpreting similar provisions of the TCHRA and Title VII, then I believe that would be appropriate to consider that case law, but in this case when the provisions, when the statutes themselves are different, significantly different such that this portion of Title VII does not exist in the TCHRA and it is a substantive amendment. It creates liability for employers that did not previously exist and it expands the waiver of immunity found in the TCHRA and the Court should be wary of simply adopting the federal law in the point when it considers the substantive effect it's going to have.

JUSTICE EVA M. GUZMAN: Shouldn't that silence though, the fact that it's not in the TCHRA and the legislative silence then sort of support the court's looking to the federal amendment to that jurisprudence for guidance in light of the silence here?

ATTORNEY BETH KLUSMANN: No, Your Honor, because the Legislature has demonstrated on several occasions that it is not going to remain silent when it wants to change the TCHRA. Again --

JUSTICE EVA M. GUZMAN: Although it has not done so and it's had an opportunity since the Ledbetter Act.

ATTORNEY BETH KLUSMANN: It's had two opportunities, Your Honor, and if you look at the amendments in 1993 and 2009, again, in 2009, it amended the TCHRA to follow amendments to the Federal Americans with Disabilities Act. So it acted in 2009 to change the TCHRA to follow Title VII, but it did not act to change it to follow Title VII with respect to the Ledbetter Act.

JUSTICE NATHAN L. HECHT: There was a bill?

ATTORNEY BETH KLUSMANN: There was a bill, Your Honor.

JUSTICE NATHAN L. HECHT: And then also in the last session?

ATTORNEY BETH KLUSMANN: Correct, Your Honor, there have been two opportunities. We also know from Section 21.006 that the Legislature, in 1983, did not think that Title VII and the TCHRA would always be identical. In 21.006, it applies when the EEOC reconsiders the Commission status as a deferral agency. So in that case, federal law and state law would have been so different that the EEOC says, we're not sure if the Commission is going to be a deferral agency for the State of Texas.

JUSTICE DON R. WILLETT: Does the record show one way or the other whether the Respondent was aware of the alleged pay disparity when she got her promotion in 2004?

ATTORNEY BETH KLUSMANN: I know the record reflects that she complained about her pay. I forget if it was before or after the pay decision in 2004, but she had been concerned for several years regarding whether her pay was what it should be compared to those of her colleagues.

JUSTICE PAUL W. GREEN: Why is it good policy for some employers in this state to have employees of employers in this state to have a remedy and others not? When they're essentially the same set of facts.

ATTORNEY BETH KLUSMANN: I'm sorry, Your Honor, I didn't hear that.

JUSTICE PAUL W. GREEN: Well, I mean, you have, with respect to paychecks, employees in this state receive paychecks and so forth, but if they fall within Title VII and the provisions of that act, they have a remedy under Ledbetter, but in Texas law they don't.

ATTORNEY BETH KLUSMANN: That's a policy decision for the Legislature, Your Honor. They have decided what the extent of liability should be for Texas employers. If the Legislature has currently decided that you need to file a charge of discrimination within 180 days, if the Legislature decides it would be a better policy to expand that to conform to Title VII, again, that's a policy decision for the Legislature. But if it wants the TCHRA to be more limited in scope, again, it's more than welcome to do that. Just finishing up my point on 21.006, when there is a difference between state and federal law according to 21.006, the Commission is to act to maintain the status quo, to maintain federal funding, but then it is up to the Legislature. The Legislature has reserved to itself the right to do what it wants to do in that circumstance. It then has the option to amend the TCHRA to meet what the EEOC requires or to leave the TCHRA as it is and perhaps create a different policy than federal law, but it's the Legislature's decision to do so. So again, the purpose argument does not automatically incorporate federal law and the Texas Legislature has shown both in the statute in the language of the TCHRA itself and in its actions in amending the TCHRA in order to follow amendments to Title VII that it does not intend there to be automatic incorporation either. This Court should not do what the Legislature has chosen not to do and incorporate the Ledbetter Act into federal law. Therefore, we ask that the court would reverse the decision of the Court of Appeals and dismiss the claims against the university.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mrs. Sprovach will present argument for the Respondent.

