

Reverse and Render; and Dismiss and Opinion Filed December 22, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00537-CV

**DALLAS INDEPENDENT SCHOOL DISTRICT, Appellant
V.
FAIRY ALLEN, Appellee**

**On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-02580**

MEMORANDUM OPINION

Before Justices Lang-Miers, Stoddart, and O'Neill¹
Opinion by Justice O'Neill

Fairy Allen, who is an African-American woman, was employed by the Dallas Independent School District (the DISD) as the Manager of its Campus and Activity Funds Department (the CAFD). The DISD reorganized the CAFD, renamed it the Finance and Accounting Support for Campuses Department (the FASCD), and decided the new department should be led by a Director, a position a managerial level higher than Manager. The DISD hired Donna Zemanek, an Anglo woman, to be the Director of the FASCD, eliminated the Manager's position held by Allen, and terminated Allen's employment on January 10, 2014. Allen filed suit, contending her termination and the DISD's subsequent failure to hire her for a different

¹ The Hon. Michael J. O'Neill, Justice, Assigned.

position were based on racial discrimination and retaliation in violation of the Texas Commission on Human Rights Act, §§ 21.001–.556 (West 2015 & Supp. 2016) (the TCHRA).

In its answer, the DISD raised the defense of governmental immunity from suit and liability. The DISD filed a partial plea to the jurisdiction, requesting the dismissal of Allen’s failure-to-hire claim because she failed to exhaust her administrative remedies as to that claim. In response, Allen filed a first amended petition, “preserv[ing] the factual contention that DISD failed to hire her, but omit[ting] any cause of action related to the failure to hire.” The DISD filed a second partial plea to the jurisdiction on the ground Allen could not establish a prima facie case of retaliation. The trial court granted the DISD’s second partial plea and dismissed Allen’s retaliation claim for lack of subject matter jurisdiction. In a third plea to the jurisdiction, the DISD sought dismissal of Allen’s claim her termination was due to racial discrimination. The trial court denied the DISD’s third plea to the jurisdiction.

In this interlocutory appeal, the DISD argues in three issues that the trial court erred by denying the third plea to the jurisdiction because Allen has no direct evidence of racial discrimination and failed to establish a prima facie case that she was replaced by an individual outside her protected class or was treated differently than similarly situated individuals outside her protected class. In a fourth issue, the DISD challenges evidentiary rulings made by the trial court. We reverse the trial court’s order denying the DISD’s plea to the jurisdiction and render judgment dismissing this case for lack of jurisdiction.

Background

This case involves the DISD’s handling of campus activity funds (CAFs) and student activity funds (SAFs). Generally, CAFs are funds raised by a school campus from sources such as uniform fees or other authorized activities. CAFs are general operating funds of the DISD and do not have to be used in a manner that directly benefits the students who raised the funds. SAFs

include funds raised and collected by students, such as through school-approved fundraisers for student groups or organizations. SAFs must be used to support the activities of student-led and managed organizations or clubs and are held in trust by the DISD for the student or student organization that raised the money.

In 2007, the CAFD was responsible for the processing of, and overseeing the accounting for, activities funds for each campus within the DISD. The DISD's secondary schools used Oracle, which is a network accounting software program, as well as EPES, which is a desktop accounting software program, to account for their CAFs and SAFs. The elementary campuses relied only on EPES to account for their CAFs and SAFs. The campuses using Oracle were considered "centralized," while the campuses using EPES were considered "non-centralized."

Allen, who has a Bachelor of Science in accounting and a Master of Business Administration, was named Manager of the CAFD in October 2007.² The CAFD had six Specialists' positions that reported to Allen, however, two of the positions were vacant at the time relevant to this case. The four Specialists employed by the CAFD were all African-American women. According to Allen, at that time the CAFD was responsible for (1) training the DISD campuses regarding the collection and management of CAFs and SAFs; (2) managing and training DISD campuses and others regarding collection and processing payments and deposits using Oracle and other programs; (3) performing customer service functions for the campuses, some departments, and vendors, as well as fielding ongoing questions, concerns, calls, and emails related to activity funds process; and (4) managing some grant funds and grant guideline compliance.

² Prior to being named Manager of the CAFD, Allen was a staff accountant for the DISD from 1978 through 1989, at which time she moved to Louisiana. She resumed employment with the DISD in 1997 in the Management Division and became an audit supervisor in either 1998 or 1999.

As the Manager of the CAFD, Allen initially reported to Steve Korby, who gave Allen a performance evaluation of “proficient” on July 23, 2008. Marian Hamlett, an Anglo woman, was subsequently named the Director of Accounting and became Allen’s supervisor. Over the next several years, Allen received two performance reviews of “exceeds expectations” and two performance reviews of “proficient” from Hamlett.

