TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00500-CV

The University of Texas at Austin, Appellant

v.

Beverly Kearney, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT
NO. D-GN-13-003908, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Beverly Kearney brought suit against the University of Texas at Austin, her former employer, pursuant to the Texas Commission on Human Rights Act (TCHRA), alleging constructive discharge based on disparate treatment and retaliation. *See* Tex. Lab. Code §§ 21.051(1), .055. In this interlocutory appeal, the University challenges the trial court's denial of its plea to the jurisdiction on the grounds that Kearney failed to exhaust her administrative remedies and failed to assert a viable discrimination or retaliation claim. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). For the reasons that follow, we affirm the trial court's order in part and reverse in part.

BACKGROUND[1]

Kearney, who is African-American, was the head coach of the University's women's track and field team for approximately 21 years during which time she had much success and received considerable recognition. Kearney alleges that she has won more competitions than any other African-American coach in the history of all NCAA sports and at the time of her termination was the only African-American head coach in any sport in the history of the University. In October 2012, Kearney was told by the women's athletic director that a report had been made to the University that Kearney had engaged in a personal relationship with a former student athlete in approximately 2002. Kearney admitted to the relationship and was subsequently placed on administrative leave pending an investigation. After meeting with University attorneys in November 2012, she became concerned that she would be fired. On December 6, 2012, Kearney met with University attorneys and raised complaints alleging past incidents of race and sex discrimination for which she had not filed charges of discrimination. On December 28, 2012, Kearney alleges, University officials informed her that she was going to be fired because of the undisclosed relationship with the student athlete. On January 5, 2013, Kearney resigned in lieu of termination.

On March 8, 2013, Kearney filed a charge of discrimination with the Texas Workforce Commission (TWC).[2] *See* Tex. Lab. Code § 21.0015 (providing for transfer of duties

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[1] Because the University's plea to the jurisdiction was based solely on legal arguments applied to the face of Kearney's petition, we take the factual background as set forth in the parties' pleadings and briefs.

[2] Although the record before us does not contain a copy of the charge of discrimination, Kearney states that she alleged discrimination based on gender and race and retaliation, and the University does not dispute that statement.

under TCHRA from Human Rights Commission to civil rights division of TWC), .201 (providing that person claiming to be aggrieved by unlawful employment practice may file administrative complaint). She received her right-to-sue letter from TWC on October 30, 2013, and filed suit on November 14, 2013. *See id.* § 21.252 (complainant who receives notice that complaint is not dismissed or resolved is entitled to request right-to-sue letter from TWC); *Rice v. Russell–Stanley, L.P.*, 131 S.W.3d 510, 513 (Tex. App.—Waco 2004, pet. denied) (holding that plaintiff's entitlement to right-to-sue letter exhausts administrative remedies and ends exclusive jurisdiction of TWC). In her petition, Kearney alleged facts related to the claims of prior harassment and discrimination that she reported to University attorneys on December 6, 2012. She also alleged that she was informed of the report of her relationship with the student athlete, she was placed on administrative leave, and an investigation was conducted. She alleged that after she reported claims of prior race and sex discrimination during the investigation, she was informed she would be fired and resigned in lieu of resignation. Kearney asserted that other University employees who were white males and who had been involved in relationships with students or direct subordinates had not been subjected to meaningful disciplinary action or termination. Kearney identified by name a former football coach and a former volleyball coach employed from 1997 to 2000, who Kearney alleges married his former student athlete. She also listed without names other coaches, current and former law school professors, current and former undergraduate professors, a department chairman, and a high level administrator. Kearney alleged that she was singled out as an African-American female and treated differently for having a relationship with a student when she was terminated. She asserted causes

of action under sections 21.051 and 21.055 of the TCHRA for constructive discharge based on disparate treatment and retaliation. *See* Tex. Lab. Code §§ 21.051(1), .055.

The University filed a plea to the jurisdiction arguing that Kearney's claims of constructive discharge based on disparate treatment and retaliation were founded on "stale allegations" that had not been administratively exhausted and that her claim of retaliation also fails because the alleged adverse employment action occurred before any protected activity, making it impossible for Kearney to establish causation. The University's plea to the jurisdiction was based solely on legal arguments applied to the face of Kearney's petition, and the University offered no evidence. The trial court denied the plea, and the University filed this appeal.