ORAL ARGUMENT OF ELLEN SPROVACH ON BEHALF OF THE RESPONDENT

ATTORNEY ELLEN SPROVACH: May it please the Court, it's perhaps my background as a dog person, but I find the Petitioner's argument to be nothing but tail chasing around and around coming back to the same place and that same place does not make sense under Texas law. The Petitioner has made references in this case about this Court incorporating the Lilly Ledbetter Fair Pay Act, the Amendment to Title VII. We're not asking the court to step in the place of the Legislature or incorporate the language of the Title VII amendment. What we're asking the Court to do is what it consistently has done is in issues just like this case where the Texas Commission on Human Rights Act is silent on a specific issue, the Court looks to federal law for guidance.

JUSTICE DEBRA H. LEHRMANN: But what do you have to say about the fact that the Ledbetter Act was enacted what, two years ago? And our Legislature still has not amended our law to conform with that.

ATTORNEY ELLEN SPROVACH: Your Honor, Justice Lehrmann, I don't believe that the Legislature in Texas has to amend the Texas Commission on Human Rights Act for us to look to the federal law for guidance on

this issue. What the Lilly Ledbetter Fair Pay Act did was in response to the Ledbetter decision was make an amendment changing just one issue, not all discrete events. It's not a broad expansion. It says, just with regard to compensation issues that it is each paycheck or wage pay is an actual event. When the Texas Commission on Human Rights Act is silent just as it is here with regard to the word occurrence, we look to federal law for guidance. Now ever case that the Petitioner relies on has looked to federal law for guidance, particularly if we use Justice Hecht, Specialty Retailers is our Ledbetter decision. It looks to federal law for guidance. So in this issue when the Ledbetter Act was signed by President Obama and recognized as an Amendment, it changes that one decision. Now there are hundreds--

JUSTICE NATHAN L. HECHT: You only want the change with respect to paychecks?

ATTORNEY ELLEN SPROVACH: Yes, Your Honor, and that is the only change because--

JUSTICE NATHAN L. HECHT: But it seems like that's very specific. Would the Supreme Court of the United States ever have decided that occurrence means one thing for paychecks and something else for everything else?

ATTORNEY ELLEN SPROVACH: It is very specific in that, in fact, I think there's a suggestion that the Respondent suggests that the Ricks or Ledbetter decision have been overturned. They have not. They have been subrogated, 25 states have recognized the subrogation in 61 cases and the subrogation only refers to the compensation issue. And so Ricks is still good law and the Ledbetter decision is still good law, but when it comes to compensation decisions and compensation discrimination decisions, the law has changed.

JUSTICE NATHAN L. HECHT: Here's the best example I could think of. Suppose that Congress changed the 180 days to a year, then would we change ours to a year even though the statute says, 180 days?

ATTORNEY ELLEN SPROVACH: No, Your Honor, and in that example, ours is 180 days and Title VII's is 300 days. That's where they're non-analogous. So we don't go to federal law for guidance on that. And --

JUSTICE NATHAN L. HECHT: But if they changed it or they said, well, we need to incorporate some sort of towing device or something, we wouldn't necessarily do that. And --

ATTORNEY ELLEN SPROVACH: No, we wouldn't do that, Your Honor. We'd only do that where our statute is silent on the issue and we looked at federal law for guidance. For example, Texas Commission on Human Rights Act is a two-year statute where federal law Title VII doesn't have a statute so we don't look to that for guidance. When the statute speaks, it speaks. It is the plain language. In this case, it is suggested that there is plain language in the statute and there is not, not with the definition of occurrence. Now --

JUSTICE NATHAN L. HECHT: It seems like to me if the Congress had come along after Ledbetter and said, occurrence means each individual act, not the original decision, paycheck or no paycheck, that's what we always meant by occurrence, that's what we mean by it now, then you'd have a pretty strong argument that we should think of occurrence in the same way. But if they just carve out this one little category, it seems awfully hard, that seems more legislative than judicial.

