Opinion issued June 27, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00901-CV

UT HEALTH SCIENCE CENTER-HOUSTON, Appellant

V.

NANCY PERKINS, Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2015-60644

MEMORANDUM OPINION

Appellant UT Health Science Center-Houston (UTHSC-H) has filed an interlocutory appeal from the trial court's denial of its motion for summary judgment, which challenged subject-matter jurisdiction. The underlying case is a suit by appellee Nancy Perkins, a former employee of UTHSC-H, alleging

employment discrimination and retaliation. UTHSC-H raises three issues arguing that the trial court erred by denying its plea to the jurisdiction as to each of the three claims raised by Perkins in her original petition.

Because we conclude that the trial court should have dismissed Perkins's claim for gender-based disparate-treatment discrimination, we reverse the trial court's order, in part, and we otherwise affirm the order.

Background

This is an employment-discrimination case. The plaintiff, Nancy Perkins, who is Caucasian, worked as a telephone-triage nurse for UTHSC-H for approximately six months. She contends that her supervisor, David Riley, who is African-American, harassed her, threatened her with physical violence, and treated her in an abusive manner due to her gender and race. She further contends that he treated other non-African-American female nurses the same way, but he behaved much differently toward Lela Sanders, the only African-American female nurse in the telephone-triage department. Perkins contends that her complaints to Sandra Kelley, the human-resources representative, and Dr. Sandra Tyson, the department manager, were not addressed.

Christie Carver, another Caucasian nurse who worked in the telephone-triage department, filed a grievance based on Riley's behavior. In the grievance, Carver described an incident when Riley's anger was directed at Perkins. Perkins

supported Carver by testifying consistently with the grievance during an investigation conducted by Tyson. In her response to the grievance, Tyson concluded that Riley presented no threat to Carver or anyone else and that the supervisors had acted appropriately. Among other things, Tyson found that Riley had "apologized to the person, to whom the anger and raised voice was directed," and that those interviewed "do not feel scared" of him, "nor do they feel unsafe in any way." She also explained that in her interviews she had asked each nurse if Riley had "discussed sexual activities; told off-color jokes concerning race, sex, disability, or other protected classes; engaged in unnecessary touching; commented on physical attributes; displayed sexually suggestive, or racially insensitive pictures; used demeaning or inappropriate terms, or epithets; used indecent gestures; used crude language; sabotaged anyone's work; or engaged in hostile physical conduct." Tyson found that each person interviewed "gave a resounding 'No' to each one."

Two days later, Tyson became aware that Carver intended to appeal the response to the grievance, and that she had sent an email to four of the nurses—including Perkins—seeking support. Tyson warned the nurses not to discuss or work on Carver's grievance during the work day, and she reminded them that they were not obligated to assist.

Carver appealed Tyson's response to her grievance by submitting a letter to the Vice President and Chief Operating Officer of UTHSC-H. Carver refuted the findings in the response, and she added information pertaining to Tyson's warning regarding her appeal. Carver asserted that Tyson's findings misrepresented the facts that had been shared by the people who were interviewed. For example, Carver wrote: "Despite Dr. Tyson's findings that no one worried or worries about David Riley's temper, I believe 3 interviewees told her they did and they still do. Each one told me that their answers were very different than Dr. Tyson wrote in her response to me." She also wrote, "I did not complain about protected class discrimination. I do not know why Dr. Tyson addressed those things in her response." And she stated that Perkins told her "that David Riley never apologized to her for his temper outbursts." The next day, Perkins was fired.

Perkins sued UTHSC-H for violations of the Texas Commission on Human Rights Act (TCHRA). *See* TEX. LAB. CODE §§ 21.001–.556. Her petition alleged the following facts:

- "Nancy Perkins was a good employee who did her job well."
- "She was discriminated against because of her race and gender and was retaliated against for opposing discriminatory practices in the workplace."
- "Nancy Perkins was a nurse in the DSRIP [Delivery System Reform Incentive Payment] office."

- "David Riley did not like Nancy Perkins because she is female and is not African American."

- "Riley is male and African American."

- "He managed Nancy Perkins and the other female, non-African-American nurses in the office by bullying them, throwing temper tantrums, and routinely trying to intimidate them."

- "There were incidents where Nancy Perkins feared that David Riley would physically assault her and other nurses."