STANDARD OF REVIEW

As a political subdivision of the state, the University is immune from suit unless the legislature has waived immunity. *See Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 512 (Tex. 2012); *College of Mainland v. Glover*, 436 S.W.3d 384, 391 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). One such waiver can be found under the TCHRA, which provides in relevant part that an employer may not, on the basis of race or sex, discharge an employee. *See* Tex. Lab. Code § 21.051; *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008) (*Garcia I*) (holding that "the TCHRA clearly and unambiguously waives immunity"). The TCHRA's waiver of immunity applies only in those suits in which the plaintiff actually alleges a violation within the scope of the statute. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 636 (Tex. 2012) (*Garcia II*); *Glover*, 436 S.W.3d at 391. Because sovereign

immunity deprives a trial court of subject matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 223, 226 (Tex. 2004).

The University filed a plea to the jurisdiction arguing that Kearney had failed to allege facts that establish a prima facie case under the TCHRA. Thus, the University challenges only the sufficiency of Kearney's pleadings. The determination of whether the pleadings contain factual allegations affirmatively demonstrating the trial court's subject matter jurisdiction presents a question of law that we review de novo. *Id.* at 226. To make this determination, we look to the pleader's intent, construe the pleadings liberally in favor of jurisdiction, and accept the allegations in the pleadings as true. *Westbrook v. Penley*, 231 S.W.3d 389, 405 (Tex. 2007); *Miranda*, 133 S.W.3d at 226. Although a plaintiff has the burden to plead facts showing jurisdiction, she is not "required to marshal evidence and prove her claim to satisfy this jurisdictional hurdle." *Garcia II*, 372 S.W.3d at 637; *see City of El Paso v. Marquez*, 380 S.W.3d 335, 340 (Tex. App.—El Paso 2012, no pet.). "While a plaintiff must plead the elements of her statutory cause of action—here the basic facts that make up a 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."[3] *Garcia II*, 372 S.W.3d at 637. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 133 S.W.3d at 227.

[3] Although "[t]here is no prima facie case requirement in the text of the TCHRA[,] . . . [t]he mechanics of the prima facie case . . . are products of caselaw . . . consistently applied to TCHRA cases by [the Texas Supreme Court]." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 638 (Tex. 2012) (*Garcia II*).

DISCUSSION

Exhaustion of Remedies

In its first issue, the University contends that Kearney has not stated a prima facie case of disparate treatment or retaliation because she bases her claims on events for which she did not exhaust administrative remedies. Before filing suit in state court under the TCHRA, an employee must first exhaust her administrative remedies by filing a complaint with the TWC within 180 days of the alleged discriminatory act, and failure to do so is a jurisdictional defect. *See* Tex. Lab. Code § 21.202(a); *City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008) (describing "unique and comprehensive provisions" established in Chapter 21 and concluding that noncompliance with TWC procedures "deprives courts of subject-matter jurisdiction" over employment discrimination disputes); *Lueck v. State*, 325 S.W.3d 752, 761–62 (Tex. App.—Austin 2010, pet. denied). The University cites Kearney's allegations of harassment and discrimination prior to the investigation that resulted in her termination and argues that she cannot sue for those acts because they occurred prior to September 9, 2012, which was 180 days before she filed suit. However, Kearney's petition refers to the arguably stale offensive acts not as causes of action, but rather in support of her current claims for constructive discharge based on disparate treatment and retaliation. Further, Kearney's counsel expressly stated at the hearing on the University's plea to the jurisdiction that "Kearney is . . . suing the University . . . solely for the constructive discharge that occurred between December 28, 2012 and January 5, 2013." Explaining that the allegations of prior acts were the same allegations that Kearney communicated to University officials on December 6, 2012, prior to Kearney's termination on December 28, 2012, Kearney's counsel conceded that those prior acts are

not actionable and serve merely as background facts in support of her current claims. Kearney repeats this position in her appellate brief.[4]

Both Kearney's disparate treatment and retaliation claims stem from her alleged constructive discharge, and the University does not dispute that Kearney filed a charge of discrimination within 180 days of the date of the alleged constructive discharge—December 28, 2012. The record does not support, and the University does not urge, that Kearney has failed to exhaust her administrative remedies as to the only claims she now asserts. We overrule the University's first issue.

