NUMBER 13-20-00570-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

EDINBURG CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, **Appellant,**

v.

GREVIL O. AYALA, **Appellee.**

On appeal from the County Court at Law No. 2 of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Hinojosa and Silva
Memorandum Opinion by Chief Justice Contreras

Appellant Edinburg Consolidated Independent School District (ECISD) appeals the denial of its plea to the jurisdiction in this employment discrimination suit brought by appellee Grevil O. Ayala. By one issue, ECISD argues that the trial court lacks jurisdiction

over Ayala's suit because Ayala cannot establish a waiver of its sovereign immunity. We affirm.

I. BACKGROUND

Ayala was employed as a bus driver for ECISD from February 2007 through November 2013, when he suffered an injury following a bus accident. After undergoing treatment, Ayala returned to work as a bus dispatcher until his September 2015 termination. In May 2016, Ayala filed a complaint with the Texas Workforce Commission—Civil Rights Division (TWC), alleging that ECISD illegally terminated his employment. He took no further action on that complaint.

According to Ayala, in March 2018, he applied for employment at ECISD "in an effort to regain a job as a bus driver and/or a dispatcher, an office clerk[,] or any other light duty job which was available." In August 2018, Ayala "received a full-duty release" from his physician. In September 2018, after receiving no correspondence from ECISD regarding his application for employment, Ayala filed a second complaint with TWC, this time alleging a claim for failure to hire. Specifically, Ayala alleged that ECISD

> has refused to hire [him] due to his age (53), his disability (thoracic lumbar disc injury, lumbar strain/sprain grade II, shoulder sprain/strain), and his national origin (Honduran)[,] and [he] has further been retaliated against for engaging in protected activity by previously filing a charge of discrimination with the [TWC] and the EEOC.

In April 2019, the TWC issued Ayala a "Notice of Dismissal and Right to File Civil Action" form. In May 2019, Ayala filed his original petition against ECISD, asserting a claim for wrongful discharge.

In June 2019, ECISD filed its original answer, generally denying Ayala's claims

and asserting affirmative defenses. In January 2020, ECISD filed a plea to the jurisdiction arguing, among other things, that Ayala cannot establish a claim under the Texas Labor Code, and, as such, the trial court was without jurisdiction "because [Ayala] failed to trigger a waiver of [ECISD's] sovereign immunity." As evidence of Ayala's failure to establish a claim, ECISD affixed to its plea two signed, but unsworn letters by two ECISD employees stating that they conducted searches and could not find any application by Ayala for the 2018–2019 school year. ECISD further highlighted that: (1) Ayala testified in November 2019 that he had no evidence beyond his own allegations that he applied for a job with ECISD in March 2018; and, assuming that Ayala did apply, (2) Ayala lost his commercial driver's license in 2015, so he could not be employed as a bus driver; (3) Ayala was not cleared to work until five months after he applied for a position with ECISD; (4) Ayala presented no evidence that individuals outside of his protected classes were treated more favorably; and (5) Ayala presented no evidence of a causal link between his first TWC complaint and ECISD's alleged decision not to hire him.

Ayala filed his First Amended Original Petition on February 18, 2020, dropping his wrongful discharge claim, asserting a claim for failure to hire, and alleging that ECISD "discriminated against [him] and failed to hire him because he exercised his statutory rights under Section 21.051 and Section 21.055 of the Texas Labor Code." Ayala further alleged "that the decision to not hire him was part of a larger unwritten plan or scheme of [ECISD] to discriminate against older, injured long-term employees." Two days later, in response to Ayala's amended petition, ECISD filed its second plea to the jurisdiction, reiterating its sovereign immunity argument, and attaching no additional evidence.

The trial court held its initial hearing on ECISD's plea to the jurisdiction on August 11, 2020, and, after hearing the parties' arguments, continued the hearing until August 31, 2020, to allow Ayala additional time to submit evidence. Ayala submitted his Second Amended Original Petition on August 20, 2020, which generally recited the elements of age discrimination, disability discrimination, and national origin discrimination claims. Ayala attached to his amended petition an affidavit that largely echoed the information in his petition.

