TITLE VII V. TCHRA: WHO CARES?

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State Bar of Texas
25TH ANNUAL
SUING & DEFENDING GOVERNMENTAL ENTITIES COURSE
July 18-19, 2013
Austin

CHAPTER 9

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Berkman v. City of Keene, No. 3:10-CV-2378-B, 2011 U.S. Dist. LEXIS 83580 (N.D. Tex. July 29, 2011) (prevailed on summary judgment based on *res judicata* grounds).

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Mesquite Indep.Sch. Dist.v. Mendoza, No. 05-12-01479-CV, 2013 Tex. App. LEXIS 6793 (Tex. App.—Dallas June 3, 2012, no pet. h.) (court reversed, in part, denial of summary judgment on plaintiff's employment sex discrimination claim).

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TITLE VII V. TCHRA: WHO CARES?

I. INTRODUCTION

When an employee suffers from discrimination or retaliation on the job, that employee has an important decision to make – whether or not to pursue available legal remedies or continue to suffer in silence. Once the decision has been made to pursue available legal remedies, a second important decision must be made – whether to pursue the remedies available under federal law, those under state law, or, perhaps, to pursue the remedies available under both. The purpose of this paper is to explore the factors that may come into play regarding this second decision.

Title VII is a federal statute that prohibits employers from discriminating and retaliating against employees for certain reasons. The Texas Commission on Human Rights Act ("TCHRA") is, effectively, Texas' version of Title VII. The TCHRA was modeled after Title VII, and as a result, Texas courts generally look to federal precedent for guidance in determining the proper interpretation of the statute. *See Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 474 (Tex. 2001). That being said, Title VII and the TCHRA court decisions do not always turn out the same. There are some instances in which the TCHRA and Title VII have differing statutory language and have been interpreted differently.

This paper will highlight some specific instances in which the TCHRA and Title VII and other similar federal employment anti-discrimination laws diverge. Additionally, this paper will discuss, based on the differences, why plaintiffs and defendants may prefer seeking relief under one statutory scheme versus the other.

Specifically, this paper will look at seven distinct areas where the two statutory schemes diverge. First, it will look at the different statute of limitations filing requirements under Title VII and the TCHRA. Second, it will address the recent Texas Supreme Court decision in *Prairie View A&M University v. Chatha*, which specifically refused to adopt the *Lilly Ledbetter Fair Pay Act*'s extension of filing deadlines as it relates to discriminatory actions regarding compensation decisions. Third, it will discuss the different burdens of proof required of a plaintiff filing an age discrimination claim under the Age Discrimination in Employment Act ("ADEA") versus an age discrimination claim under the TCHRA. Fourth, it will address the difference between federal and state law and the effect on the recovery of liquidated damages in discrimination claims. Fifth, it will address the recent U.S. Supreme Court decision in *University of Texas Southwestern Medical Center v. Nassar* and its effect on a plaintiff's burden of proof for a retaliation claim. Sixth, it will look at the Genetic Information Nondiscrimination Act ("GINA") and its counterpart under the TCHRA. Finally, it will address how the defense of governmental immunity affects a lawsuit depending on whether a Title VII or TCHRA claim is asserted.

II. TITLE VII V. CHAPTER 21 OF THE TEXAS LABOR CODE (TCHRA)

President Lyndon Johnson signed the Civil Rights Act of 1964 on July 2, 1964, containing Title VII. Title VII prohibits discrimination in the workplace based on an individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Though not covered by Title VII itself, the list of protected categories has expanded over the years to include a prohibition against discrimination based on age with the passage of the Age Discrimination in Employment Act of 1967 ("ADEA"), the prohibition against discrimination based on disability under the Americans with Disabilities Act of 1990 ("ADA"), and most recently, the prohibition against discrimination based on genetic information under the Genetic Information Nondiscrimination Act of 2008 ("GINA").

As a result of some of the federally enacted statutes, Texas responded with Chapter 21 of the Texas Labor Code, which includes the TCHRA. The TCHRA was intended to mirror the federally enacted statutes, and "provide for the execution of the policies of Title VII …and its subsequent amendments." TEX. LAB. CODE § 21.001(1).

One of the important policies that Title VII, and subsequently the TCHRA, were enacted to enforce was an alteration of Texas' at-will employment standards and practices. At-will employment is the condition where an employer may fire an employee without notice and for any reason. After the passage of Title VII and the TCHRA, the "any reason" standard for at-will employment has been curtailed to exclude the firing of an employee based on one of the legally-recognized protected classes. After the passage of these statutes, the at-will doctrine was effectively changed from the original version which stated that an employer could fire a person for "any reason or no reason" to the current version which effectively adds the phrase "except for an illegal reason."

A. Filing Requirements

Neither Title VII nor Chapter 21 allows a plaintiff to go directly to court. Both statutes require a plaintiff to exhaust his administrative remedies by filing a charge of discrimination with the appropriate state or federal agency charged with enforcing the terms of Title VII and Chapter 21, as applicable.

When Title VII was enacted, it created a federal administrative agency known as the U.S. Equal Employment Opportunity Commission ("EEOC"). 42

U.S.C. § 2000e-5(e)(1). In creating the EEOC, Congress' stated purpose was to have alleged Title VII violations addressed outside of court. Texas has a similar filing agency in the Texas Workforce Commission – Civil Rights Division ("TWC").

1. EEOC Filing Requirement

Before a plaintiff can pursue a Title VII claim in federal court, he must first exhaust his available administrative remedies. *See Gallentine v. House Auth.*, No. 1:12-CV-417, 2013 U.S. Dist. LEXIS 8238, *17-*18 (E.D. Tex. Jan. 22, 2013) ("While not uniformly viewed as a jurisdictional prerequisite, the filing of an EEOC charge 'is a precondition to filing in district court.'") (internal citations omitted); *Howe v. Yellowbook USA*, 840 F. Supp. 2d 970, 976 (N.D. Tex. 2011) (citing *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002)). This is because the "primary purpose of the EEOC charge is to provide notice to the respondent of the discrimination alleged and to activate the voluntary compliance and conciliation functions of the EEOC." *Gallentine*, 2013 U.S. Dist. LEXIS 8238, *18 (citing *Manning v. Cheveron Chem. Co.*, 332 F.3d 874, 878 (5th Cir. 2003). In passing Title VII, it was Congress' intent to promote conciliation rather than litigation. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

The administrative remedies provided in Title VII require a timely filing with the EEOC. A timely filing is described in the statute as follows:

> a charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred … except that in a case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted proceedings with a state or local agency* with authority to grant or seek relief from such practice…such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier.