Retaliation Claim

In its second issue, the University argues that Kearney has failed to state a prima facie claim for retaliation because her own allegations negate one of the required elements of a retaliation claim. To state a prima facie case for retaliation, an employee must allege that (1) she engaged in

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[4] Relying on *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 113 (2002), the University argues Kearney cannot rely on "the 'background evidence' idea" to "save stale allegations like the exhausted claims in Ms. Kearney's Petition." However, as discussed, Kearney has judicially admitted that her prior claims are not actionable, *see Texas Dep't of Pub. Safety v. Stanley*, 34 S.W.3d 321, 322 (Tex. App.—Fort Worth 2000, no pet.) (statements made by counsel at hearing on behalf of client can be considered judicial admissions), and has expressly waived any such claims in her appellate brief. Further, although the U.S. Supreme Court in *Morgan* held that time-barred discrete acts cannot support a timely claim for hostile work environment, it also expressly stated that Title VII of the Civil Rights Act of 1964 and its subsequent amendments do not "bar an employee from using the prior acts as background evidence in support of a timely claim[,]" as Kearney does here. *Morgan*, 536 U.S. at 113; *see* Tex. Lab. Code § 21.001(1) (TCHRA was enacted to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments"); *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010) (orig. proceeding) (we may look to federal law interpreting analogous Title VII provisions as authority).

an activity protected by Chapter 21 of the Labor Code, (2) the employer took adverse action against her, and (3) a causal connection exists between the employee's protected activity and the alleged adverse employment decision. Tex. Lab. Code § 21.055; *Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 647 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *Herbert v. City of Forest Hill*, 189 S.W.3d 369, 376 (Tex. App.—Fort Worth 2006, no pet.). Protected activities are listed in section 21.055 of the Labor Code and 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.

To establish causation, the employee must establish "a 'but for' causal nexus between the protected activity and the prohibited conduct." *Anderson*, 458 S.W.3d at 648. In other words, the plaintiff must prove that she would not have suffered an adverse employment action "but for" engaging in the protected activity. *Id.* (characterizing causation element as requiring plaintiff to show that absent protected activity, adverse employment action would not have happened when it did); *Navy v. College of the Mainland*, 407 S.W.3d 893, 901 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Martinez v. Daughters of Charity Health Servs.*, No. 03-05-00264-CV, 2006 Tex. App. LEXIS 10327, at *11–12 (Tex. App.—Austin Nov. 30, 2006, no pet.) (mem. op.); *see University of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (concluding that plaintiff making retaliation claim brought under Title VII must establish that protected activity was but-for cause of alleged adverse action by employer); *see also In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 308 (Tex. 2010) (orig. proceeding) (because one of the primary goals of the TCHRA is to coordinate state and federal employment discrimination law, we may look to analogous

federal law as authority in interpreting the TCHRA). "Even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct." *Long v. Eastfield Coll.*, 88 F.3d 300, 305 n.4 (5th Cir. 1996).

The University contends that Kearney's pleadings negate causation. We agree. To support her disparate treatment claim, Kinney pleaded, and on appeal relies on, the allegation that the University singled her out and fired her for having a consensual relationship with a student athlete.[5] Having affirmatively asserted that the University fired her for having a relationship with a student athlete, she cannot show a but-for causal connection between her complaints of prior discrimination and her alleged constructive discharge. *See Kingsaire, Inc. v. Melendez*, 477 S.W.3d 309, 313 (Tex. 2015) (if employee's termination was required by uniform enforcement

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[5] As discussed above, to make a prima facie showing of retaliation, the plaintiff must establish that (1) she engaged in an activity protected by Chapter 21 of the Labor Code, (2) the employer took adverse action against her, and (3) a causal connection exists between the employee's protected activity and the alleged adverse employment decision. *See* Tex. Lab. Code § 21.055; *Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 647 (Tex. App.—Houston [1st Dist.] 2015, no pet.). Once the plaintiff meets this requirement, the burden shifts to the defendant to demonstrate a legitimate, nondiscriminatory reason for the adverse employment action. *Navy v. College of the Mainland*, 407 S.W.3d 893, 900 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The plaintiff then assumes the burden of proving that the stated reason was pretextual. *Id.*