On August 31, 2020, the parties again appeared before the trial court. At the hearing, ECISD argued that the only evidence that Ayala presented to establish the trial court's jurisdiction was his own affidavit, which "contains conclusory statements that essentially attempt to establish that the allegations [Ayala] has made in this lawsuit are true because he says they are true, nothing more."

On December 28, 2020, the trial court denied ECISD's plea to the jurisdiction. This interlocutory appeal by ECISD followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (providing for interlocutory appeal from a trial court's order on a plea to the jurisdiction).

II. DISCUSSION

By its sole issue, ECISD argues that the trial court erred in denying its plea to the jurisdiction "because the evidence in the record conclusively proves that Ayala cannot establish a waiver" of its sovereign immunity.

A. Standard of Review

A plea to the jurisdiction is a dilatory plea used to defeat a cause of action without

considering whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea challenges the trial court's subject-matter jurisdiction. *Id.* Whether a trial court has subject-matter jurisdiction and "[w]hether the pleader has alleged facts that affirmatively demonstrate the trial court's subject-matter jurisdiction are questions of law that we review de novo." *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016) (quoting *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)).

The plaintiff has the initial burden to plead facts affirmatively showing that the trial court has jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *see Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). "If the plaintiff pleaded facts making out a prima facie case and the governmental unit instead challenges the existence of jurisdictional facts, we consider the relevant evidence submitted." *Metro. Transit Auth. of Harris Cty. v. Douglas*, 544 S.W.3d 486, 492 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *see Garcia*, 372 S.W.3d at 635. "The analysis then 'mirrors that of a traditional summary judgment.'" *Tex. Dep't of Transp. v. Lara*, 625 S.W.3d 46, 52 (Tex. 2021) (quoting *Garcia*, 372 S.W.3d at 635); *see* TEX. CODE CIV. P. 166a(c). That is, "[i]nitially, the defendant carries the burden to meet the summary judgment proof standard for its assertion that the trial court lacks jurisdiction." *Garcia*, 372 S.W.3d at 635. "If it does, the plaintiff is then required to show that a disputed material fact exists regarding the jurisdictional issue." *Id.* We take as true all evidence favorable to the nonmovant plaintiff and "indulge every reasonable inference and resolve any doubts in the plaintiff's favor." *Douglas*, 544 S.W.3d at 492; *see Miranda*, 133 S.W.3d at 226. If

the relevant evidence is undisputed or if the plaintiff fails to raise a fact question on the jurisdictional issue, then the trial court rules on the plea as a matter of law. *Garcia*, 372 S.W.3d at 635; *see Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 798–99 (Tex. 2016) (op. on reh'g).

B. Texas Commission on Human Rights Act

The Texas Commission on Human Rights Act (TCHRA) prohibits, among other things, age, disability, and national origin discrimination and retaliation by employers. *See* TEX. LAB. CODE ANN. §§ 21.001, 21.051, 21.055. Section 21.051 of the labor code states:

> An employer commits an unlawful employment practice if because of . . . disability . . . national origin, or age the employer . . . fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment[.]

Id. § 21.051(1). Section 21.055 provides that an employer commits an unlawful employment practice if the employer retaliates or discriminates against a person who, under chapter 21 of the labor code, "(1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding or hearing." *Id.* § 21.055. An "employer" includes "a county, municipality, state agency, or state instrumentality, regardless of the number of individuals employed." *Id.* § 21.002(8)(D).

"Governmental units, including school districts, are immune from suit unless the State consents." *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). "The TCHRA waives immunity from suit only for statutory violations, which means the trial court lacks subject-matter jurisdiction over the dispute absent" a claim for conduct

that actually violates the TCHRA. *Id.* at 763. If a plaintiff fails to allege a violation of the TCHRA, then the trial court does not have jurisdiction, and the claim should be dismissed. *Garcia*, 372 S.W.3d at 637.