42 U.S.C. § 2000e-5(e)(1) (emphasis added).

The plain language of Title VII allowing for an extension of the 180 day filing requirement to a 300 day filing requirement appears to require a plaintiff to actually file with the state agency to trigger the elongated 300 day filing provision. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 110 (1988); *see also Wang v. Prudential Ins. Co. of Am.*, 439 Fed. Appx. 359, 365-66 (5th Cir. 2011); *Mackey v. Cont'Airlines*, CA-H-11-4246, 2012 U.S. Dist. LEXIS 50101, at *7 (S.D. Tex. Apr. 10, 2012) (stating that in a deferral state, a plaintiff has 300 days to file with the EEOC if he has filed a claim with the state or local agency with the authority to grant relief from the alleged discriminatory conduct); *Howe*, 840 F. Supp.2d at 976 (stating "Title VII requires that a complainant must first file a charge with the EEOC within 180 days (or 300 days when complainant has initially instituted proceedings with a state or local agency) after the alleged unlawful employment practice occurred").

However, some courts do not seem to require a plaintiff to file with the Texas Work Force Commission ("TWC") as a prerequisite to allowing a 300 day filing deadline. *See Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379 (5th Cir. 2002) (stating Texas is a "deferral" state, so the limitations period for filing is effectively 300 days); *Garrett v. Judson Indep. Sch. Dist.*, No. 07-51258, 2008 U.S. App. LEXIS 23189 (5th Cir. Nov. 10, 2008) (stating that a plaintiff's claims are barred if they are not filed within 300 days from the alleged unlawful employment practice, but not mentioning a state filing requirement); *Gallentine*, 2013 U.S. Dist. LEXIS 8238, *23-*24 (Plaintiff only filed with the EEOC, and not the TWC, but the court stated "because there is a state agency with the authority to grant or seek relief for discriminatory employment practices, in order to maintain a Title VII claim, a plaintiff must file her charge of discrimination with the EEOC within 'three hundred days after the alleged unlawful employment practice occurred.'") (internal citations omitted).

The effect of the 300 day filing requirement extension under Title VII disfavors defendants by extending the statute of limitations from the 180 day filing period. Additionally, the ambiguity among the courts as to whether or not the plaintiff is required to file with a state agency before he can take advantage of the extended 300 day filing period also does not favor defendants. Because of this ambiguity, defendants should keep in mind that a seemingly time barred complaint may still be filed and allowed even without first filing with a state agency, up until the 300th day after the alleged discriminatory act.

2. TWC Filing Requirement

The TCHRA also requires plaintiffs to exhaust their administrative remedies before filing suit. The state administrative agency with jurisdiction over discrimination claims in Texas is the Texas Workforce Commission Civil Rights Division ("TWC"). Therefore, it is proper for plaintiffs who believe that they have been the victim of discrimination prohibited under the Texas Labor Code to file a Charge of Discrimination with the TWC. TEX. LAB. CODE §

21.202; *Tex. Youth Comm'n v. Garza*, No. 13-11-00091-CV, 2011 Tex. App. LEXIS 5629, at *7-*8 (Tex. App. – Corpus Christi - Edinburg 2011, no pet.). The Charge of Discrimination must be filed within 180 days of the alleged discriminatory event. TEX. LAB. CODE § 21.202; *Garza*, 2011 Tex. App. LEXIS 5629, at *7-*8. The 180 day time period acts as a limitations period barring claims filed outside of that time-frame. TEX. LAB. CODE § 21.202; *Garza*, 2011 Tex. App. LEXIS 5629, at *7-*8. "If the plaintiff fails to file with the EEOC or TCHR in that time period, the trial court lacks subject matter jurisdiction over its subsequent TCHRA claim." *Garza*, 2011 Tex. App. LEXIS, at *7-*8 (citing *Czerwinski v. Univ. of Tex. Health Science Ctr.*, 116 S.W.3d 119, 121-122 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (citing *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 485-489 (Tex. 1991)).

The 300 day extension of filing time granted under Title VII only applies to Title VII claims, and does not act as an extension of the 180 day filing requirement under the TCHRA. *See Perkins v. PromoWorks, L.L.C.*, CA No. H-11-442, 2012 U.S. Dist. LEXIS 177484, at * 26 (S.D. Tex. Nov. 26, 2012) (denying plaintiffs argument that they had 300 days to file a claim with the TCHRA, and holding that the Title VII 300 day requirement only applies to claims under Title VII). For statute of limitations purposes, a defendant would, therefore, prefer a discrimination claim to be filed under the TCHRA, and not Title VII, because failure to comply with the 180 day filing requirement would bar the plaintiff's suit.

B. Compensation Decisions Based on a Discriminatory Practice

The passage of the Lilly Ledbetter Fair Pay Act ("FPA") amended Title VII and changed the way courts are required to look at standards for a timely filing in federal wage discrimination claims. By amending Title VII, Congress created a difference between the language of Title VII and the TCHRA.

1. The Lilly Ledbetter Fair Pay Act

The Lilly Ledbetter Fair Pay Act was passed in reaction to the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire and Rubber Co.*, which held that paychecks reflecting a prior discriminatory compensatory decision did not count as discriminatory acts for purposes of starting (or re-starting) the 180 day or 300 day limitations period. 550 U.S. 618 (2007). Instead, the Court held that the discriminatory act occurred at the time the compensation decision was made and, therefore, that a plaintiff must file within 180 days or 300 days, as applicable, from when the compensation decision was made in order to fall within the statute of limitations. *Id.* at 628. Congress responded by passing the Lilly Ledbetter Fair Pay Act ("FPA").[1] In passing the FPA, Congress found that the Supreme Court's decision in *Ledbetter* "ignor[ed] the reality of wage discrimination and [was] at odds with the robust application of the civil rights laws that Congress intended." Lilly Ledbetter Fair Pay Act of 2009, § 2 (2).

The FPA generally states that every paycheck that may reflect the prior discriminatory decision serves as an event triggering the start of a new 180 day or 300 day limitations period. The FPA applies to discriminatory decisions in compensation because of race, color, religion, sex, and national origin under Title VII, age under the ADEA, disability under the ADA, and claims of discrimination in compensation brought under the Rehabilitation Act of 1973.[2] *See* 42 U.S.C. § 2000e-5(e)(3)(A); 29 U.S.C. § 626(d)(3); 42 U.S.C. § 12117(a) (adopting the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5)); 29 U.S.C. §§ 791, 794.

The effect of the FPA is that the 180 day or 300 day statute of limitations period for wage based discrimination claims under federal anti-discrimination statutes has become virtually non-existent. Under the FPA, an employee can effectively bring into question a compensation decision that was made years in the past as long as she can prove that it was a discriminatory decision. *See AT&T Corp. v. Hulteen*, 556 U.S. 701, 716 (2009) (holding that the FPA did not apply to a plaintiff's claim for additional pension benefits, when the relevant pension decision, when made, was not an act of discrimination since the Pregnancy Discrimination Act was not in effect at the time).