ATTORNEY ELLEN SPROVACH: But Your Honor, what I find interesting about that is because it was large, it was expansive, that it was always a discrete event and we followed that and sort of what's good for the goose is good for the gander here. The argument for the Petitioner is well we always look to federal law for guidance. Specialty Retailers look to Delaware State College v. Ricks. That's all incorporated in Ledbetter and Ledbetter the decision and it was expanded. It related to every discriminatory event. It was a discrete event or they missed the boat. Now, the law has changed to say it's just compensation decisions. Each time they're paid, that's a new event. That is, so now federal courts have incorporated this. We've got three in Texas. We've got Lohn. We've got Klebe I. We've got a case of the Southern District, also Tryals, T-R-Y-A-L-S.

CHIEF JUSTICE WALLACE B. JEFFERSON: Have any of those been appealed to the Circuit do you know?

ATTORNEY ELLEN SPROVACH: No, there's no negative decisions, and there was -- no appeals that I know of here, Your Honor. So if we look to those, it's consistent with the way the Court has worked on these issues. A mention was made earlier about Caballero. This is a very important case. As you all know, in 1991 Congress enacted some very substantive amendments, the largest amendments to Title VII. And so subsequently a couple of years later, the Texas Legislature made some incorporations in two amendments and those were enacted in September 1st of 1993. However, a few months beforehand -- and Caballero was May 19, 1993 when the Court decided that the Texas Commission on Human Rights Act was not just an equitable remedy statute that plaintiffs were allowed to file lawsuits seeking damages and getting jury trials. Now there was no language in the statute at that time under the Texas Commission on Human Rights Act saying explicitly we could get jury trials or damages. It literally is why we're here today. A few months later, it was enacted on September 1st that we could get those jury trial and damages, compensatory and punitive damages and in fact, the legislative act wasn't approved until after the statute, until after that case on May 19th. It was approved on May 24th.

JUSTICE DALE WAINWRIGHT: So Counsel, responding to the same question I asked Petitioner's counsel, what's the principle you think we should apply in correlating the federal and the state act? Sounds like you would say if there's a change in the federal act and the state act is silent on that point, then we should incorporate that change in order to correlate the two statutes and the purposes of the two provisions.

ATTORNEY ELLEN SPROVACH: Yes, we do look at the purpose provision. I don't think it's the end-all be-all, but we do look at the purpose provision and say that we look at the federal law for guidance and the purpose is to have state law parallel federal law, but for cases where the Texas Commission on Human Rights Act in its plain language is explicitly different.

JUSTICE DALE WAINWRIGHT: So did I state the principle you would apply accurately?

ATTORNEY ELLEN SPROVACH: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: The problem here is that that principle would require us to over rule a 15-year precedent.

ATTORNEY ELLEN SPROVACH: It would require -- what I would look at, Your Honor, is law does change.

JUSTICE DALE WAINWRIGHT: So Specialty Retailers we should reverse?

ATTORNEY ELLEN SPROVACH: Your Honor, yes, I would argue it has to be reversed and changed to the extent that the law that it looked on for guidance is changed. It looked on Delaware State College v. Ricks, a 1980 Supreme Court case, and that case is now subrogated as Klebe II says, it's been subrogated subsequently by the Ledbetter Fair Pay Act.

JUSTICE PAUL W. GREEN: But what if the Texas Legislature looks at this thing and of course, we know the legislation has been out there, but knowing that we wouldn't, perhaps the public wouldn't really know what that meant by having a bill and not passing it so they specifically passed one that said we acknowledged Ledbetter and we reject it. That's not what we want the statute to mean. If they had done that, would we be here today?

ATTORNEY ELLEN SPROVACH: If the Texas state Legislature had acknowledged it and if they changed the plain language of the statute, I don't think we would be here today, Your Honor.

JUSTICE PAUL W. GREEN: So the federal law then would not overrule the legislative pronouncement.

ATTORNEY ELLEN SPROVACH: Absolutely not.

JUSTICE PAUL W. GREEN: But the Legislature is looking at Specialty Retailers. That's what apparently they think the law is in this state so why change it.