- "Numerous good nurses were either fired or quit because of the hostile work environment created by David Riley, and his supervisors' failure to correct the situation."

- "Perkins reported this discrimination to David Riley's supervisor, Monica Smith, her supervisor, Dr. Sandra Tyson, and to Sandy Kelley in human resources."

- "Perkins was also a witness to a grievance filed by Christie Carver, which complained about David Riley's discriminatory practices."

- "Tyson conducted an 'investigation,' during which she took witness statements and twisted what Nancy Perkins said."

- "Perkins was told by Dr. Tyson that nothing was going to interfere with David Riley's progress, as she was his mentor."

- "Immediately after Nancy Perkins participated in the grievance, she was terminated."

UTHSC-H identified three TCHRA causes of action reasonably alleged by Perkins's petition: disparate-treatment discrimination based on gender and race; hostile work environment; and retaliation. UTHSC-H asserted governmental

immunity and filed one document that included both a plea to the jurisdiction and a traditional motion for summary judgment.

In its plea to the jurisdiction, UTHSC-H acknowledged that governmental immunity is waived in suits in which the plaintiff pleads facts sufficient to state a claim under the TCHRA. It made arguments specific to each of the three identified claims.

As to the disparate-treatment claim, UTHSC-H argued that Perkins had "no evidence that male or non-Caucasian nurses were treated better than she was." UTHSC-H relied on excerpts from Perkins's deposition in which she said that there were no male nurses in the telephone-triage department and that Sanders, the only African-American nurse, was invited to participate in management meetings from which Perkins and all the other nurses were excluded. UTHSC-H contended that Perkins did not know if Sanders was paid more for her participation in these meetings, and she had "no evidence that Sanders was not performing other job duties when she was away from the unit." UTHSC-H argued that Perkins had "no evidence" to support her claim that she was terminated because of her race.

Perkins responded with affidavits from herself and two former colleagues from the telephone-triage department, who also were Caucasian women. All three women averred that in March 2014, Riley began bullying non-African-American female nurses in the telephone-triage department. They all averred that Riley

"yelled at" several of them, including Perkins, "often interrupting" their phone calls. They all described an angry outburst when Riley nearly struck a nurse with his hand, and a second angry outburst when he kicked a chair in front of one of his supervisors. They all described ongoing intimidating and verbally abusive treatment by Riley directed toward the nurses with one exception—Sanders, the sole African-American nurse, whom they averred was treated respectfully. They all averred that the pattern of ongoing harassment of the non-African-American nurses continued through May 2014 and beyond, and that Perkins was terminated shortly after showing support for Carver's grievance.

As to the hostile-work-environment claim, UTHSC-H argued that the conduct that Perkins challenged "was not based on any protected characteristic" and "it was not severe or pervasive enough to alter the conditions of her employment or to create a hostile work environment." UTHSC-H maintained that, aside from a single incident, Perkins had "no evidence" that Riley "intended to physically threaten her." UTHSC-H argued that Perkins's deposition testimony proved that "this conduct that is the basis for her claim was not severe or pervasive—it occurred only one time." In addition, UTHSC-H contended that Perkins could not "point to any evidence that this perceived unfair treatment occurred because of her race or gender," and thus she could not "sustain her claim."

Perkins argued that she was harassed verbally by Riley, Tyson, and Monica Smith (Riley's supervisor). She attached affidavits describing two incidents on the same day in April, but she did not make any specific race-based or gender-based claims of harassment.

As to the retaliation claim, UTHSC-H argued that it is barred because Perkins did not make a complaint for race or gender discrimination. Specifically, UTHSC-H argued that the "retaliation claim is barred by immunity because [Perkins] does not and cannot allege facts establishing the necessary prima facie elements of her claims." UTHSC-H acknowledged that Perkins made a verbal complaint to a human-resources representative, but it relied on her deposition testimony in which she said that she did not file a grievance. UTHSC-H argued that Perkins "provides no other evidence of retaliation for any protected activity other than her unsubstantiated verbal complaints" to the human-resources representative. For example, in her deposition in Carver's employment-discrimination case, Sandra Kelley, the human-resources representative, testified that she had not heard allegations that Riley's behavior was based on racial or gender bias:

> Q: [D]id any of these nurses from the triage department ever talk to you about the fact that they thought that David Riley's conduct was racially biased?
>
> A: I never heard any statements like that.