A discriminatory compensation decision occurs when an employer pays different wages or provides different benefits to similarly situated employees on the bases of one of the employees being a member of a protected class. *See Almond v. Unified Sch. Dist. #501*, 665 F.3d 1174, 1180 (10th Cir. 2011) *Schuler v. Pricewatterhouse Coopers, LLP*, 595 F.3d 370, 374 (D.C. Cir. 2010); *Noel v. Boeing Co.*, 622 F.3d 266, 272 (3rd Cir. 2010) (stating that the FPA protects against unequal pay for the performance of the same job). A "compensation decision" does not always require action on the part of the employer. For

[1] Some courts have taken the passage of the FPA as Congress "reinstat[ing] the law regarding timelines of pay compensation claims as it was prior to the Ledbetter decision." *Noel v. Boeing Co.*, 622 F.3d 266, 271 (3rd Cir. 2010) (quoting *Mikula v. Allegheny Cnty.*, 583 F.3d 181, 184 (3rd Cir. 2009)).

[2] One court has extended the FPA to apply to claims under 42 U.S.C. § 1983 claims for past discriminatory compensation practices as well. *Groesch v. City of Springfield*, 635 F.3d 1020, 1026 (7th Cir. 2011).

example, a failure to answer a request for a raise has also been held to be a "compensation decision" covered by the FPA. *See Mikula v. Allegheny County*, 583 F.3d 181, 186 (3rd Cir. 2009) (finding that a failure to answer a request for a raise has the same effect as if a request for a raise were denied). The plaintiff who successfully meets that burden can seek back pay for up to two years. This is in addition to other available damages.

Federal courts have interpreted the FPA, in the context of plaintiffs trying to extend the breadth of the FPA beyond claims for discriminatory compensation decisions. *See e.g. Leach v. Baylor Coll. Of Med.*, No. H-07-0921, 2009 U.S. Dist. LEXIS 11845, *50-*51 (S.D. Tex. Feb. 17, 2009) (holding that the FPA did not change the principle that plaintiffs cannot sue for a prior discriminatory act outside the charging period based on the continuing effects of that act into the charging period, when it is not an act involving compensation). At issue in the claims is the interpretation of the following portion of the FPA:

> An unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or *other practice* is adopted, when a person becomes subject to a discriminatory compensation decision or *other practice*, or when a person is affected by application of a discriminatory compensation decision or *other practice*.

42 U.S.C. § 2000e-5(e)(3)(A) (emphasis added).

The most prevalent arguments by plaintiffs have been with regards to failure to promote claims. With regards to these claims, plaintiffs have argued that a failure to promote should fall under the FPA clause that allows for recovery of a "discriminatory compensation decision or other practice." *See Schueler*, 595 F.3d at 375 (stating that the "other practice" language refers to actions such as the repeatedly lower performance reviews given to a female employee that then resulted in lower pay raises). For the most part, the courts are rejecting this argument, finding that a failure to promote claim does not challenge a "compensation decision" as intended by the FPA. *See e.g., Daniels v. UPS*, 701 F.3d 620, 630 (10th Cir. 2012); *Hernandez v. City of Corpus Christi*, 820 F. Supp. 2d 781, 795 (S.D. Tex. 2011). Instead, a failure to promote is a discrete discriminatory decision that the FPA does not apply too. *See Tillman v. Southern Wood Preserving of Hattiesurg, Inc.*, No. 09-60716, 377 Fed. Appx. 346, 349 n.2 (5th Cir. May 4, 2010); *Schuler v. Pricewaterhouse Coppers, LLP*, 595 F.3d 370, 375 (D.C. Cir. 2010) (Failure to promote is not a claim for discrimination in compensation); *Harris v. Auxilium Pharms., Inc.*, 664 F. Supp. 2d 711, 745 (S.D. Tex. 2009) (a failure to promote claim does not challenge a "compensation decision as contemplated by the FPA") (reversed by stipulation and agreement of the parties by 473 Fed. Appx. 400); *but see Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564, 567 (S.D. Miss. 2009) (finding that it could not grant summary judgment because plaintiff alleged that the denial of tenure was not only a discrete act, but also denied the plaintiff a salary increase, and was therefore, a compensation decision as well); *Gertskis v. New York City Dep't of Health and Mental Hygiene*, Civ. 2235, 2009 U.S. Dist. LEXIS 25244, *11 (S.D.N.Y. 2009) (applying the FPA to a failure to promote claim).

In reaching this conclusion, the courts have relied on the Supreme Court's definition of "discrete acts" which are "easily identifiable incidents, including termination, failure to promote, denial of transfer, and refusal to hire." *Tillman*, 377 Fed. Appx. at 349 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)); *see also Arters v. Univision Radio Broad. Tx, L.P.*, No. 3:07-CV-0957-D, 2009 U.S. Dist. LEXIS 39924, *25-*27 (N.D. Tex. May 12, 2009) (holding that the FPA only applies to "discriminatory compensation claims" not to wrongful termination or retaliation claims). A discrete discriminatory act is time barred if the plaintiff does not file an EEOC complaint within either 300 days or 180 days of the discriminatory action. *See Tillman*, 377 Fed. Appx. at 349. In so finding, the courts are upholding as binding law one of the findings of the Court in *Ledbetter*, that under Title VII disparate treatment cases "current effects alone cannot breathe new life into prior uncharged discrimination" involving discrete acts other than pay. *Leach*, 2009 U.S. Dist. LEXIS 11845, *51 (quoting *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007)); *see also Tryals v. AltairStricklan, LP*, No. H-08-3653, 2010 U.S. Dist. LEXIS 144328, *20 (S.D. Tex. Feb. 26, 2010) (finding *Ledbetter* is still binding on other Title VII cases involving disparate treatment claims other than those dealing with pay).

Plaintiffs have also tried to apply the FPA to expand the 90 day period in which a charging party must file suit after the EEOC has addressed the charge. In rejecting this argument one court stated that while the FPA "applies retroactively to claims of discrimination in compensation allowing a plaintiff to seek relief for discriminatory pay decision[s] occurring more than 180 days prior to filing a charge of discrimination," and retroactively "in allowing an affected Plaintiff to recover back pay for up to two years preceding the filing of the charge…[n]either of [the] retroactive provisions impact[s] the ninety-day filing deadline." *Simmons v. Tex. Water Dev. Bd.*, No.

A-09-CA-785-LY, 2010 U.S. Dist. LEXIS 116442, *11-*12 (W.D. Tex. Nov. 2, 2010)

Though there is no question that the FPA applies to wage claims under Title VII and other analogous federal employment anti-discrimination laws, the question arose as to whether it applies to cases brought under the TCHRA. That question was decided by the Texas Supreme Court in *Prairie View A&M v. Chatha*.