ATTORNEY ELLEN SPROVACH: I don't think, with due respect, Your Honor, I don't think the Legislature is looking at Specialty Retailers because Specialty Retailers happened in 1996 and our amendments happened in 1993 and there is no definition of the word "occurrence" in the Texas statute. So if I may, Your Honor, when you asked if they're different. Do we look at it and would we be here today? For example, it's a 180-day statute to file a charge under the Texas statute. federal is 300. So those are two separate. We wouldn't be here on an issue like that. It's only when our statute is silent that we look to federal law for guidance.

JUSTICE PAUL W. GREEN: Okay, so if we agree with you and we change the law by following your review and the Texas Legislature says, no, that's not what we meant and they change the law back. So what the law is today, we change with our ruling and then the Legislature would then change it back to what it is today.

ATTORNEY ELLEN SPROVACH: Using that example, I would argue it would be possible, Your Honor. And if I may expand a little bit, would specialty be completely over ruled? No, specialty would still be good law for everything but compensation discrimination claims. That's where the definition of occurrence has changed.

JUSTICE NATHAN L. HECHT: What if the Congress had thought about this and decided that, you know, this is really unfair for hourly workers who get paid like every week or so because they're not really focusing on this and they should get extra time. But people who are paid maybe on a contractual salary or a longer period of time, no. The Ledbetter rule is fine with that. If they had made it even a finer distinction, you would argue, I guess, that we should follow the same fine distinction?

ATTORNEY ELLEN SPROVACH: Yes, Your Honor, I would argue that because our statute is silent, we do look to federal law for guidance and if it was more refined or more specific, I do think that we would have to follow it. And if I may use the Ledbetter Fair Pay Act language, an unlawful employment practice occurs with respect for discrimination and compensation in violation of this title. It goes on to say, "when a discriminatory compensation decision or practice is adopted, when an individual becomes subject to that decision or practice," or what's important here is when an individual is affected by application of discriminatory compensation, decision or other practice, including, it says, specifically each time wages, benefits, or other compensation is paid. So Justice Hecht, I think that actually is accomplished in the act. And what I'm quoting out of is actually the Tryals case out of the Southern District that goes on to say that the Fair Pay Act is only with respect to the timeliness of discriminatory compensation claims. The more general rule in Ledbetter did not change the general rule that the charging period is triggered as a discrete unlawful practice takes place. And I think what's an analogous case for this Court to look at is the Penjada case v. UPS. It's 2004 out of the Fifth Circuit and it brings back the case that everyone here is probably very familiar with is Quantum v. Penney's and in Quantum v. Penney's, the issue was a jury charge. And the jury charge question was with regard to discrimination under each class, gender, race, religion, etc. And ultimately this Court ruled that the motivating factor standard was indeed the jury standard on those discrimination claims and that's because the statute 21 -- I believe it's 125A, used the actual language motivating factor and that's where it came from. Now under the same Labor Code, we have retaliation claims and one would think that if you have "motivating factor" under the discrimination claims, you'd have the same standard under the retaliation claims. But in that case under 21.055, the Texas Commission on Human Rights Act was silent and didn't use the words "a motivating factor." So in Penjada, the court said, well because it's not there, we can't use that language and we can't just grab it because it's inside the Labor Code because it says, it doesn't specifically apply to this. And so the Court used a "But for," standard with retaliation. That "But for," standard is the Title VII standard and the standard that the cases interpreting Title VII use. So with regard to jury standards on very similar causes of action under the same act, we have two different causation standards, motivating factor and "But for," and that's specifically because a Texas Commission on Human Rights Act was silent. Just so in this case because they are silent, we look to Title VII. Now I don't want to get confused and say that we incorporate this amendment of Lilly Ledbetter Fair Pay Act. We've got lots of cases,

including those three in Texas, that already have interpreted it for us and we use them for guidance.

JUSTICE DALE WAINWRIGHT: Counsel, I understand the principle that you're arguing for today. What about the argument that it sounds suspiciously like the Court writing in legislation? Only, however, from your standpoint if the state act is silent, then the Court can write in the appropriate provision to fill in the gap the Legislature didn't. What's your response to that?