Ordinarily, we would not reach the alternating burden-shifting analysis in reviewing a plea to the jurisdiction. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (if plaintiff establishes prima facie case and survives plea to jurisdiction, burden would then shift to employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection"). In this case, however, even assuming that Kearney met her initial burden by pleading that she was terminated in retaliation for raising complaints of discrimination, she also alleged that the reason for her termination was her undisclosed relationship with a student athlete. Thus, Kearney not only did not argue that the University's nondiscriminatory reason was pretextual, but alleged it herself and relies on it as a basis for her disparate treatment claim.

of reasonable policy, it cannot be case that termination would have occurred when it did but for employee's assertion of compensation claim or other protected conduct); *Long*, 88 F.3d at 305 n.4. Even if Kearney had asserted her retaliation claim in the alternative, her alleged protected activity—reporting complaints of prior harassment and discrimination—occurred after she had been suspended and the investigation that ultimately led to her alleged constructive discharge had been initiated. Because the adverse employment action had already begun before Kearney raised her complaints of prior harassment and discrimination, even if her complaints were a substantial element leading to her constructive discharge, Kearney cannot establish that she would not have been fired but for her complaints. *See Long*, 88 F.3d at 305 n.4. Consequently, as a matter of law, Kearney cannot establish the required causation element of retaliation. *See id.*; *Anderson*, 458 S.W.3d at 648; *Navy*, 407 S.W.3d at 901.

Further, because Kearney's pleadings affirmatively negate causation as to her retaliation claim, they affirmatively negate jurisdiction as to that claim, and merely pleading more facts in support of her retaliation claim will not cure her pleading defects. *See Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839–40 (Tex. 2007) (merely pleading more facts in support of breach of contract claim against university would not overcome university's immunity from breach of contract suit absent statutory waiver); *Miranda,* 133 S.W.3d at 227. Accordingly, Kearney need not be afforded an opportunity to amend her pleadings. *See Koseoglu*, 233 S.W.3d at 840 (pleader must be given opportunity to amend only if it is possible to cure pleading defect); *Miranda*, 133 S.W.3d at 227. We sustain the University's second issue.

Disparate Treatment Claim

In its reply brief, the University asserts for the first time that Kearney cannot establish one of the elements of disparate treatment. Because this argument challenges the trial court's jurisdiction, on interlocutory appeal, "we must address [this argument] regardless of whether [the University] raised [it] in the trial court." *See Glover*, 436 S.W.3d at 394; *see also Dallas Metrocare Servs. v. Juarez*, 420 S.W.3d 39, 41 (Tex. 2013) (per curiam) (court of appeals erred when it concluded that it could not consider jurisdictional arguments raised for first time on appeal). To establish a prima facie case for disparate treatment, and thus to establish jurisdiction, Kearney must have pleaded that (1) she is a member of a protected class, (2) she is qualified for her position, (3) she was terminated, and (4) she was treated less favorably than similarly situated members of the opposing class. *Garcia II*, 372 S.W.3d at 637 (to "satisfy [the] jurisdictional hurdle[,] . . . a plaintiff must plead elements of her statutory cause of action—here the basic facts that make up the prima facie case"); *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005) (setting out elements of disparate treatment claim). The University challenges only the fourth element—whether Kearney can show she was treated less favorably than similarly situated members of the opposing class. Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct. *Ysleta*, 177 S.W.3d at 917; *University of Tex. Med. Branch at Galveston v. Petteway*, 373 S.W.3d 785, 789 (Tex. App.—Houston [14th Dist.] 2012, no pet.). The misconduct of the disciplined and undisciplined employees must be of "comparable seriousness" and "nearly identical," and the plaintiff and other employees must have

"essentially comparable violation histories." *Ysleta*, 177 S.W.3d at 917–18; *Petteway*, 373 S.W.3d at 789.