2. Prairie View A&M University v. Chatha

In *Prairie View A&M University v. Chatha*, the Texas Supreme Court addressed the question of what effect the FPA had on wage discrimination claims brought in Texas under the TCHRA. *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500 (Tex. 2012). The Court held that a pay discrimination complaint must be brought within 180 days of when the claimant is informed of a compensation decision. *Id.* at 503. The Supreme Court specifically refused to adopt the federal standard statutorily created by Congress in the FPA, which would have allowed the 180 day limitations period to begin each time a claimant receives a paycheck containing an amount reflecting a discriminatory decision. *Id.* The Court's decision marked an important deviation from the general Texas practice of applying federal law and precedent to claims under the TCHRA. *See Id*.

In *Chatha*, a female professor at Prairie View A&M University was promoted from an associate professor to a full time professor, but was not given an adequate salary adjustment. Two years after her promotion, Chatha filed a complaint with the EEOC and the TWC. *Id*. After being issued a right-to-sue letter, she filed suit in state court under the TCHRA. *Id.* at 504. The University responded by filing a plea to the jurisdiction, asserting that the claim was untimely filed and barred by the 180 day statute of limitations period. *Id*. Chatha, in response, asserted that the Ledbetter Act applied to her discriminatory pay claim because the purpose of the TCHRA is to execute the policies of Title VII. *Id.*

The Texas Supreme Court refused to accept Chatha's argument, and instead, found that the FPA does not apply to discrimination claims brought under the TCHRA. *Id.* at 506. The Court reasoned that the Ledbetter Act is a Congressional amendment to Title VII and that the Texas legislature has not similarly amended the TCHRA, meaning that the two are no longer analogous on the interpretation of the 180 day filing requirement. *Id.* As a result of the amendment to Title VII, federal case law no longer controls on the issue of when the 180 day filing requirement starts to run for purposes of determining if a wage claim was timely filed. *Id.* The Court explained that it refused to find a similar exception to the 180 day filing requirement for pay discrimination claims, as exists under the FPA, because the Texas legislature has similarly amended the TCHRA. *Id.* at 509. The Court refused to take on legislative duties which would require it to abdicate its role as interpreters of the law. *Id.* The Court instead looked to the plain textual meaning of the TCHRA as it stands absent an amendment, and in doing so continued to hold that the setting of an alleged discriminatory pay rate is a discrete act with discrimination only occurring at the time the pay setting decision is made. *Id*. Thus, by waiting two years since her promotion to make a claim, Chatha was barred by the TCHRA's 180 day statute of limitations. *Id.*

Recently, the Texas legislature passed "an act relating to unlawful employment practices regarding discrimination in payment of compensation" ("the Act"). The Act was signed in the House and the Senate on May 26, 2013, and was sent to the Governor on May 27, 2013. The Act was vetoed by Governor Rick Perry. As such, the state of the law in Texas still stands as ruled in *Chatha*.

The Texas Supreme Court's ruling in *Chatha* appears to favor defendants, in that in Texas there is still a definitive statute of limitations for filing a claim based on wage discrimination under the TCHRA. A plaintiff must file a claim within 180 days of the discriminatory pay decision, and is not allowed the benefit of claiming that each paycheck is, in effect, its own discriminatory action. As such, a claim under the TCHRA, provides defendants with the intended protections that come from a statute of limitations.

C. Plaintiff's Burden of Proof in Age Discrimination Claims

The TCHRA is substantively identical to Title VII when it comes to what classes are protected, with the exception that Title VII does not protect against age, disability, and genetic information discrimination. Instead, the federally protected category of age is established under the Age Discrimination in Employment Act ("ADEA"), which makes it unlawful for an employer to take an adverse action against an employee based on his age. *See* 29 U.S.C. § 623(a); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 170 (2009).[3] Analysis of age discrimination claims generally, but not exclusively, mirrors the analysis and application incorporated under Title VII. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 633 (Tex. 2012). As such, Texas courts have generally looked to federal courts for guidance in deciding age discrimination claims, just as they look to federal courts for guidance in determining other aspects of the TCHRA. However, age discrimination claims under the ADEA have a different standard for the plaintiff's

[3] The federal Americans with Disabilities Act prohibits employment discrimination based on disability.

burden of proof than a discrimination claim under Title VII and the TCHRA.

1. Plaintiff's Burden of Proof under the ADEA

In *Gross v. FBL Financial Services*, the Supreme Court held that in order for a plaintiff to prevail on a disparate-treatment claim under the ADEA, the plaintiff must prove by a preponderance of the evidence that age was the "but-for" cause of the alleged adverse employment action. 557 U.S. 167 (2009). In requiring a "but-for" causation standard, the Court established that Title VII and ADEA claims have different burdens of proof. Under Title VII, a plaintiff could prevail if he showed that age was a motivating factor with regard to the adverse employment action in question and the employer was not able to establish that it would have acted in precisely the same manner regardless of the employee's age. As a result of *Gross*, this type of burden-shifting does not apply to ADEA cases.

Plaintiff Gross began working as a claims administration director at FBL Financial Group, Inc. in 1971. *Id.* at 170. At the age of 54, after over thirty years of service, Gross was reassigned to a different position while a majority of his job responsibilities were transferred to a younger female employee in her early forties. *Id.* Gross filed suit with the district court, alleging that his reassignment and the reallocation of his duties to a younger employee violated the ADEA. *Id.* At the close of trial, the court instructed the jury that they should find for Gross if he had proven by a preponderance of the evidence that "age was a motivating factor" in FBL's decision to reassign his job responsibilities and effectively demote him. *Id.* Additionally, the court instructed the jury as to FBL's burden of proof stating that the "verdict must be for [FBL]…if it has been proven by the preponderance of the evidence that [FBL] would have demoted [Gross] regardless of his age." *Id.* The jury returned a verdict for Gross and FBL appealed. *Id.*

On appeal, FBL challenged the jury instruction as given, and the court of appeals remanded for a new trial, finding that the instruction as given did not comport with the standard established in *Price Waterhouse v. Hopkins*, which only allows for the burden of persuasion in a "mixed-motives" case to shift to the employer after the plaintiff has shown "direct evidence that an illegitimate criterion was a substantial factor" in the adverse employment decision. *Id.* at 172 (citing *Price Waterhouse*, 490 U.S. 228, 276 (1989)). A "mixed-motives" case is where an adverse employment action is made because of both permissible and impermissible considerations. Once direct evidence of the impermissible considerations is supplied, the burden then shifts to the employer, to prove "it would have taken the same action regardless of that impermissible consideration." *Id.* (citing *Price Waterhouse*, 490 U.S. at 258). Since the district court's jury instruction did not require Gross to show "direct evidence" that age was a motivating factor in his alleged demotion, and since Gross admitted that he did not present any such direct evidence, the court of appeals held that the mixed motives instruction should not have been given to the jury. *Id.* at 173. The Supreme Court granted certiorari, and was asked by the parties to clarify whether a plaintiff must present "direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." *Id*.

