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## Mixed-Motive Mix-Up—Non-Prevailing Party Attorney’s Fees Under Texas Antidiscrimination Law “Up in the Air” After Fifth Circuit’s *Peterson v. Bell Helicopter*

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**MIXED-MOTIVE MIX-UP—  
NON-PREVAILING PARTY ATTORNEY’S FEES UNDER  
TEXAS ANTIDISCRIMINATION LAW “UP IN THE AIR”  
AFTER FIFTH CIRCUIT’S *PETERSON V. BELL HELICOPTER***

ALEXANDER P. COHEN\*

**A**LTHOUGH THE TEXAS COMMISSION on Human Rights Act (TCHRA) was modeled after Title VII of the Civil Rights Act of 1964 (Title VII), the Fifth Circuit made an “*Erie* guess” as to whether a plaintiff who fails to achieve any affirmative relief may nonetheless recover attorney’s fees in its recent mixed-motive discrimination case, *Peterson v. Bell Helicopter (Peterson I)*.<sup>1</sup> Relying on a single Texas appellate court decision, the majority held that a plaintiff must be the “prevailing party” to recover fees under both Tex. Lab. Code § 21.259(a) and § 21.125.<sup>2</sup> But, as explained by Judge Dennis in his fiery dissent, that decision got it wrong.<sup>3</sup> Accordingly, this note argues the majority incorrectly buttressed *Burgmann Seals v. Cadenhead* as a wobbly foundation for its *Erie* guess.<sup>4</sup> In doing so, the majority failed to consider “persuasive data that the highest court of the state would decide otherwise.”<sup>5</sup> Specifically, the statute, in light of federal case law, by its plain language, and in full context of the TCHRA scheme, carries no prevailing party requirement.<sup>6</sup> By barring Peterson from recovering fees, the court created uncer-

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<sup>1</sup> *Peterson v. Bell Helicopter Textron, Inc. (Peterson I)*, 806 F.3d 335 (5th Cir.), *reh’g denied per curiam*, 807 F.3d 650 (5th Cir. 2015).

<sup>2</sup> *Id.* (relying, in large part, on *Burgmann Seals Am., Inc. v. Cadenhead*, 135 S.W.3d 854, 861 (Tex. App.—Houston [1st Dist.] 2004, *pet. denied*)).

<sup>3</sup> *Peterson v. Bell Helicopter Textron, Inc. (Peterson II)*, 807 F.3d 650, 657 (5th Cir. 2015) (Dennis, J., dissenting) (*per curiam*).

<sup>4</sup> *See id.*

<sup>5</sup> *Peterson I*, 806 F.3d at 343.

<sup>6</sup> *See* TEX. LAB. CODE § 21.125; *Peterson II*, 807 F.3d at 655 (Dennis, J., dissenting).

tainty for similarly situated plaintiffs and defendants in the Texas aerospace industry as to how TCHRA will be applied in future mixed-motive cases.

Following the loss of a substantial contract with the U.S. Army, Bell Helicopter Textron, Inc. (Bell) implemented several rounds of “reduction-in-force” (RIF) layoffs.<sup>7</sup> Bell created a system of selection criteria to make these cuts that considered metrics like sales, impact on organization, and annual reviews.<sup>8</sup> David Peterson (Peterson) was a sales manager who was among the employees let go in Bell’s 2008 RIF.<sup>9</sup> While Peterson did have several negative metrics—including low performance scores—he contended that Bell let him go, at least partially, due to his age.<sup>10</sup> Peterson thus sued Bell in the Northern District of Texas for age discrimination under the federal ADEA and state TCHRA.<sup>11</sup> He argued that Bell terminated him due to ageism and “corporate blame-shifting,” only coming up with a legal explanation *ex post facto*.<sup>12</sup>

Partially agreeing with Peterson, the jury determined that Bell’s decision to lay him off was motivated in part by age.<sup>13</sup> However, while the jury found age was *a* motivating factor, it was not *the* sole motivating factor, and other legitimate reasons partially pierced Peterson’s pretext argument.<sup>14</sup> In light of the jury finding “mixed-motive” age discrimination, the district court relied on § 21.125(b) and granted Peterson injunctive relief and attorney’s fees.<sup>15</sup> Bell appealed, taking issue primarily with the injunction. The Fifth Circuit’s final decision reversed the district court’s injunction on mainly procedural and fairness grounds because Peterson failed to add an injunctive relief claim until after “his case was effectively concluded.”<sup>16</sup>