The University contends that, as a matter of law, Kearney cannot show that she was treated less favorably than similarly situated members of the opposing class because the other employees she has cited were employed in different capacities by different departments with different supervisors and at different, i.e., much earlier, periods of time from Kearney. It also argues that her reference to the former volleyball coach regarding his alleged conduct between 1997 and 2000 is a "vague allusion" to a "far-flung incident[]" that cannot suffice as proof of a similarly situated individual during the relevant time period. As for the former football coach, the University argues that Kearney's conduct and that of the former football coach are not comparable because, in contrast with Kearney's ongoing relationship, the former football coach "was disciplined, but not fired, after a one-night stand with a UT student (who was not a student-athlete playing on his team and not under his supervision)." Consequently, the University contends, Kearney cannot show that the misconduct of the two coaches was of comparable seriousness or nearly identical. *See Ysleta*, 177 S.W.3d at 917–18. The University also argues that Kearney cannot show that she and the former football coach had essentially comparable violation histories, as required. *See Petteway*, 373 S.W.3d at 789.[6]

[6] The University also appears to argue in a single sentence that Kearney cannot show that she was less favorably treated than the former football coach because "she herself left UT before it was clear what discipline she would receive." In addition, the University states in its reply brief that "[t]he fourth element [of a disparate treatment claim] is the only one critical to understanding UT's jurisdictional argument." To the extent the University attempts by this argument to challenge Kearney's allegation that she was terminated, the third element of a disparate treatment claim, the University has failed to fully brief the issue and has therefore waived it. *See* Tex. R. App. P. 38.1(i)

We do not find the University's arguments persuasive. While it may appear from the face of Kearney's pleadings that some of the University employees alleged to be similarly situated or were employed in different capacities in different departments and under different supervisors from Kearney, we cannot determine from the pleadings alone whether "other coaches within the University's Athletic Department," in particular the former football coach—or for that matter, the former volleyball coach, whose employment overlapped with Kearney's—were subject to different employment standards or ultimate supervisors from Kearney.[7] Nor can we determine from the pleadings whether the former football coach's or the former volleyball coach's conduct was of comparable seriousness or nearly identical to that of Kearney or whether Kearney and the former football coach or Kearney and the former volleyball coach had comparable violation histories.

Kearney alleged in her petition that she is an African-American woman, qualified for her former position, and that when she was terminated, she was treated less favorably than other coaches who were white males, in particular the former football coach and the former volleyball coach. She alleged that the former football coach and other coaches were involved with students or direct subordinates, that the former volleyball coach married his former student athlete, and that none of the white males was subjected to termination or even "meaningful disciplinary actions." Thus, looking to Kearney's intent, construing her pleadings liberally in favor of jurisdiction, and accepting

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(appellant's brief must contain clear and concise argument for contentions made with citation to authorities and record).

[7] Although the University argues that the former volleyball coach's conduct and the University's response were too remote in time for him to be a similarly situated employee, it offers no authority indicating how close in time to a plaintiff's alleged adverse employment decision the allegedly more favorable decision must have been made. *See* Tex. R. App. P. 38.1(i) (appellant's brief must contain appropriate citations to authorities).

the allegations in the pleadings as true, we conclude that Kearney has pleaded the elements of her statutory cause of action, i.e., the basic facts of a prima facie case, and has sufficiently alleged a TCHRA violation. *See Garcia II*, 372 S.W.3d at 637; *Westbrook*, 231 S.W.3d at 405; *Ysleta*, 177 S.W.3d at 917; *Miranda*, 133 S.W.3d at 226. She is not "required to marshal evidence to prove her claim to satisfy [the] jurisdiction hurdle" until the University presents evidence negating one of those basic facts. *See Garcia II*, 372 S.W.3d 637.

As reflected in the clerk's record and as explained in its opening brief, the University based its plea to the jurisdiction "solely on legal arguments applied to the Petition's face" and "reserve[d] the right to challenge Ms. Kearney's factual allegations and present evidence to the contrary at a later stage, if necessary." Although the University now makes factual assertions that it contends show that the former football coach, the former volleyball coach, and the others are not employees who are similarly situated to Kearney, it offered no evidence in support of its plea to the jurisdiction. However, as our sister court has observed, an argument that employees alleged to have been treated more favorably than the plaintiff are not similarly situated to the plaintiff challenges the existence of jurisdictional facts. *See Glover*, 436 S.W.3d at 394. When a plea to the jurisdiction challenges the existence of jurisdictional facts, we may consider relevant evidence submitted by the parties and must do so when necessary to resolve the jurisdictional issue. *Miranda*, 133 S.W.3d at 227; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554–55 (Tex. 2000); *Good Shepherd Med. Ctr., Inc. v. State*, 306 S.W.3d 825, 831 (Tex. App.—Austin 2010, no pet).