ATTORNEY ELLEN SPROVACH: Your Honor, my response would be that every time this Court and every court of appeals interpreted a provision of the Texas Commission on Human Rights Act that was silent and looked to Title VII for guidance and it's the progeny of Title VII, then under that argument then this court and the court of appeals would be stepping in the shoes of Legislature and examples I can give --

JUSTICE DALE WAINWRIGHT: So it's legislating, but it's okay?

ATTORNEY ELLEN SPROVACH: Your Honor, I wouldn't concede that. It's not legislating. It's interpreting.

JUSTICE DALE WAINWRIGHT: Well, I understand the words you use and they were carefully selected, but it sounds like legislating, but it's okay.

ATTORNEY ELLEN SPROVACH: I'm feeling like a politician in my answer, Your Honor. I dont think it's ever okay to legislate. It's okay for the Legislature to--

JUSTICE DALE WAINWRIGHT: It's okay to fill in the gaps.

ATTORNEY ELLEN SPROVACH: It is okay to fill in the gaps.

JUSTICE DALE WAINWRIGHT: That's not legislating.

ATTORNEY ELLEN SPROVACH: I disagree, Your Honor, respectfully, I believe we're looking at other cases for interpretation and we do it consistently in these cases.

JUSTICE EVA M. GUZMAN: Would you discuss some of the precedent that you were about to discuss where we have interpreted and looked to federal courts when our statute is silent?

ATTORNEY ELLEN SPROVACH: Yes, Your Honor. Particularly with regard to gender discrimination. There are cases in these courts that recognize sexual harassment. There is no specific provision in the Texas Commission on Human Rights Acts for sexual harassment. That is part of gender discrimination. That came out of a Supreme Court line of cases. It's been subsequently adopted by the Texas state cases to recognize sexual harassment, recognizes after the Oncale case, same sex sexual harassment. For instance, to go on with ideas that what we have adopted is constructive discharge. There's no language in the Texas Commission on Human Rights Act that says, if you were constructively discharged there are language with regard adverse actions like termination, but the courts have interpreted what could be constructive discharge. It's a situation where it was so unreasonable that an average person in a civilized society, a reasonable person in a civilized society would quit. So those are the kind of cases that this Court has looked at and interpreted to make those decisions.

JUSTICE EVA M. GUZMAN: And those seem to be more substantive-type issues. This, to me, may be more akin to just a limitations issue where we do differ, we have that 90-day, 60-day right to sue and then the two-year difference in -- right to sue letter, and then when you actually file the lawsuit. Why isn't this more like simply a limitations issue where we don't have to look to the substantive?

ATTORNEY ELLEN SPROVACH: A few reasons. There are the differences, the 60 days, 90 days, the 180, the 300 because Texas Commission on Human Rights has spoken on the issue, it's in the plain language, so has

Title VII. We don't have any disagreement that it's 180 days. I fully agree that it's 180 days, the statute. The question is, not what is the statute. It is when is the statute, and I believe the Klebe court went on to, to expand on that, The Klebe II that it is, when does it occur, using the definition of the word "occurrence" and that's where this whole, -- why we're here today because we're defining "occurrence." So I agree that it would be substantive. In fact, I think a case that was cited by the Petitioner is, I can't read, it's [inaudible] Research when a statute creates a cause of action and incorporates an express limitations upon time in which the statute may be brought, the statute of limitations is considered substantive. I agree. But we're not talking about the statute or the timeline of the statute. We're talking about when it's triggered.

JUSTICE DALE WAINWRIGHT: What are the limits to your argument?

ATTORNEY ELLEN SPROVACH: I'm sorry, Your Honor?

JUSTICE DALE WAINWRIGHT: What are the limits to your argument? Can this Court fill in any gap or are there limits?

ATTORNEY ELLEN SPROVACH: No it can't, Your Honor, and I think it's under Klebe where it says, we can go back two years from -- prior to the dates that the charge of discrimination is filed; yes, it does say this. And actually it quotes the Labor Code, 21.258C "liability under a back pay award may not accrue for date more than two years before the date a complaint is filed with the Commission." I do remember an argument that Petitioner made that we could go back 16 years. I think there was some suggestion of that in Ledbetter, but we would agree that the limit is two years.