Moreover, Bell argued, the majority ultimately accepted, and this note disputes, that in the absence of a properly granted in-

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<sup>7</sup> *Peterson I*, 806 F.3d at 337.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; *Peterson v. Bell Helicopter Textron, Inc.*, 901 F. Supp. 2d 846, 850 (N.D. Tex. 2012) (quoting from the record, a manager allegedly “made age-related remarks” about Peterson, “calling [Peterson]—in an uncomplimentary manner—‘old school.’”) (alterations in original).

<sup>11</sup> 29 U.S.C. § 623(a)(1) (2016); TEX. LAB. CODE § 21.051(1) (West 2015).

<sup>12</sup> *Peterson I*, 806 F.3d at 337–38.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 338–39.

<sup>16</sup> *Id.* at 343.

junction and any other form of affirmative relief, Peterson could not recover attorney's fees under the TCHRA.<sup>17</sup> In other words, Peterson could only recover attorney's fees under § 21.125(b) if he was the "prevailing party" at trial.<sup>18</sup> The majority leaned on *Cadenhead*, a single appellate court decision that thrust a prevailing party requirement from another provision in the TCHRA (§ 21.259) into § 21.125.<sup>19</sup> When followed, *Cadenhead* forecloses a plaintiff like Peterson from recovering attorney's fees under § 21.125(b) if he does not otherwise achieve affirmative relief.<sup>20</sup> Since the Texas Supreme Court has not ruled on this particular point of law under § 21.125, the majority said *Cadenhead* served as an available basis for an *Erie* guess.<sup>21</sup> In so holding, the majority opined it was not "convinced by other persuasive data that the highest court of the state would decide otherwise[.]"<sup>22</sup>

Following a denied petition for rehearing en banc in *Peterson v. Bell Helicopter (Peterson II)*, Judge Dennis eviscerated the majority for what he called a "distortion of both state and federal law in a published opinion."<sup>23</sup> Without monetary or injunctive relief, Peterson concededly was not the "prevailing party" under Texas (and most federal) law.<sup>24</sup> But this was not the rub of Judge Dennis's dispute. Instead, Judge Dennis argued whether or not a party "prevails" does not matter for purposes of recovering fees under § 21.125.<sup>25</sup> So long as the fact finder determined age was factored somewhat into Peterson's termination, Judge Dennis argued, § 21.125(b) allowed Peterson to recover fees.<sup>26</sup> Judge Dennis's argument was reinforced by authority from a majority of federal circuits that allow attorney's fees recovery in mixed-motive Title VII cases.<sup>27</sup> Because Texas emphasizes the role of Title VII case law in interpreting TCHRA, these federal authorities should have factored heavily into the analysis of fees under

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<sup>17</sup> *Id.* at 339, 343.

<sup>18</sup> *Id.* at 342–43.

<sup>19</sup> *Burgmann Seals Am., Inc. v. Cadenhead*, 135 S.W.3d 854, 861 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

<sup>20</sup> *Id.*

<sup>21</sup> *Peterson I*, 806 F.3d at 343.

<sup>22</sup> *Id.*

<sup>23</sup> *Peterson v. Bell Helicopter Textron, Inc. (Peterson II)*, 807 F.3d 650, 657 (5th Cir. 2015) (Dennis, J., dissenting) (per curiam).

<sup>24</sup> *See id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 653.

<sup>27</sup> *Id.*; *see, e.g.*, *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1336 (4th Cir. 1996) ("[Section] 2000e-5(g)(2)(B) [of Title VII] contains no prevailing party requirement.").