Because the University produced no evidence in support of its plea to the jurisdiction and has asserted this challenge for the first time in its reply brief, there is no evidence in the record

indicating that Kearney and the former football coach or Kearney and the former volleyball coach were not subject to similar standards and supervisors, that their conduct was not of comparable seriousness or nearly identical, or that they did not have comparable violation histories. Instead, the University asserts only *arguments* as to what the evidence *would* show had it offered any. However, the arguments of counsel are not evidence. *In re Doe 3*, 19 S.W.3d 300, 305 (Tex. 2000); *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) ("Normally, an attorney's statements must be made under oath to constitute evidence."). Thus, the University asks us to determine jurisdictional facts in the absence of any record evidence whatsoever. Consequently, there is no evidence of the facts it now urges us to rely on in determining that Kearney cannot show she was treated less favorably than similarly situated employees. We cannot do so. *See Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex.1979) (per curiam) (review limited to evidence properly in appellate record); *see also Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454, 458 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (parties cannot rely on matters outside record in making arguments to appellate court). We conclude that Kearney has pleaded a prima facie case of disparate treatment and that the University has not produced evidence to negate any of the elements of that claim. *See Ysleta*, 177 S.W.3d at 917–18; *Petteway*, 373 S.W.3d at 789.[8]

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[8] The cases the University cites in support of its argument are distinguishable in that the defendants in those cases produced evidence to negate the plaintiffs' claims that other employees were similarly situated. *See, e.g.*, *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005) (appeal from jury trial with evidence and testimony showing that conduct of other employees was not of comparable seriousness); *University of Tex. Med. Brand at Galveston v. Petteway*, 373 S.W.3d 785, 786, 789 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (reversing denial of plea to jurisdiction where defendant produced evidence that other employees did not have comparable violation histories); *Romo v. Texas Dep't of Transp.*, 48 S.W.3d 265, 272–73 (Tex. App.—San Antonio 2001, no pet.) (affirming summary judgment for defendant where plaintiff's evidence failed

CONCLUSION

Because Kearney has affirmatively negated the required elements of her constructive discharge claim based on retaliation, we reverse the district court's denial of the University's plea to the jurisdiction as to the retaliation claim. We affirm the trial court's denial of the University's plea to the jurisdiction as to Kearney's claim of constructive discharge based on disparate treatment.

Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed in Part; Reversed and Remanded in Part

Filed: May 3, 2016

to show prima facie case because, unlike plaintiff, other employee was supervisor and where defendant offered undisputed testimony that plaintiff had less education and experience than other employee); *Grice v. Alamo Cmty. Coll. Dist.*, No. 04-12-00524-CV, 2013 Tex. App. LEXIS 4999, at *1, *14–15 (Tex. App.—San Antonio Apr. 24, 2013, no pet.) (mem. op.) (affirming summary judgment in favor of defendant where evidence showed plaintiff and other employees were not similarly situated with regard to supervisory responsibilities); *City of San Antonio ex rel. City Pub. Serv. Bd. v. Gonzalez*, No. 04-08-00829-CV, 2009 Tex. App. LEXIS 9701, at *8, *14–15 (Tex. App.—San Antonio Dec. 23, 2009, pet. denied) (mem. op.) (reversing judgment on jury verdict in favor of plaintiff where evidence established conduct of other employees was not of comparable seriousness); *see also Garcia II*, 372 S.W.3d at 642 (involving plea to jurisdiction in which defendant produced evidence negating one element of plaintiff's prima facie case); *College of Mainland v. Glover*, 436 S.W.3d 384, 390, 394 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (treating as plea to jurisdiction motion for summary judgment based on jurisdictional grounds and reversing denial where record evidence showed plaintiff's and other employees' circumstances were not nearly identical).