Q: You never heard anybody say I think he's treating us differently because we're not African American?

A: That is correct. I never heard that.

Q: And you never heard any kind of nuance about that . . . speculation about whether it was because of their race or anything like that?

A. I did not hear any allegations or nuances that there was a racial bias.

. . . .

Q. Did anybody ever say, we think there is gender discrimination?

A. No.

Q. Anybody say any nuance of that like . . . David would be completely differently if he was dealing with men?

A. No.

Q. So, in your mind, race and gender weren't a component of this, it was just a manager treating his employees badly in their perspective?

A. I would agree with that.

UTHSC-H also argued that the "complete lack of evidence of retaliation" was underscored by Perkins's allegation that she was "a witness" to a colleague's grievance, yet the colleague specifically denied complaining about "protected class discrimination." It attached Carver's appeal of her grievance, in which she wrote: "I did not complain about protected class discrimination. I do not know why Dr. Tyson addressed those things in her response."

Perkins responded with evidence that she made several verbal complaints to Kelley. In her affidavit, Perkins averred that in May 2014, she began calling Kelley for advice. Perkins averred that she described the harassment and abuse she alleged that she had suffered and asked for help. She also stated that she told Kelley that she believed she was being subjected to discrimination because of her gender and race.

Perkins argued that her testimony to Tyson and in support of Carver's grievance was a complaint of race and gender discrimination. In her affidavit, Perkins averred that she told Tyson about the harassment, bullying, intimidation, and verbal abuse she allegedly had experienced from Riley. She maintained that she told Tyson "the same things that I have stated in this affidavit." In her affidavit, Perkins stated that she had reported to Kelley that she believed Riley had discriminated against her and the other nurses on the basis of race and gender. Perkins also stated in her affidavit that Tyson told her she would not "interfere" with "Riley's progress, as she was his mentor."

Finally, Perkins argued that the temporal proximity of her discharge to her voicing support for Carver's grievance, which was based on the same factual allegations upon which she based her claims of race and gender discrimination in this case, is evidence of retaliation.

In the "traditional motion for summary judgment," UTHSC-H incorporated "all of its preceding arguments" about Perkins's "failure to establish a prima facie case of discrimination, hostile work in environment, and retaliation, under the Texas Labor Code." UTHSC-H maintained that because Perkins failed to "establish a prima facie case," the court should render judgment in its favor. It further argued that, should the court find that Perkins had met her evidentiary burden to make a prima facie case of discrimination, UTHSC-H "articulated" a "legitimate, nondiscriminatory and non-retaliatory reason for termination." Specifically, it argued that its termination of Perkins was justified by her poor work performance and chronic tardiness, as evidenced by her four-month and six-month performance reviews, which it attached. Finally, UTHSC-H argued that Perkins had "no evidence" that the performance ratings were "untrue and merely a pretext for unlawful discrimination or retaliation."

Perkins responded to UTHSC-H's summary-judgment evidence of a legitimate, nondiscriminatory reason for her termination by contrasting the six-month performance review with the four-month performance review. She noted that the six-month performance review criticized her for failing to correct deficiencies that were not identified in the four-month performance review, which showed her meeting or exceeding performance standards. She also proffered evidence showing that she was terminated within two weeks of expressing support

for her colleague's grievance, which was based on the same factual allegations on which Perkins bases her claim of gender-based and race-based discrimination.

Both parties submitted to the trial court blank orders on both the plea to the jurisdiction and the motion for summary judgment. The court denied the motion for summary judgment, but it did not rule expressly on the plea to the jurisdiction.