The Supreme Court's majority opinion did not address the question on which it granted certiorari. Instead, it considered whether under the ADEA the burden of persuasion in an age discrimination claim ever shifted to the defending party (i.e., requiring employers to show that it would have terminated the plaintiff regardless of his age). The Court held that the court of appeals erred in applying the *Price Waterhouse* burden shifting scheme to an age discrimination claim under the ADEA. *Id.* at 180. The Court pointed out that the *Price Waterhouse* decision was applicable only to claims made under an amended Title VII, and that it does not apply to an ADEA claim. *Id.* at 174. In so holding, the Court reasoned that Congress amended Title VII in order to explicitly provide for a discrimination claim where an improper consideration was "a motivating factor" in making an adverse employment decision, even when there are other factors present that also motivated the employment decision. *Id*. The Court went on to state that the ADEA does not contain similar language regarding age as a "motivating factor" for an adverse employment action, nor has Congress ever amended the ADEA to include such language, even though it has amended it in other respects. *Id.* Since the ADEA has not been amended to incorporate the "motivating factor" language of Title VII, the Court stated that interpretation of the ADEA should not be governed by Title VII decisions such as *Price Waterhouse*.

Rejecting *Price Waterhouse* as to the appropriate guide for its interpretation of the burden of proof required for an age discrimination claim under the ADEA, the Court looked to the plain language of the ADEA. The Court acknowledged that the ADEA states that "it shall be unlawful for an employer…to fail to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment *because of* such individual's age." *Id.* at 176 (citing 29 U.S.C. § 623(a)(1) (emphasis added). The Court looked at the words "because of" and reasoned that the plain meaning of the phrase requires a plaintiff to show that age was the "but-for" cause of

the adverse employment decision. *Id.* at 176. In so reasoning the Court held that "the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action" and that burden requires a plaintiff to prove by a preponderance of the evidence that age was the "but for" cause for the alleged discriminatory employment decision. *Id.* at 177-78.

2. Plaintiff's Burden of Proof under the TCHRA in Age Discrimination Cases

Under the TCHRA "an unlawful employment practice is established when the complainant demonstrates that race, color, sex, national origin, religion, age, or disability was a *motivating factor* for an employment practice, even if other factors also motivated the practice." TEX. LAB. CODE § 21.125 (emphasis added). Section 21.125, entitled "Clarifying Prohibition Against Impermissible Consideration of Race, Color, Sex, National Origin, Religion, Age, or Disability," came into effect in 1997, and added the "motivating factor" language. *Id.* The additional language altered the burden of proof that was previously required under section 21.051 which states: "an employer commits an unlawful employment practice if *because of* race, color, disability, religion, sex, national origin, or age the employer" undertakes an adverse employment action. TEX. LAB. CODE § 21.051 (emphasis added).

As discussed previously, the fact that Title VII does not cover age is important to the conclusion that state and federal age discrimination claims will now be treated differently. The reason why the U.S. Supreme Court held that a "but for" burden of proof applies to age discrimination cases under the ADEA, while a "mixed-motives" burden of proof applies to other discrimination cases covered by Title VII, was because of the specific language of both statutes. Unlike Title VII, the ADEA does not include "motivating factor" language. Like Title VII, the TCHRA, includes the "motivating factor" language.

The "but for" burden of proof standard set forth in *Gross* for an age discrimination claim under the ADEA has not been applied to an age discrimination claim under the TCHRA. *See Houchen v. Dallas Morning News, Inc.*, CA-No. 3:08-CV-1251-L, 2010 U.S. Dist. LEXIS 33389, at *32 (N.D. Tex April 1, 2010) (holding that the standards for an ADEA age discrimination claim as set forth in *Gross* does not apply to a claim for age discrimination under the TCHRA because of the differences in the statutory language of the two statutes); *Hernandez v. Grey Wolf Drilling*, 350 S.W.3d 281 (Tex. App.—San Antonio June 22, 2011, no pet.) (holding that *Gross*'s "but for" standard does not apply because the TCHRA contains the "motivating factor" language that was critically absent from the ADEA).

In short, an age discrimination claim under the TCHRA allows for a burden shifting scheme which does not require a plaintiff to show "but for" causation. A plaintiff who pursues an age discrimination claim will have a less onerous burden of proof if he pursues the claim under the TCHRA, as opposed to pursuing the same claim under the ADEA.

D. Availability of Liquidated Damages

Liquidated damages are available to a plaintiff under the ADEA, but not under Title VII, the ADA, or the TCHRA.

1. Liquidated Damages under the ADEA

Although passed only three years after Title VII, the ADEA did not incorporate the remedial model for damages of Title VII. Instead, it incorporates the Fair Labor Standard Act's remedial provisions. As such, a plaintiff seeking redress under the ADEA is entitled to a different set of damages then a plaintiff under Title VII. Specifically, the ADEA allows a plaintiff to recover lost wages plus liquidated damages in an amount equal to the jury's award of lost wages for a "willful violation" of the act. *See* 29 U.S.C. § 626(b); *Smith v. Berry Co.*, 165 F.3d 390, 395 (5th Cir. 1999). The ADEA, therefore, allows for "double damages." In allowing for liquidated damages, Congress intended them to be punitive in nature and they are meant to act as a deterrent against employers who willfully discriminate on the bases of age. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 125 (1985); *but see Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 491 (5th Cir. 2007) (stating "damages under the ADEA are not meant to be punitive"). However, they are not the traditional punitive damages available under Title VII, since they are capped at double the award of damages for lost wages in the form of back pay.

An employer's conduct is a "willful violation" if it "knows or shows reckless disregard for the matter of whether its conduct is prohibited by the ADEA." *Thurston*, 469 U.S. at 126; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993) (affirming the definition of "willful" given in *Thurston*). Simply knowing that the ADEA is "in the picture" or potentially applies to its actions will not expose an employer to the possible recovery of liquidated damages. *Thurston*, 469 U.S. at 127. Therefore, where an employer in good faith attempted to determine if its proposed retirement plan violated the ADEA before enacting the plan, the Court found that it did not act willfully or in reckless disregard of the ADEA, even when the retirement plan was found to be discriminatory on its face. *Id.* An award of liquidated damages that is equal to the back pay award is mandatory, where there has been a finding of

willfulness. *Tyler v. Union Oil Co.*, 304 F.3d 379, 399 (5th Cir. 2002).

