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Title VII v. TCHRA: Who Cares?

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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 and was modeled after Title VII and, therefore, 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 which the TCHRA and Title VII have differing statutory language and have been interpreted differently.

This paper will highlight a few specific instances in which the TCHRA and Title VII diverge. These are just some considerations, and this paper does not attempt to be an exhaustive resource. 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 four 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 look at the differing 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. 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"), for example.

As a result of the federally enacted statutes, Texas responded in turn by passing 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. Labor 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 for an alleged violation of the statutes. 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.

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"). The significance of each of these agencies and how they relate to an employee's statute of limitations for filing is discussed below.

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 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)). The administrative remedies require a timely filing with the EEOC. A timely filing is described in the statute 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); *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 as a prerequisite to allowing a 300 day filing deadline a plaintiff to file with the Texas Work Force Commission ("TWC"). *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 plaintiffs' claims are barred if they are not filed within 300 days from the alleged unlawful employment practice, but not mentioning a state filing requirement).

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 administrative agency that covers 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. Labor Code § 21.202; *Texas Youth Commission 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. Labor Code § 21.202; *Garza*, 2011 Tex. App. at *7-*8. The 180 days' time period acts as a limitations period barring claims filed outside of that

time-frame. Tex. Labor Code § 21.202; *Garza*, 2011 Tex. App. 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. 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). 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 ("Ledbetter Act") amended Title VII and changed the way federal courts are required to look at standards for a timely filing in 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 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. *Ledbetter v. Goodyear Tire and Rubber Co.*, 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 ("Ledbetter Act"), which 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 effect of the Lilly Ledbetter Act is that the 180 day or 300 day statute of limitations period for wage based discrimination claims under the federal anti-discrimination statutes has become virtually non-existent. Under the Lilly Ledbetter Act an employee can effectively bring into question a compensation decision that was made years in the past, and can seek back pay for up to two years, in addition to other available damages. This is a challenge for defendants because it exposes them to a much greater range of possible liability, and denies them the protections of a statute of limitations.

Though there is no question that the Act applies to wage claims under Title VII (and other analogous federal employment anti-discrimination laws), the question arose as to whether the Act 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 Lilly Ledbetter Fair Pay Act 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 upheld the fact 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 Lilly Ledbetter Act, which allows 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 notice, 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 Lilly Ledbetter Act 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 Lilly Ledbetter Act, because the Texas legislature has not adopted a similar amending statute. *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 was made. *Id.* Thus, by waiting two years since her promotion to make a claim, Chatha was barred by the 180 day statute of limitations. *Id.*

The Supreme Court's ruling in *Chatha* is beneficial to 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. A claim under the TCHRA, therefore, 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 and disability 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).[1] Analysis of age discrimination claims generally, but not exclusively, mirrors the analysis and application incorporated under Title VII. *See Mission Consolidated Independent School District 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, the Supreme Court has distinguished that an age discrimination claim under the ADEA has a different standard for the plaintiff's burden of proof than a discrimination claim under Title VII. The different burdens of proof are discussed herein.

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. *Gross v. FBL Financial Services*, 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 motiving 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

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

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*.

Not relying on *Price Waterhouse* to guide its interpretation of the burden of proof required for an age discrimination claim under the ADEA, the Court instead 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. Labor 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. Labor 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 or 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. Stated simply, a plaintiff who pursues an age discrimination claim will have a less onerous burden of proof if he or she pursues the claim under the TCHRA as opposed to the ADEA.

D. 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 (*El Paso Community College 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.)), but it marked the first time for the Supreme Court to issue such a decision.

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."[45] A "complainant" is defined in the TCHRA as "an individual who brings an action or proceeding *under this chapter*."[46] 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.[47] **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. at *15-*16 (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 hi, 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, that 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.