Analysis

On appeal, UTHSC-H raises three issues arguing that the trial court erred by denying its plea to the jurisdiction. We construe the order denying the motion for summary judgment as an order denying the plea to the jurisdiction. *See Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006). We review a trial court's ruling on subject-matter jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

"A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). In most cases, a plea to the jurisdiction "should be decided without delving into the merits of the case." *Id.* "Typically, the plea challenges whether the plaintiff has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case." *Mission Consol. Indep. Sch. Dist. v. Garcia* (*Garcia II*), 372 S.W.3d 629, 635 (Tex. 2012). Pleadings are reviewed liberally in favor of the plaintiff, and a plaintiff's good-

faith allegations are used to determine the trial court's jurisdiction. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 502–03 (Tex. 2010); *Miranda*, 133 S.W.3d at 226. "If there is a gap in jurisdictional facts, the trial court is required to afford the plaintiff an opportunity to amend its pleadings." *Green Tree Servicing, LLC v. Woods*, 388 S.W.3d 785, 792 (Tex. App.—Houston [1st Dist.] 2012, no pet.). A trial court's subject-matter jurisdiction cannot be challenged in a no-evidence motion for summary judgment or by an allegation in a plea to the jurisdiction that the plaintiff has no evidence of a jurisdictional fact. *See id.* at 794.

A plea to the jurisdiction also may be used to challenge the existence of the jurisdictional facts that have been alleged by the plaintiff. *Garcia II*, 372 S.W.3d at 635. When a defendant uses a plea to the jurisdiction to assert that the jurisdictional facts alleged by the plaintiff are false, the court may consider evidence, even if such evidence "implicates both the subject matter jurisdiction of the court and the merits of the case." *Miranda*, 133 S.W.3d at 226.

The procedure for a plea to the jurisdiction when evidence has been submitted to the trial court mirrors that of a traditional motion for summary judgment. *Id.* at 228; *see also* TEX. R. CIV. P. 166a(c). Thus, the burden is on the movant to present evidence establishing that the trial court lacks jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 228. Thereafter, the burden shifts to the plaintiff to demonstrate that a disputed issue of material fact exists regarding the

jurisdictional issue. *Id.* "If a fact issue exists, the trial court should deny the plea." *Garcia II*, 372 S.W.3d at 635. "But if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law." *Id.*

Governmental immunity deprives a trial court of jurisdiction over suits against a governmental unit absent the Legislature's consent to suit. *City of Hous. v. Hous. Firefighters' Relief & Ret. Fund*, 196 S.W.3d 271, 277 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Governmental immunity may be asserted in a plea to the jurisdiction. *Garcia II*, 372 S.W.3d at 636; *Miranda*, 133 S.W.3d at 225–26. The Legislature has waived immunity from suit for employment discrimination and retaliation claims arising under the TCHRA. *See* TEX. LAB. CODE § 21.254; *Mission Consol. Indep. Sch. Dist. v. Garcia* (*Garcia I*), 253 S.W.3d 653, 660 (Tex. 2008). To show a valid waiver of immunity under the TCHRA, a plaintiff must allege a violation of the statute by pleading facts that state a claim thereunder. *See Garcia II*, 372 S.W.3d at 637–38; *see also* TEX. LAB. CODE § 21.254; *State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009).

In *Garcia II*, the Supreme Court explained that the elements of the plaintiff's claim under the TCHRA are jurisdictional facts, but the plaintiff ordinarily will not be required to produce evidence at the outset of the case only to establish the court's jurisdiction. The Court wrote:

> While a plaintiff must plead the elements of her statutory cause of action—here the basic facts that make up the prima facie case—so that the court can determine whether she has sufficiently alleged a TCHRA violation, she will only be required to submit evidence if the defendant presents evidence negating one of those basic facts. And even then, the plaintiff's burden of proof with respect to those jurisdictional facts must not "involve a significant inquiry into the substance of the claims." Cases may exist where the trial court decides, in the exercise of its broad discretion over these matters, that the inquiry is reaching too far into the substance of the claims and should therefore await a fuller development of the merits.

Garcia II, 372 S.W.3d at 637–38.

The plaintiff in *Garcia II* alleged age discrimination, and the school district filed a plea to the jurisdiction, submitting evidence that the plaintiff had been replaced by a worker who was three years older than she was. 372 S.W.3d at 633. The Supreme Court held that this evidence negated one element of the TCHRA age-discrimination cause of action. *Id.* at 642–43. Garcia did not respond with controverting evidence or direct evidence of a discriminatory intent, which would create a fact issue for a trier of fact. *Id.* The inquiry did not reach so far into the substance of the claims that it was necessary to await a fuller development of the merits for a decision on the jurisdictional issue, and the Court held that the trial court should have granted the plea to the jurisdiction. *Id.* at 643.