With regards to governmental entities, courts have rejected the governmental entity defendants' argument that they should not be subjected to the liquidated damages provision of the ADEA because governmental entities are not subject to paying exemplary or punitive damages. *See Potence v. Hazelton Area Sch. Dist.*, 357 F.3d 366, 371 (3rd Cir. 2004). In rejecting this argument, courts have acknowledged that there is an exception to the general rule that governmental entities do not pay punitive damages, and that is when they are "expressly authorized by statute." *Id.* (quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260 (1981)). Courts have looked to the plain language of the ADEA and have found that, on its face, the ADEA expressly allows for the recovery of liquidated damages against governmental entities. Courts have recognized that the ADEA incorporates the remedies of the Fair Labor Standards Act ("FLSA"), which expressly provides for the imposition of liquidated damages when *any* employer commits a "willful violation" of the FLSA. *Id.* (emphasis added). Additionally, the ADEA's definition of employer includes "a State or political subdivision of a State." *Id.* The language of the ADEA itself makes it clear that liquidated damages are recoverable against a governmental entity. *Id*.; *see also Cross v. N.Y. City Transit Auth.*, 417 F.3d 241, 255-256 (2nd Cir. 2005); *Ray v. Iuka Special Mun. Separate Sch. Dist.*, 51 F.3d 1246, 1253 (5th Cir. 1995) (allowing for an award of liquidated damages under an ADEA claim against a school district); *Castillo v. Homan*, No. H-04-4859, 2005 U.S. Dist. LEXIS 41515, *16 (S.D. Tex. Aug. 16, 2005) (allowing plaintiff to amend his complaint to reflect that he is seeking liquidated damages against a defendant that was a city).

The possibility of "double damages" under the ADEA, and the absence of traditional punitive damages, makes for the possibility of different damages awards against governmental entities under the ADEA than under Title VII or the ADA.

2. Liquidated Damages under the TCHRA

Liquidated damages are not available under the TCHRA. TEX. LAB. CODE § 21.258(c); *In re Hot-Hed Inc.*, 477 F.3d 320, 324 (5th Cir. 2007). The TCHRA caps a plaintiff's damages for lost earnings at two years. *Id.* A defendant should be aware of these damages limitations under the TCHRA, because they can affect the defendant's right to remove the claim from state court to federal court. At least one court has held that where a plaintiff filed suit in state court, making a claim for age discrimination under the TCHRA, but sought as a remedy unlimited back pay and liquidated damages, that the case was properly removed by the defendant to federal court. *See Medina v. Ramsey Steel Co.*, 238 F.3d 674, 680 (5th Cir. 2001). In reaching its decision, the court noted that the plaintiff is the master of his pleadings, and by requesting damages that were only available under a federal statute, the plaintiff could not avoid the removal of his claims to federal court by the defendant.

E. Plaintiff's Burden of Proof in Retaliation Claims

The U.S. Supreme Court has recently decided that retaliation claims under Title VII have a different standard for the plaintiff's burden of proof than discrimination claims under Title VII.

1. Plaintiff's Burden of Proof for Title VII Retaliation

In *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that Title VII retaliation claims require a plaintiff to prove their claim according to traditional principles of "but-for" causation, not the lessened causation test as applied to mixed motive discrimination claims under Title VII. No.12-484, 2013 U.S. LEXIS 4704 (June 24, 2013). In requiring a "but-for" causation standard, the Court followed its precedent in *Gross*, and established that Title VII discrimination and retaliation claims have different burdens of proof. *Id*. at *9-*10. Under a Title VII discrimination claim, a plaintiff could prevail if he showed that his membership in a protected class was a motivating factor with regard to the adverse employment action in question and the employer was not able to establish that it would have acted in precisely the same manner regardless of the employee's membership in a protected class. Id. at *9. As a result of *Nassar*, the burden-shifting analysis is different in Title VII retaliation cases.

The Supreme Court in reaching its opinion in *Nassar* distinguished between two types of discrimination protected by Title VII: (1) "status-based discrimination," which refers to "basic workplace protection such as prohibitions against employer discrimination on the basis of race, color, religion, sex, or national origin in hiring, firing, salary structure, promotion and the like;" and (2) "employer retaliation on account of an employee's having opposed, complained of, or sought remedies for, unlawful workplace discrimination. *Compare* 42 U.S.C. §2000e-2(a); *with* 42 U.S.C. § 2000e-3(a). The Court affirmed that for "status-based discrimination" a plaintiff is not required to meet a standard of "but-for" causation, i.e. that the causal link between the injury suffered and the wrongful act of the employer, that the injury would not have occurred "but-for" the employers action. *Id.* at *10.

The Court refused to extend that lesser standard to a retaliation claim under section 2000e-3(a), finding that since the protection against retaliation is located in a different section of Title VII that was not amended by the legislature to contain "motivating factor language" that it was not the intent of Congress to apply the lesser causation standard to claims of retaliation. *Id*. at *18. Instead, after the amendment, the section of Title VII referring to protection against retaliation for a protected act mirrors the "because of" language in the ADEA, which the Court recently held in *Gross v. FBL Financial Services, Inc.* required a "but-for" causation standard. *Id.* at *20-*21(citing 557 U.S. 167, 176 (2009)). As a result, "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *Id*. at *23-*24. The Court also refused to accept the argument that every reference to "race, color, creed, sex, or nationality in an antidiscrimination statute is to be treated as a synonym for 'retaliation.'" *Id.* at *29-*30. The Court rejected that argument since Title VII is a detailed statutory scheme and Congress explicitly altered the standard of causation for one class of claims under Title VII, but not another. *Id.* at *32.

The Court concluded that Title VII retaliation claims "must be proved according to traditional principles of but-for causation," not the lessened causation test stated in "status-based discrimination" claims, covered by section 2000e-2(m). *Id*. at *42.

2. Plaintiff's Burden of Proof for TCHRA Retaliation

Section 21.055 of the Texas Labor Code prohibits an "employer" from retaliating or otherwise discriminating against a person who: (1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies or otherwise participates in an investigation, proceeding or hearing. See Texas Labor Code §21.055. "Employer" is specifically defined to include governmental units. TEX. LAB. CODE § 21.002(8)(D).

A plaintiff can establish a prima facie case of unlawful retaliation by showing: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there was a causal connection between his participation in the protected activity and the adverse employment action. *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282 (Tex. App.-Corpus Christi 2000, pet. denied). In order to engage in a protected activity, an employee must complain about discrimination covered by the TCHRA. *Anderson v. Limestone County, Texas*, 2008 Tex. App. LEXIS 5041 (Tex. App. – Waco July 2, 2008, pet. denied) (quoting *Spinks v. Trugreen Landcare, L.L.C.*, 322 F. Supp. 2d 784, 796 (S.D. Tex. 2004)). If the plaintiff makes this showing, the burden shifts to the defendant-employer to articulate a legitimate, nonretaliatory reason for the adverse employment action. *Hernandez v. Grey Wolf Drilling, L.P.*, 350 S.W.3d 281, 286 (Tex. App.—San Antonio 2011).