Because the TCHRA is modeled after federal civil rights law, we may look to analogous federal precedent for our guidance. *Lara*, 625 S.W.3d at 58 (citing *Clark*, 544 S.W.3d at 782); *see also Brownsville Indep. Sch. Dist. v. Alex*, 408 S.W.3d 670, 674 n.6 (Tex. App.—Corpus Christi–Edinburg 2013, no pet.); *see* TEX. LAB. CODE ANN. § 21.001.

To establish unlawful discrimination under the TCHRA, a plaintiff may rely on either direct or circumstantial evidence. *Clark*, 544 S.W.3d at 781–82. A case based on circumstantial evidence is referred to as a "pretext" case. *See Quantum Chem. Co. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001) (per curiam). In a pretext case, the plaintiff's goal is to show that the employer's stated reason for the adverse action was a pretext for discrimination. *Id.*

"When a plaintiff relies on circumstantial evidence to establish a discrimination claim, we follow the burden-shifting framework the United States Supreme Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Tex. Tech Univ. Health Scis. Ctr.-El Paso v. Flores*, 612 S.W.3d 299, 305 (Tex. 2020); *Clark*, 544 S.W.3d at 782. Under this framework: (1) the plaintiff must first create a presumption of illegal discrimination by establishing a prima facie case; (2) the defendant must then rebut that presumption by producing evidence of a legitimate, non-discriminatory reason for the employment action; and (3) the plaintiff must then overcome the rebuttal evidence by producing evidence that the defendant's stated reason is a mere pretext. *Flores*, 612

S.W.3d at 305; *Clark*, 544 S.W.3d at 782. If a plaintiff fails to establish a prima facie case against a governmental unit or overcome the rebuttal evidence, then the trial court lacks jurisdiction and must dismiss the case. *See Garcia*, 372 S.W.3d at 635; *Miranda*, 133 S.W.3d at 225–26.

C. Prima Facie Case

The requirements to establish a prima facie case of discrimination "vary depending on the circumstances." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 583 (Tex. 2017). To establish a prima facie case of age discrimination, Ayala must show he

> (1) was a member of the protected class (that is, 40 years of age or older), (2) was qualified for the position at issue, (3) suffered a final, adverse employment action, and (4) was either (a) replaced by someone significantly younger or (b) otherwise treated less favorably than others who were similarly situated but outside the protected class.

Flores, 612 S.W.3d at 305. To establish a prima facie case of national origin discrimination, Ayala must show "(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) [ECISD] gave preferential treatment to a similarly situated employee outside the protected class." *Exxon Mobil*, 520 S.W.3d at 583. To establish a prima facie case of disability discrimination, Ayala must show "(1) he has a 'disability[';] (2) he is 'qualified' for the job; and (3) he suffered an adverse employment decision because of his disability." *Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 433 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). And, to establish a prima facie case of retaliation, Ayala must show "(1) [he] engaged in an activity protected by the TCHRA, (2) [he] experienced a material adverse employment action, and (3) a causal link exists between

the protected activity and the adverse action." *Lara*, 625 S.W.3d at 58.

D. Analysis

Ayala has the initial burden to plead facts establishing the trial court's jurisdiction. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 446. ECISD argues that Ayala has failed to plead a prima facie case of discrimination because he "cannot just state the elements of a prima facie case." However, "Texas follows a 'fair notice' standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000); *see* TEX. R. CIV. P. 45(b). "'The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense.'" *Horizon/CMS Healthcare*, 34 S.W.3d at 897 (citing *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982)); *see* TEX. R. CIV. P. 45.

Ayala's petition lists his causes of action and the specific elements he must prove to succeed on his claims, and thus sufficed to inform ECISD of the nature of the case and to enable ECISD to prepare a defense. Indeed, Ayala's petition must have been sufficient because ECISD challenged the very elements of Ayala's claim in its plea to the jurisdiction. *See Lara*, 625 S.W.3d at 61 (noting that an employee's claim of "'termination of [his] employment' . . . must have been sufficient to enable [appellant] to prepare a response because [appellant] expressly challenged the claim in its motion to dismiss"). Ayala, therefore, pleaded a prima facie case and ECISD's immunity was waived. The burden accordingly shifted to ECISD to produce evidence negating jurisdiction. *See id.* at 52; *McDonnell Douglas*, 411 U.S. at 802–03; *Clark*, 544 S.W.3d at 783.