The purpose of the TCHRA is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments." TEX. LAB. CODE § 21.001(1). The TCHRA prohibits discrimination in employment

based on "race, color, disability, religion, sex, national origin, or age." TEX. LAB. CODE § 21.051; *Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 898 (Tex. App.—Houston [14th Dist.] 2013, no pet.). "The TCHRA also makes it an unlawful employment practice for an employer to retaliate against an employee who opposes a discriminatory practice or makes or files a complaint." *McCoy v. Tex. Instruments, Inc.*, 183 S.W.3d 548, 554 (Tex. App.—Dallas 2006, no pet.)

I. Disparate treatment

To establish a prima facie case of disparate-treatment discrimination, a plaintiff must show that she was (1) a member of a protected class, (2) qualified for her position, (3) subject to an adverse employment action, and (4) treated less favorably than similarly situated members of the opposing class. *Autozone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008) (citing *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005)). "Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct." *Ysleta Indep. Sch. Dist.*, 177 S.W.3d at 917.

In its plea to the jurisdiction, UTHSC-H argued that Perkins could not demonstrate that she was treated less favorably than similarly situated men because, according to her deposition testimony, there were no male nurses in the telephone-triage department. Perkins did not respond with contradictory evidence. Because there is no fact issue, UTHSC-H conclusively negated Perkins's allegation

of gender-based disparate-treatment discrimination, and the trial court should have granted the plea to the jurisdiction as to that claim. *See Garcia II*, 372 S.W.3d at 635.

As to the race-based disparate-treatment discrimination claim, however, UTHSC-H argued that Perkins had no evidence to support her claim that she was terminated because of her race. UTHSC-H argued that Perkins premised her claim of race-based disparate treatment solely on a subjective belief that Riley did not like her. It submitted excerpts from Perkins's deposition which related to Lela Sanders and the special treatment she received as compared to the other nurses. UTHSC-H argued that attendance at management meetings was insufficient to show that Perkins was treated less favorably than Sanders because she was not African-American. In addition, UTHSC-H attached to its filing a copy of Dr. Tyson's response to Carver's grievance. In her response, Tyson detailed her findings and concluded that the nurses' allegations against Riley regarding his abusive and discriminatory conduct were unfounded.

Perkins responded with affidavits from herself and two former colleagues from the telephone-triage department, who were also Caucasian women. All three women averred that in March 2014, Riley began bullying non-African-American female nurses in the telephone-triage department. They all averred that that throughout April, Riley "yelled at" several of them, including Perkins, "often

interrupting" their phone calls. They all described an incident in April when Riley had an angry outburst and nearly struck a nurse with his hand, and a second incident when he had another angry outburst and kicked a chair in front of one of his supervisors. They all described ongoing intimidating and verbally abusive treatment by Riley directed toward the nurses with one exception—Sanders, the sole African-American nurse, whom they averred was treated respectfully. They all averred that the pattern of ongoing harassment of the non-African-American nurses continued through May 2014 and beyond, and that Perkins was terminated shortly after showing support for a colleague's grievance based on Riley's alleged harassment of the non-African-American nurses.

UTHSC-H's evidence, particularly Tyson's report, negated Perkins's allegations that she was discriminated against by Riley, an African-American man, whom she alleged treated her harshly because of her gender and race. The evidence that Perkins presented in response created a question of fact as to whether she was treated less favorably than a similarly situated member of the opposing class. Because a fact issue exists as to Perkins's race-based disparate-treatment discrimination claim, the trial court properly denied the plea to the jurisdiction. *See Garcia II*, 372 S.W.3d at 635.

II. Hostile work environment

A claim that a plaintiff has been subjected to a hostile work environment "entails ongoing harassment, based on the plaintiff's protected characteristic, so sufficiently severe or pervasive that it has altered the conditions of employment and created an abusive working environment." *Bartosh v. Sam Houston State Univ.*, 259 S.W.3d 317, 324 (Tex. App.—Texarkana 2008, pet. denied) (citing *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986)).