§ 21.125.<sup>28</sup> Judge Dennis further set up a pure statutory construction argument that § 21.125 cannot possibly be read as having a prevailing party requirement.<sup>29</sup>

In addition, Judge Dennis called *Cadenhead* a “broken reed” and lamented the majority’s reliance thereon.<sup>30</sup> Because its pivotal holding has never been before the Texas high court, and the opinion itself cites seemingly no authority nor construction rules in reaching its final conclusion, Judge Dennis said *Cadenhead* could not bolster an *Erie* guess.<sup>31</sup> Rather, Judge Dennis subscribed to Peterson’s argument on appeal.<sup>32</sup> Namely, the Fifth Circuit’s *Garcia v. City of Houston*, combined with statutory construction rules reinforced by the Texas Supreme Court’s *Quantum Chemical v. Toennies*, allowed Peterson to recover fees in a mixed-motive discrimination case without prevailing party status.<sup>33</sup> The majority attacked this argument, saying it “fail[ed] to account for the Texas Supreme Court’s more recent decisions requiring a party who seeks fees to have obtained some meaningful relief.”<sup>34</sup> Yet, as Judge Dennis stated, the majority cited no such Texas Supreme Court cases.<sup>35</sup> Rather, the “more recent” cases to which the majority may have been referring do not stand for the majority’s quoted proposition.<sup>36</sup>

Presumably, the majority attempted to invoke a case it cited earlier, *Intercontinental v. KB Home*, for its proposition that more recent cases question the wisdom of *Garcia* under the TCHRA.<sup>37</sup> As Judge Dennis alluded, however, the majority read *KB Home* out of context.<sup>38</sup> *KB Home* stands for the proposition that a plain-

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<sup>28</sup> *Peterson II*, 807 F.3d at 652 (Dennis, J., dissenting).

<sup>29</sup> See generally Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 359–83 (2012) (outlining general rules for construing Texas statutes).

<sup>30</sup> *Peterson II*, 807 F.3d at 654 (Dennis, J., dissenting).

<sup>31</sup> *Id.* (discussing *Burgmann Seals Am., Inc. v. Cadenhead*, 135 S.W.3d 854, 861 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)).

<sup>32</sup> *Id.* at 652–54.

<sup>33</sup> *Garcia v. City of Houston*, 201 F.3d 672, 677–79 (5th Cir. 2000); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001); see 42 U.S.C. § 2000e-5(g)(2)(B) (2016).

<sup>34</sup> *Peterson v. Bell Helicopter Textron, Inc. (Peterson I)*, 806 F.3d 335, 343 (5th Cir. 2015).

<sup>35</sup> See *id.*

<sup>36</sup> *Intercontinental Grp. P’ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009).

<sup>37</sup> *Id.* at 656.

<sup>38</sup> *Peterson v. Bell Helicopter Textron, Inc. (Peterson II)*, 807 F.3d 650, 654 n.4 (5th Cir. 2015) (Dennis, J., dissenting) (per curiam).

tiff must obtain affirmative relief to be a *prevailing party* but not for the proposition that affirmative relief is a prerequisite for obtaining *attorney's fees* absent an explicit requirement to the contrary.<sup>39</sup> In fact, Texas Supreme Court holdings repeatedly emphasize the need for an explicit attorney's fees provision in the statute itself.<sup>40</sup> Thus, the majority's *Erie* guess should have focused on the federal analog and the TCHRA itself.<sup>41</sup>

Its failure to do so creates uncertainty for plaintiffs and defendants alike in mixed-motive cases, as *Peterson I* will likely lead to both forum-shopping and increased litigation cost.<sup>42</sup> With over 153,000 employees, major hubs for aerospace companies like American Airlines, Lockheed Martin, Southwest Airlines, and Bell Helicopter, and the largest air sector GDP in the country, the Texas aerospace industry will incur some of the greatest uncertainty.<sup>43</sup> When the "volatile" air industry ebbs and flows, as it often does, layoffs are inevitable.<sup>44</sup> However, now, if mixed-motive discrimination is at issue in a TCHRA case, aerospace defendants with Texas hubs will almost certainly remove the Texas claim to federal court. Plaintiffs will respond by pleading all possible forms of relief, even if they do not want or have no basis to do so, making every effort to "prevail."<sup>45</sup> Additional burdens will detract lawyers willing to take these cases.<sup>46</sup> Aerospace defendants, in turn, will be burdened by additional time and money spent to defend otherwise unnecessary claims.<sup>47</sup> Surely such a cycle undercuts the purpose of the TCHRA mixed-motive provision vis-à-vis Title VII<sup>48</sup> and the likely outcome if the same case was tried in Texas courts.