JUSTICE DALE WAINWRIGHT: Well, when you said, we can't do something that contradicts the statute, but assume that there's a gap. The state statute is silent. Can we fill in any gap following federal law or are there limits to the types of gaps we can fill in?

ATTORNEY ELLEN SPROVACH: Well, I think with regards to Justice Guzman, we can't fill in a substantive gap. But if the statute is silent, we do look to federal law for guidance.

JUSTICE DALE WAINWRIGHT: So if the federal act changed so that you could recover a certain type of damages that you couldn't, that the state act is silent on, is that something you would say we should be able to fill in or not?

ATTORNEY ELLEN SPROVACH: Well, I do think that's what happened in Caballero. The Texas Commission on Human Rights Act was silent as of May 19, 1993 and Title VII had already been amended to include compensatory and punitive damages and this very Court in 1993 said, yes, we can have jury trials and we can look to compensatory and punitive damages.

JUSTICE DALE WAINWRIGHT: So that is substantive?

ATTORNEY ELLEN SPROVACH: I will concede that, Your Honor.

JUSTICE DALE WAINWRIGHT: I'm not sure I understand where your limits are then.

ATTORNEY ELLEN SPROVACH: I'm not sure if there are any limits, Your Honor. If the statute is silent, we look to federal law for guidance.

JUSTICE NATHAN L. HECHT: Do you think the Supreme Court in the Ledbetter case could have said, well we're going to stick with Ricks on occurence generally, but we're going to carve out an exception for paychecks?

ATTORNEY ELLEN SPROVACH: Yes, Your Honor, and I think--

JUSTICE NATHAN L. HECHT: What principle basis would there have been for a judicial decision like that?

ATTORNEY ELLEN SPROVACH: I think that if I may, Your Honor, and actually I'll quote, I think, why they said that. The judicial basis, I believe, is because under Ricks, first of all, Ricks was a case where it was a professor who had a, got a contract. It was a terminal contract. It was going to expire and there was no more renewal or no tenure and Ricks, in those cases, said, it's when you're notified of the decision and not when you feel the effects and that's traditionally true on adverse actions, terminal or seminal adverse actions. Under Ledbetter, it's because each time you get the paycheck, that is a discriminatory act and that is why they made decisions simply for compensation issues. Your Honor, I know I'm running out of time if I may just have --

JUSTICE DEBRA H. LEHRMANN: May I ask you just something. You alluded a moment ago that this can't go on for 16 years, right? And that it would only go on for two years. Now, if we're talking about the occurrence is getting the paycheck then two years from when? As opposed to when the, do you see what I'm saying?

ATTORNEY ELLEN SPROVACH: Two years - back from the date the charges, back from the date the charges--

JUSTICE DEBRA H. LEHRMANN: When the complaint was made?

ATTORNEY ELLEN SPROVACH: Yes. I see that I'm out of time. I ask if I may have a few seconds just to wrap up, Your Honors?

CHIEF JUSTICE WALLACE B. JEFFERSON: You can wrap up, Counsel.

ATTORNEY ELLEN SPROVACH: With regard to the quick argument on the sovereign immunity decision, I think that was made clear. If you look at Chatha's first Court of Appeals case that all the courts of appeals have considered that the Texas Act clearly, unambiguously waives immunity. I think any argument otherwise is a red herring citing Mission Consolidated Independent School District v. Garcia from this Court in 2008. Because we should look consistently and continually at federal law for guidance, specifically the cases interpreting Title VII, the hundreds of cases that have interpreted it since the Lilly Ledbetter Federal Fair Pay Act was enacted, and the three cases particularly in Texas in the Southern District Courts for guidance on these issues where the statute of silent just as it is here. And just as it's noted out that the Klebe I Court did and Specialty Retailers did, we believe that it is proper that these cases apply and federal law tells us that every time Diljit Chatha was issued a new paycheck, a new action occurred and they are incorporated in her charge so we, therefore, ask this Court to respectfully affirm the decisions of the lower courts and let Diljit Chatha go on to litigate her claims. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF BETH KLUSMANN ON BEHALF OF PETITIONER

ATTORNEY BETH KLUSMANN: This case is not about legislative silence regarding the definition of the word "occur." We've never disputed that paychecks occur when they are issued. That wasn't the question in Ledbetter. The question is, what is a paycheck? Is it an unlawful employment practice even if the individuals issuing the paycheck do not have a discriminatory intent?