UTHSC-H argued that Perkins had no evidence that the alleged harassment was based on a protected characteristic. Perkins's petition did not allege expressly that the harassment itself was based on a protected characteristic. UTHSC-H did not argue that Perkins failed to plead a prima facie case as is required to waive jurisdiction under the TCHRA. It did not argue that the evidence it submitted with its filing conclusively negated this element. Although the evidence submitted by both UTHSC-H and Perkins in association with the plea to the jurisdiction suggests that Perkins is challenging only incidents of harassment that were not specifically based on a protected characteristic, she was not required to marshal all of her evidence in response to a plea to the jurisdiction. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 554. To the extent that UTHSC-H intended to suggest that there was a gap in Perkins's jurisdictional facts, she was entitled to an opportunity to amend

her pleadings to allege such facts as would state a claim for hostile work environment discrimination under the TCHRA if possible. *See Green Tree Servicing*, 388 S.W.3d at 792. To the extent that this argument in UTHSC-H's plea to the jurisdiction was a no-evidence plea to the jurisdiction, it was improper, because a trial court's subject-matter jurisdiction cannot be challenged by way of a no-evidence motion. *See id.* at 794; *see also Garcia II*, 372 S.W.3d at 637 (plaintiff only required to submit evidence on element of statutory cause of action in response to jurisdictional plea if defendant presents evidence negating a basic fact establishing prima facie case).

UTHSC-H also argued that the challenged behavior was not severe or pervasive because it happened only once. To support its argument, it relied on Perkins's deposition testimony, which it attached to the plea. In her deposition, Perkins described a single incident in which Riley had an angry outburst directed at her. This evidence, if true and complete, would negate a showing that the harassment was severe and pervasive. However, Perkins's petition contains no allegation that the harassment was severe and pervasive. When there is a gap in jurisdictional facts alleged in the pleading, ordinarily, the plaintiff is afforded an opportunity to amend her pleadings. *See Green Tree Servicing*, 388 S.W.3d at 792.

Nevertheless, the parties proceeded as if Perkins had alleged severe and pervasive harassment and discrimination. In response to the combined plea to the

jurisdiction and motion for summary judgment, Perkins argued that "throughout her time" working at UTHSC-H she was "constantly subjected to unwelcome harassment" by Riley, Tyson, and Smith. The affidavits attached to Perkins's response alleged that there were two incidents of angry outbursts on the same day in April 2014, as well as ongoing episodes of harassing behavior by Riley from March through May 2014.

This competing and contradictory jurisdictional evidence is sufficient to create a question of fact as to whether Perkins had experienced severe, pervasive harassment. Because there is a question of fact, the trial court properly denied the plea to the jurisdiction. *See Garcia II*, 372 S.W.3d at 635.

III. Retaliation

To establish a prima facie claim of retaliation, a plaintiff must establish that: (1) she participated in protected activity; (2) her employer took an adverse employment action against her; and (3) a causal connection existed between her protected activity and the adverse employment action. *Brewer v. Coll. of the Mainland*, 441 S.W.3d 723, 729 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Protected activities include: (1) opposing a discriminatory practice; (2) making or filing a charge; (3) filing a complaint; or (4) testifying, assisting, or participating in any manner in an investigation, proceeding or hearing. TEX. LAB. CODE § 21.055. "The employee must establish that absent [her] protected activity, the adverse

employment action would not have occurred when it did." *Brewer*, 441 S.W.3d at 729.

In the plea to the jurisdiction, UTHSC-H argued that Perkins did not engage in a protected activity. In her petition, Perkins alleged that she reported discrimination by Riley to Kelley, Smith, and Tyson. UTHSC-H argued that Perkins's deposition testimony that she did not file a grievance against Riley, or anyone else, and that she made only verbal reports to Kelley over the telephone negated her allegation that she reported discrimination. The trial court also had before it Kelley's deposition testimony in which she said that none of the nurses ever mentioned anything about discrimination. Perkins responded with her affidavit in which she averred that she told both Kelley and Tyson about Riley's harassing and allegedly discriminatory behavior.

As to retaliation, there are questions of fact about whether Perkins participated in a protected activity by reporting and opposing discriminatory behavior, to whom she made such reports, and what she said. Because there is a question as to a jurisdictional fact, the trial court properly denied the plea to the jurisdiction. *See Garcia II*, 372 S.W.3d at 635.

Conclusion

We reverse the order of the trial court to the extent that it denied the plea to the jurisdiction as to Perkins's claim of gender-based disparate-treatment discrimination, and we otherwise affirm the order of the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Higley, and Massengale.