Because the Texas Supreme Court has not interpreted elements of a mixed-motive attorney's fees recovery under

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<sup>39</sup> *Id.* ("[In Texas], plaintiff must receive affirmative judicial relief to be considered a *prevailing party*." (emphasis added) (quoting *KB Home*, 295 S.W.3d at 656 n.27)).

<sup>40</sup> *KB Home*, 295 S.W.3d at 653.

<sup>41</sup> See *Peterson II*, 807 F.3d at 652–54 (Dennis, J., dissenting).

<sup>42</sup> See *Peterson v. Bell Helicopter Textron, Inc. (Peterson I)*, 806 F.3d 335, 343 (5th Cir. 2015).

<sup>43</sup> *The Texas Aerospace & Aviation Industry*, TEXAS WIDE OPEN FOR BUSINESS 1, 2, 6 (2014), [http://gov.texas.gov/files/ecodev/Aerospace\\_Report.pdf](http://gov.texas.gov/files/ecodev/Aerospace_Report.pdf) [<https://perma.cc/PGD4-Q7C5>].

<sup>44</sup> See, e.g., *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 30 (D.C. Cir. 1987).

<sup>45</sup> See *Peterson II*, 807 F.3d at 656 (Dennis, J., dissenting).

<sup>46</sup> *Id.* at 655–56.

<sup>47</sup> *Id.*

<sup>48</sup> *Wilson v. Nomura Sec. Int'l, Inc.*, 361 F.3d 86, 90 (2d Cir. 2004).

§ 21.125, the majority in the principal case acknowledged it was making an *Erie* guess.<sup>49</sup> However, if the Texas Supreme Court heard Peterson's case, it likely would have adopted Judge Dennis's reasoning instead of the majority's for three main reasons.<sup>50</sup>

### I. DEFERENCE TO FEDERAL AUTHORITY IN TCHRA CASES

The majority did not acknowledge the deference Texas affords federal law when analyzing statutes modeled after federal counterparts, such as TCHRA.<sup>51</sup> Judge Dennis argued, by relying on *Cadenhead*, the majority failed to consider the "special role that federal law has in guiding the interpretation of the state provisions."<sup>52</sup> TCHRA was modeled after Title VII. In fact, § 21.001 states: "The general purposes of this chapter are to: (1) provide for the execution of the policies of Title VII . . . ."<sup>53</sup> Although the Texas Supreme Court has yet to interpret § 21.125 mixed-motive attorney's fees, it has repeatedly interpreted § 21.001.<sup>54</sup> In doing so, it iterated that TCHRA and Title VII are "nearly identical."<sup>55</sup> Thus, because "analogous federal statutes and the cases interpreting them guide our reading of the TCHRA,"<sup>56</sup> the proper standard for fees under § 21.125 should have been that used by most federal courts, including the Fifth Circuit.<sup>57</sup>

In *Garcia*, the Fifth Circuit upheld an award of attorney's fees in a Title VII case, even though plaintiff obtained no other meaningful relief.<sup>58</sup> There, defendant argued plaintiff should not be allowed to recover attorney's fees since plaintiff failed to recover damages or injunctive relief.<sup>59</sup> The Fifth Circuit held an

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<sup>49</sup> *Peterson v. Bell Helicopter Textron, Inc. (Peterson I)*, 806 F.3d 335, 343 (5th Cir. 2015).

<sup>50</sup> *See Peterson II*, 807 F.3d at 652–55 (Dennis, J., dissenting).

<sup>51</sup> *See Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001).

<sup>52</sup> *Peterson II*, 807 F.3d at 652–53 (Dennis, J., dissenting).

<sup>53</sup> TEX. LAB. CODE ANN. § 21.001 (West 2015).

<sup>54</sup> *See, e.g., Quantum Chem. Corp.*, 47 S.W.3d at 476.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; *see also Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996) (stating that in TCHRA cases "federal case law may be cited as authority.").