The only evidence that ECISD provided were two unsworn letters signed by two ECISD employees indicating that they searched and could find no application submitted by Ayala. Normally, such "unauthenticated or unsworn documents do not constitute competent summary judgment evidence." *Heirs of Del Real v. Eason*, 374 S.W.3d 483, 488 (Tex. App.—Eastland 2012, no pet.); *see also Lara*, 625 S.W.3d at 52 (traditional summary judgment standard applies when defendant challenges jurisdictional facts in plea to the jurisdiction). "Documents submitted as summary judgment proof must be sworn to or certified." *Eason*, 374 S.W.3d at 488; *see* TEX. R. CIV. P. 166a(f) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); TEX. GOV'T CODE ANN. § 312.011(1) ("'Affidavit' means a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office."). Ayala, however, did not object to the letters as unsworn or unauthenticated in the trial court, and he does not argue on appeal that the letters were improperly considered as evidence to negate the jurisdictional facts alleged in his pleadings.

In any event, we assume without deciding that ECISD's letters are probative and negate one of Ayala's jurisdictional facts—that he applied for a job in 2018. Consequently, the burden shifts back to Ayala to produce evidence demonstrating a fact issue on the issue of his application. *See Lara*, 625 S.W.3d at 52; *McDonnell Douglas*, 411 U.S. at 802–03; *Clark*, 544 S.W.3d at 783.

In his affidavit, signed on August 20, 2020, Ayala noted that "[o]n or about March 28, 2018, [he] applied to [ECISD] in an effort to regain a job as a bus driver and/or a dispatcher, an office clerk or any other light duty job which was available." ECISD is correct that, in deposition testimony, Ayala stated he has no documentary proof that he applied to be rehired. However, Ayala's affidavit alone creates a fact issue as to whether he applied for employment with ECISD in 2018. Furthermore, other than the two letters addressing whether Ayala applied to be rehired in 2018, ECISD produced no evidence to negate any element of any of Ayala's discrimination claims. Instead, ECISD's filings repeatedly claim that Ayala "cannot establish" the elements of his claims, or that he "failed to offer" evidence supporting his claims. But, in a plea to the jurisdiction, a "defendant cannot simply deny the existence of jurisdictional facts and force the plaintiff to raise a fact issue." *La Joya Indep. Sch. Dist. v. Gonzalez*, 532 S.W.3d 892, 897 (Tex. App.—Corpus Christi–Edinburg 2017, pet. denied). Stated differently, "a defendant may not advance a 'no-evidence' plea to the jurisdiction." *Id.*[1] It is initially defendant's burden to produce evidence to negate jurisdictional facts. *See Lara*, 625 S.W.3d at 52. Thus, Ayala was not required to produce evidence to create a fact issue on issues beyond the fact that he applied at all.

[1] In *Town of Shady Shores v. Swanson*, the Texas Supreme Court held that jurisdiction may be challenged by means of a motion for no-evidence summary judgment. 590 S.W.3d 544, 552 (Tex. 2019). When a defendant does so, "the plaintiff will be required to present sufficient evidence on the merits of her claims to create a genuine issue of material fact," regardless of whether the defendant negated any of the plaintiff's jurisdictional fact allegations. *See id.* The court noted that, "while defendants may move for traditional summary judgment 'at any time,' TEX. R. CIV. P. 166a(b), no-evidence motions are permissible only '[a]fter adequate time for discovery,' TEX. R. CIV. P. 166a(i)," and "[t]hat difference in timing provides an important degree of protection to a nonmovant responding to a no-evidence motion, whether the motion challenges jurisdiction, the merits, or both." *Shady Shores*, 590 S.W.3d at 552.

ECISD has not filed a motion for no-evidence summary judgment in this case.

Without more, ECISD may properly challenge Ayala's claims via other procedural vehicles. However, its plea to the jurisdiction fails.

III. CONCLUSION

We affirm the trial court's order.

DORI CONTRERAS
Chief Justice

Delivered and filed on the
9th day of December, 2021.