CHIEF JUSTICE WALLACE B. JEFFERSON: But what if our holding in Specialty Retailers, if you look at it broadly, the holding is that the Court will define "occurrence" as federal law defines "occurrence." If that's the precedent and federal law has shifted, why would we not be required by stare decisis to change our definition or our analysis of what occurrence means?

ATTORNEY BETH KLUSMANN: Because the Texas Legislature has not done it. And this Court, - excuse me - the Texas Legislature encountered nearly identical circumstances in 1993 with respect to occurrence of a com plaint--

CHIEF JUSTICE WALLACE B. JEFFERSON: Right, but we didn't care about the Texas Legislature in Specialty Retailers. We're looking, we said, we want to be, we want to make sure that the law is consistent with federal law. And it's silent in this respect, but federal law has filled that gap and we're going to fill it because federal law has and now federal law has changed. And -- so I'm just trying to understand if we, if we're to be consistent, why would we not be required to change?

ATTORNEY BETH KLUSMANN: I think there's a difference between following federal precedent and following federal statute. federal precedent, which drew that initial line regarding when a discriminatory act occurs and when its effects are felt, that is still good law, but Congress has carved out a legislative exception for that with respect to paychecks. And so until the Texas Legislature does that same thing, this Court should continue to follow the federal precedent and the Texas Legislature as indicated in 1993 that it will do that when it wants to specifically with regard to unlawful employment practices occurring. The Supreme Court in 1989 in the Lawrence case said that, with respect to discriminatory seniority systems that the 180-day period starts when the system is enacted not when it is applied to individuals. Congress changed that in 1991 and enacted something very similar to the Ledbetter Act that says, with respect to seniority system, an unlawful employment practice occurs when it is adopted, when an individual is subject to that system or when an individual is injured by the application of that system. Now you take out seniority systems and you plug in compensation decisions and you have the same exact thing. The Legislature did not sit idly by and just wait for this Court to change its definition of occurrence. It amended the TCHRA but the statute entitled expansion of rights to challenge discriminatory systems and so it created, it redefined, if you will, what an unlawful employment practice is with respect to seniority systems just like the Ledbetter Act did with respect to paychecks. And so we see that the Legislature when confronted with almost identical circumstances has acted before to bring that law into the TCHRA. It has not done so in this case. So again, this is not about a missing definition of occurred. This is about applying the plain language of the TCHRA, which requires a discriminatory intent in order to restart the 180-day clock. Chatha has not alleged that the individuals in the university's payroll office had a discriminatory intent every time they issued her a paycheck. The only discriminatory intent she alleges was at the very latest in 2004, well outside the 180-day deadline. I guess perhaps to try and answer your question, Justice Wainwright, just a little bit better, I would say if this Court were to give a rule, you should start with the plain language of the statute as that is always the best evidence of the Texas Legislature's intent. Here the plain language mirrors Title VII as it existed during the Ledbetter decision. Therefore, that is the decision that should guide the Court. If the language is similar in the statutes, then following federal precedent is perfectly acceptable and perhaps preferable. But if the language is different, if there is something in Title VII that is different than what is in the TCHRA, the Court should not just automatically follow the Title VII. It should look to whether or not that can be part of the TCHRA or if there's any legislative intent that that should be part of the TCHRA and in this case, there simply is not. The Congress, excuse me the Legislature has shown that it knows how to amend the TCHRA. It has had an opportunity to do so in this case and it has not done so. Therefore, the Ledbetter Act is not part of the TCHRA and this Court should not act as if it is. We ask that the court would reverse the decision of the Court of Appeals and dismiss the claims against the university.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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