<sup>57</sup> *Garcia v. City of Houston*, 201 F.3d 672, 677–79 (5th Cir. 2000).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 677. Thus, as in the principal case, the plaintiff in *Garcia* did not "prevail." *Id.*

“employer’s success in its mixed-motive defense does not in itself bar an award of attorneys’ fees.”<sup>60</sup> Since Texas draws on federal law in TCHRA cases, the Texas Supreme Court would certainly have looked to its federal circuit in interpreting § 21.125.<sup>61</sup>

Further, *Garcia* comports with the weight of federal authority addressing fees in Title VII mixed-motive cases.<sup>62</sup> For example, in *Wilson v. Nomura Securities International*, the Second Circuit relied on Title VII in granting fees, stating § 2000e-5(g)(2)(B) “was added to Title VII specifically to address the situation in which the plaintiff does not receive a damages award at trial but nonetheless serves a public purpose by ‘proving’ that the defendant acted with discriminatory intent.”<sup>63</sup> *Peterson I*, by contrast, stripped a similar deterrent mechanism from TCHRA; a deterrent that could have easily saved air sector defendants time and money by avoiding the aforementioned litigation cycle.

## II. PLAIN LANGUAGE OF § 21.125

In analyzing § 21.125, the majority bypassed statutory interpretation rules that emphasize a plain language analysis of the statute.<sup>64</sup> Accordingly, the court was to “enforce the statute ‘as written’ and ‘refrain from rewriting text that lawmakers chose’” by limiting “analysis to words of the statute and . . . [their] plain meaning.”<sup>65</sup> It should have examined “specific statutory language at issue . . . while looking to the statute as a whole, rather than as ‘isolated provisions’”<sup>66</sup> Also, the court could not add elements to § 21.125, as each omission was to be presumed a choice.<sup>67</sup>

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<sup>60</sup> *Id.* at 678.

<sup>61</sup> *Peterson v. Bell Helicopter Textron, Inc. (Peterson II)*, 807 F.3d 650, 653 (5th Cir. 2015) (Dennis, J., dissenting) (per curiam).

<sup>62</sup> See *Wilson v. Nomura Sec. Int’l, Inc.*, 361 F.3d 86, 90 (2d Cir. 2004); see also *Norris v. Sysco Corp.*, 191 F.3d 1043, 1050 (9th Cir. 1999) (holding 42 U.S.C. § 2000e-5(g)(2)(B) allows a plaintiff to recover fees, even if defendant has a mixed-motive defense).

<sup>63</sup> *Wilson*, 361 F.3d at 90.

<sup>64</sup> *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562–63 (Tex. 2014) (stating courts “endeavor[ ] to read the statute contextually, giving effect to every word, clause, and sentence”).

<sup>65</sup> *Id.* (internal citations omitted).

<sup>66</sup> *Id.* (internal citations omitted).

<sup>67</sup> See *Old Am. Cty. Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111, 115 (Tex. 2004); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).



Here, TCHRA language only requires success in § 21.125(a) to be eligible for fees in (b):

In a complaint in which a complainant proves a violation under Subsection (a) and a respondent demonstrates that the *respondent would have taken the same action in the absence of the impermissible motivating factor*, the court may grant declaratory relief, injunctive relief except as otherwise provided by this subsection, and *attorney's fees and costs* demonstrated to be directly attributable only to the pursuit of a complaint under Subsection (a) . . . .<sup>68</sup>

Therefore, an attorney's fees award for a mixed-motive claim under § 21.125 would clearly comply with the plain language of the statute itself.<sup>69</sup> Instead, here, the majority broke these rules and imputed a prevailing party requirement to § 21.125.<sup>70</sup> The legislature did, by contrast, write such a requirement into TCHRA § 21.259(a).<sup>71</sup> If the legislature wanted a similar requirement in § 21.125, it would have so added, but the omission is presumed to be intentional.<sup>72</sup> Thus, the majority's holding usurped rules of construction and legislative intent while creating confusion.<sup>73</sup>

### III. ADDITIONAL RULES OF STATUTORY INTERPRETATION

The majority ignored other fundamental canons of statutory interpretation by failing to look at the larger statutory scheme.<sup>74</sup> Specifically, the majority "should not [have] give[n] one provision a meaning out of harmony or inconsistent with other provisions, although it might [have] be[en] susceptible to such a construction standing alone."<sup>75</sup> "Harmony" undergirds two vital rules that reinforce Judge Dennis's interpretation of § 21.125.<sup>76</sup>

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<sup>68</sup> TEX. LAB. CODE § 21.125 (West 2015) (emphasis added).