Under the TCHRA, "a 'but for' causal nexus must exist between the protected activity and the employer's prohibited conduct." *Anderson v. Limestone County*, 2008 Tex. App. LEXIS 5041, *36 (Tex. App.—Waco July 2, 2008, no pet.)(quoting *Herbert v. City of Forest Hill*, 189 S.W.3d 369, 377 (Tex. App.—Fort Worth 2006, no pet.)) The standard of proof is that the plaintiff must show that "without his protected activity, the employer's prohibited conduct would not have occurred when it did." *Id.* While this appears to be the same "but for" causation standard as discussed under Title VII retaliation claims, the courts in Texas have made a further qualification, stating that "the plaintiff need not establish that the protected activity was the *sole cause* of the employer's prohibited conduct." *Id.* This language creates a modified "but for" causation, that is a lesser standard then under Title VII post-*Nassar*.

In short, a retaliation discrimination claim under the TCHRA allows for a burden shifting scheme which does not require a plaintiff to show strict "but for" causation. In other words, a plaintiff who pursues a retaliation claim will have a less onerous burden of proof if he or she pursues the claim under the TCHRA as opposed to Title VII.

F. Protection Against Genetic Information Discrimination

The Human Genome Project, in which researchers over a 13 year period identified the individual genes that make up human DNA, was completed in 2003. With its completion, came the advances of new genetic testing which allows individuals to learn if they have a genetic predisposition to certain diseases. A concern arose in the employment context as to how this information may be used to discriminate against certain individuals based on their genetic predispositions. Of prime concern is with regards to an employer not employing certain individuals if they possess a genetic predisposition for a condition that could potentially cost the employer money in terms of providing health insurance and the employee being absent from work. The protections against such discrimination are discussed herein.

1. The Genetic Information Nondiscrimination Act ("GINA")

The Genetic Information Nondiscrimination Act ("GINA") was signed into law on May 21, 2008, by President George W. Bush. With regards to employment law, the purpose of Title II of GINA is to

protect employees from genetic discrimination at the hand of their employers.[4] *See* 42 U.S.C. § 2000ff-1. GINA makes it an illegal employment practice "to fail or refuse to hire, or to discharge, any employee, or otherwise discriminate against an employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee." *Id.* "Genetic information" is defined as: (1) an individual's genetic tests, (2) the genetic tests of family members, and (3) the manifestation of a disease or disorder in family members. 42 U.S.C. §2000ff(4)(A)(i)-(iii). Age and sex are specifically excluded from this definition. 42 U.S.C. § 2000ff(4)(C). "Genetic test" is defined as "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes." 42 U.S.C. § 2000ff(7)(A).

The definitions of "genetic information" and "genetic test" make it clear that not all confidential medical information is "genetic information" for purposes of protection under GINA. Notably, a disease or condition that has already manifested itself in the individual employee is not protected by GINA, and instead is covered by the ADA. *See* 42 U.S.C. § 2000ff; *see also Bell v. PSS World Medical*, 3:12-cv-381-J-99MMH-JRK, 2012 U.S. Dist. LEXIS 183288, *7-*9 (M.D. Fla. Dec. 7, 2012) (finding that plaintiff did not meet her burden under GINA for either genetic testing and/or genetic information when her allegations were that the employer discriminated against her based on her hyperthyroidism). Following that principle, courts have clarified what GINA means with regards to when family medical history is considered "genetic information." The court stated that "the fact that an individual family member merely has been diagnosed with a disease or disorder is not considered 'genetic information' if 'such information is taken into account only with respect to the individual in which such disease or disorder occurs and not as genetic information with respect to any other individual." *Poore v. Bristol*, 852 F. Supp. 2d 727, 731 (W.D. Va. April 4, 2012) (denying protection to an individual who was fired shortly after the employer found out that his wife had multiple sclerosis). Therefore, evidence of a family member's disease diagnosis "is only considered 'genetic information' if used to determine the likelihood of disease in another individual." *Allen v. Witman*, 3:12-cv-482, 2013 U.S. Dist. LEXIS 80228, * 73-*74 (D. Conn. June 6, 2013).

Under GINA, employers are also prohibited from requesting, requiring, or purchasing genetic information about their employees or an employee's family member. 42 U.S.C. §2000ff-1. An employer, therefore, can violate GINA by simply possessing genetic information, even if it is not used to make a discriminatory employment decision. Importantly, GINA does contain a safeguard for employers who inadvertently receive protected genetic information from the voluntary disclosure of an employee. Finally, should an employer obtain such information, either inadvertently or under one of GINA's exceptions to acquiring genetic information, the information must be kept separately as a confidential medical record of the employee. 42 U.S.C. §2000ff-5.

The extent of protection offered by GINA is not yet clear since very few cases have been brought alleging a violation of GINA. *See e.g Macon v. Cedarcroft Health Services, Inc.*, 4:12-CV-1481 CAS, 2013 U.S. Dist. LEXIS 43226, *20-*21 (E.D. Mo. Mar. 27, 2013) (a plaintiff's race and social security number are not "genetic information" under GINA); *Smith v. Donahoe*, 1:12cv790, 2013 U.S. Dist. LEXIS 4096, *21-*23 (E.D. Va. Jan. 8, 2013) (holding that a plaintiff's book on genetics and accompanying genetic and religious theory on DNA did not constitute "genetic information" for purposes of GINA); *Culbreth v. WMATA*, RWT 10cv3321, 2012 U.S. Dist. LEXIS 37335, *10-*11 (D. Md. Mar. 20, 2012) (granting a motion for summary judgment because plaintiff did not present evidence that she ever underwent genetic testing or that the employer had access to such information). However, it is clear that now there is a direct means of protection offered to employees for the covered genetic information, whereas before, a plaintiff would have to try and bring a claim under the ADA or under the Fourteenth Amendment's protection of medical confidentiality.

Additionally, under GINA, only "disparate treatment" causes of action, similar to the standards laid out under Title VII can be asserted, i.e. there are no disparate impact claims. *See* 42 U.S.C. § 2000ff-7. Under GINA, courts have stated that in order to prevail on a cause of action under GINA, a plaintiff must allege: (1) that plaintiff was an employee; (2) "who was discharged or deprived of employment opportunities;" (3) because of information from the plaintiff's genetic tests. *Allen*, 2013 U.S. Dist. LEXIS 80228, at *72-*73 (quoting *Leone v. North Jersey Orthopaedic Specialists*, No. 11-3957, 2012 U.S. Dist. LEXIS 59174, *15 (D.N.J. Apr. 27, 2012)

Of importance to defendants, one commentator has raised the issue as to what affect GINA will have on an employer, specifically, with regards to responding to workers compensation claims. Phillip K. Vacchio & Joshua L. Wolinsky, *Note: Genetic Information Nondiscrimination Act of 2008: It's in Title VII's Genes*, 29 Hostra Lab. & Emp. L.J. 229, 242 (2011). Under GINA, an employer may no longer use

[4] Title I of GINA prohibits genetic information discrimination in health insurance. As such, it is beyond the scope of this paper and is not discussed.

the affirmative defense that the plaintiff was genetically predisposed to a certain disease or condition, and as a result, the plaintiff received the injuries alleged to have been caused by, or received on, the job. *Id.* This defense is no longer available to defendants because it would require the employer to request and/or disclose the plaintiff's genetic information, and no such exception is present in GINA.