<sup>69</sup> See *Peterson v. Bell Helicopter Textron, Inc. (Peterson II)*, 807 F.3d 650, 657 (5th Cir. 2015) (Dennis, J., dissenting) (per curiam) (warning a contrary reading "may lead to [lower court] confusion").

<sup>70</sup> See *Sanchez*, 149 S.W.3d at 115.

<sup>71</sup> TEX. LAB. CODE § 21.259(a) (West 2015) ("In a proceeding under this chapter, a court may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.").

<sup>72</sup> See *Sanchez*, 149 S.W.3d at 115.

<sup>73</sup> See *Peterson II*, 807 F.3d at 657 (Dennis, J., dissenting); Beal, *supra* note 29, at 359.

<sup>74</sup> *Id.*; *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

<sup>75</sup> See *Helena Chem. Co.*, 47 S.W.3d at 493.

<sup>76</sup> See *Peterson II*, 807 F.3d at 653 (Dennis, J., dissenting) (stressing "harmonious" reading).

First, it is axiomatic that where there are two provisions within the same statutory scheme—one general, the other specific—the specific must control.<sup>77</sup> The Texas Supreme Court has determined, under TCHRA § 21.259, a plaintiff can only recover attorney’s fees if he achieves prevailing party status.<sup>78</sup> But rules of construction maintain the general provision (i.e., § 21.259 governing disputes generally) must yield to the more specific provision (i.e., § 21.125 governing only disputes involving mixed-motive).<sup>79</sup> Second, the “Rule Against Surplusage” canonically disallows courts from interpreting a statute in a way that would render some or all of it superfluous or hollow in light of another portion.<sup>80</sup> As Judge Dennis discussed, the provisions in the TCHRA were crafted by the state legislature to be “distinct and complementary; rather than conflict, they supplement each other.”<sup>81</sup> If § 21.259 were to control every dispute seeking attorney’s fees under TCHRA, there would be no purpose for § 21.125(b) to discuss such fees in a mixed-motive context.<sup>82</sup>

In conclusion, Judge Dennis was concerned this holding would lead to fewer lawyers willing to try mixed-motive cases and more—otherwise vexatious—injunctions filed to preserve the possibility of prevailing.<sup>83</sup> While the majority’s holding threatens willingness of trial lawyers to take similar employee discrimination claims, the larger concern is a “distortion of both state and federal law.”<sup>84</sup> The Fifth Circuit’s failure to follow federal case law and Texas construction rules has disconcerting implications. Aerospace employees and corporations based in Texas should take special note. As an “exceptionally volatile” sector with a strong Texas presence and a great deal of interdependency between employees and employers,<sup>85</sup> this confusion between Texas and federal law will likely affect the way in which mixed-motive

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<sup>77</sup> TEX. GOV’T CODE § 311.026(b) (West 2015); *see, e.g.*, *Forwood v. City of Taylor*, 214 S.W.2d 282, 285–86 (Tex. 1948).

<sup>78</sup> *See, e.g.*, *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012).

<sup>79</sup> *See Forwood*, 214 S.W.2d at 285–86.

<sup>80</sup> *TIC Energy & Chem., Inc. v. Martin*, No. 15-0143, 2016 WL 3136877, at \*5 (Tex. June 3, 2016), *reh’g denied* (Sept. 23, 2016) (courts must “consider the statute as a whole, giving effect to each provision so that none is rendered meaningless or mere surplusage.”).

<sup>81</sup> *Peterson II*, 807 F.3d at 653 (Dennis, J., dissenting).

<sup>82</sup> *See id.*

<sup>83</sup> *Id.* at 655–56.

<sup>84</sup> *Id.* at 657.

<sup>85</sup> *See, e.g.*, *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 409 (10th Cir. 1992).

litigation occurs each time aerospace layoffs take place. Indeed, the court has left potential parties up in the air.