2. Protection Against Genetic Information Discrimination under the TCHRA

The state of Texas adopted its own protections against the discriminatory use of genetic information in 1997, when it added sections 21.401-21.405 to the Texas Labor Code. As such, the TCHRA protects against the discriminatory use of genetic information. Under the TCHRA "an employer commits an unlawful employment practice if the employer fails or refuses to hire, discharges, or otherwise discriminates against an individual with respect to compensation or the terms, conditions, or privileges of employment: (1) on the basis of genetic information concerning the individual; or (2) because of the refusal of the individual to submit to a genetic test." TEX. LAB. CODE § 21.402(a). "Genetic information" is defined as "information that is: (A) obtained from or based on a scientific or medical determination of the presence or absence in an individual of a genetic characteristic; or (B) derived from the results of a genetic test performed on, or a family health history obtained from, an individual." TEX. LAB. CODE § 21.401(4). While not structured in the same way as GINA, it appears that both cover the same genetic information.

The TCHRA also states that such genetic information is "confidential and privileged regardless of the source of the information," and subject to certain exceptions, it may not be disclosed. TEX. LAB. CODE §§ 21.403, 21.4031. Notably different from GINA, is that an individual who discloses genetic information in violation of the TCHRA is liable for a civil penalty of not more than $10,000. TEX. LAB. CODE § 21.403(e). This establishes a civil penalty that is not present under GINA.

Another notable difference between the protection offered under the TCHRA and GINA is that the TCHRA does not provide as broad of protection for employees in that an employer is not prohibited from requesting or obtaining genetic information from an employee. Under the TCHRA, an employer could have also performed a genetic test on an employee, as long as the genetic test was not required as a term of employment and the employee had the right to refuses to submit to the test. Under GINA, even asking for an employee to submit to a genetic test is a violation.

G. Governmental Immunity in TCHRA and Title VII Cases

Independent school districts in Texas are considered to be local governmental entities. Generally speaking, a plaintiff may only sue a local governmental entity, like a school district, if there is a waiver of the entity's governmental immunity. Without a waiver of governmental immunity, a court has no jurisdiction to hear a case and the plaintiff's case will be dismissed.

It is well established that the TCHRA operates as a waiver of a school district's governmental immunity. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008). In other words, if a school district employee believes that he has been discriminated against on the basis of race, for example, he may sue the school district under the TCHRA.

Last year, however, the Texas Supreme Court held that the TCHRA provides a waiver of a governmental entity's immunity only when a plaintiff is able to establish a prima facie case of discrimination. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629 (Tex. June 29, 2012) ("*Mission Consol. II*"). This is a conclusion that some lower Texas appellate courts had previously reached, but it marked the first time for the Supreme Court to issue such a decision. *See e.g.*, *El Paso Cmty. Coll. v. Lawler*, 349 S.W.3d 81 (Tex. App.—El Paso 2010, pet. denied) and *Tex. Dept. of Criminal Justice v. Cooke*, 149 S.W.3d 700, 705-708 (Tex. App.—Austin 2004, no pet.)),

The Court found that "[i]n a suit against a governmental employer, the prima facie case implicates both the merits of the claim *and* the court's jurisdiction because of the doctrine of sovereign immunity." *Mission Consol. II*, 372 S.W.3d at 635-636 (citation omitted). While it is undisputed that the TCHRA waives a school district's immunity under the TCHRA, "the Legislature has waived immunity only for those suits where the plaintiff actually alleges a violation of the TCHRA by pleading facts that state a claim thereunder." *Id*. at 636 (citing *State v. Lueck*, 290 S.W.3d 876, 881-882 (Tex. 2009)).

As the Texas Supreme Court wrote in *Mission Consol. II*:

> *Lueck's* reasoning applies to the prima facie elements of a TCHRA claim as well. As in *Lueck*, Chapter 21 of the Labor Code waives immunity from suit only when the plaintiff actually states a claim for conduct that would violate the TCHRA. The section waiving immunity from suit, *Section 21.254*, provides that after satisfying certain administrative requirements, "the *complainant* may bring a civil action." A "complainant" is defined in the TCHRA as "an individual who brings an

> action or proceeding *under this chapter*." Thus, as in *Lueck*, it necessarily follows that a plaintiff must actually "bring[] an action or proceeding under this chapter" in order to have the right to sue otherwise immune governmental employers. **For a plaintiff who proceeds along the *McDonnell Douglas* burden-shifting framework, the prima facie case is the necessary first step to bringing a discrimination claim under the TCHRA. Failure to demonstrate those elements means the plaintiff never gets the presumption of discrimination and never proves his claim.[48] And under the language of Chapter 21 and our decision in *Lueck*, that failure also means the court has no jurisdiction and the claim should be dismissed.**

Id. 636-636 (case internal footnote citations omitted) (emphasis added).

A plaintiff can establish a prima facie case of race discrimination, for example, by showing that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the employer replaced him, with an individual outside of his protected class or, in the case of disparate treatment, show "that others similarly situated were treated more favorably." *Okoye v. Univ. of Tex. Houston Health Sci. Cen.*, 245 F.3d 507, 512-513 (5th Cir. 2001). In other words, a plaintiff alleging race discrimination must now establish a prima facie case: (1) for there to be a waiver of a governmental entity's immunity and (2) for a court to have subject matter jurisdiction.

The fact that the prima facie elements of employment discrimination claims now carry jurisdictional implications is significant because it means that if a governmental entity's plea to the jurisdiction or summary judgment asserting the governmental immunity defense is denied, than the governmental entity has the option to take an interlocutory appeal of the jurisdictional issue to a court of appeals. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). This means that the entity could appeal the denial of its immunity assertion immediately instead of having to wait until the end of the lawsuit before the trial court. Interlocutory appeals can mean that some or all proceedings before the trial court are stayed pending the resolution of the appeal.

Because the defense of governmental immunity applied by courts in TCHRA claims to Texas governmental entities is a state immunity, it is not clear whether the governmental immunity defense will apply to employment anti-discrimination claims filed under Title VII (or other analogous) federal statutes.

III. CONCLUSION

When considering whether to file suit for employment discrimination or retaliation, a prospective plaintiff and his attorney need to consider with whom to file a charge of discrimination and under which statutes, state or federal, to file suit. The decisions made in these areas will significantly impact what claims can be asserted, what defenses will be pled, and whether a decision as to the claims asserted will be a decision on the merits of the claims or if the decision will, instead, be based on technical issues concerning the proper statute of limitations or governmental immunity.