Dr. James Terry, an Anglo man, began working for the DISD in August 2011 as the Director of Budget Services. Sometime during the following school year, Terry attended a portion of a class at which Allen was training individuals on activity funds. In Terry’s opinion, the information Allen was providing in the class contained inaccuracies. Because he did not have supervisory authority over Allen, Terry did not correct any of the perceived inaccuracies. In June 2012, Terry was promoted to Executive Director for Budget and Demographic Studies.

On December 14, 2012, Allen reported to the DISD’s Equal Opportunity Compliance Manager (EOCM) a statement by Hamlett that Allen believed was racist. The DISD’s Office of Professional Responsibility (OPR) conducted an investigation of Allen’s complaint and, on December 19, 2012, substantiated that Hamlett had made the statement and the statement violated the DISD’s policies. Hamlett resigned her employment with the DISD in January or February 2013, but the record does not reflect the reasons for her decision to do so. After Hamlett’s resignation, Allen began reporting to Shonna Pumphrey, the new Director of Accounting Services, who is an African-American woman. Allen received one performance review of “proficient” from Pumphrey.

In April 2013, Terry was named the DISD’s Interim Chief Financial Officer (CFO). As CFO, Terry was in charge of the DISD’s Financial Accounting and Services Division (the FASD) and had supervisory authority over the CAFD. As interim CFO, Terry reviewed a response prepared by Allen to concerns raised in an internal audit report relating to the 2011

Activities Fund Manual. Terry disagreed with some of Allen's responses and thought others were incorrect, and became concerned about the "lack of oversight, weak management, and limited accounting knowledge" in the CAFD.

Sometime in the Spring of 2013, Allen requested that Terry obtain the DISD's Superintendent's signature on a revised Activity Funds Manual that she had prepared. Terry made a comment to another DISD employee to the effect that he been requesting the manual for over a year, had only now received it, and considered that to be insubordination and grounds for termination. Terry reviewed the revised manual and became concerned that CAFs and SAFs were not discussed separately in the manual and about the "burdensome" procedures required of the campuses in order to comply with the manual. Terry requested that Allen make revisions to the manual and that the CAFD prepare information for his review relating to the DISD's campuses' handling of activity funds.

In his review of the provided information, Terry determined only fifty-two percent of secondary campuses and twenty-six percent of elementary campuses were in compliance with the Board of Control requirements in the manual.³ Terry also noticed "substantial issues" with the reporting of CAFs and SAFs. Terry was specifically concerned that CAFs and SAFs were "being treated the same way for accounting purposes, which was incorrect." Terry noted that all CAFs and SAFs were being coded as a liability. However, in Terry's opinion, CAFs should be accounted with revenues and expenses, and if CAFS are "coded as a liability, and not as a revenue or expense, the reporting does not follow accounting rules and is improper accounting." Finally, Terry noted the information provided showed only debits and credits and not the fund balance at the beginning and end of the month and "there were no object codes to identify if the

³ Although not completely clear in the record, each campus was evidently required to have a Board of Control to oversee the disbursement of activities funds.

monies were revenues, expenses, or liabilities,” which Terry believed was “critical for proper accounting.”

In a meeting on May 22, 2013, at which Allen was not present, Terry stated he did not believe Allen understood the difference between CAFs and SAFs. Allen learned of the statement and found it to be “incredibly hostile and insulting.” On May 23, 2013, Terry met with Allen and questioned her in Pumphrey’s presence about the differences in CAFs and SAFs. In Terry’s opinion, Allen did not answer the questions correctly and took a “defensive and hostile” approach during the meeting. On May 24, 2013, Allen filed a complaint with the DISD’s EOCM asserting that Terry and Alan King, the interim superintendent, were discriminating and retaliating against her for filing the complaint against Hamlett.⁴

During the OPR’s investigation of Allen’s complaint, the investigator interviewed Annie Holmes-Partee, the Director of the DISD’s Minority and Women Business Enterprise Department, referred to within the DISD as the M/WBE Department. Holmes-Partee is an African-American woman and, at that time, the other two employees of the M/WBE Department were an Hispanic woman and an Hispanic man. Holmes-Partee stated that, during a meeting with Terry in May 2013, he asked if he could refer to the M/WBE Department as “wannabes.” Holmes-Partee stated he could not, but later in the meeting Terry again referred to the M/WBE Department as “wannabes.” In Holmes-Partee’s opinion, the term depicted inferiority. Terry admitted to making the comment, but indicated it was a nickname for the M/WBE Department.

In the spring and summer of 2013, the DISD’s Internal Audit Services Department investigated the use of activity funds at several DISD campuses, particularly elementary campuses, and discovered a number of issues relating to the campuses’ handling of activity

⁴ Allen claimed that both Terry and King had a close personal relationship with Hamlett. Terry denied such a relationship. For purposes of this appeal, it is irrelevant whether Terry and Hamlett had a close personal relationship.

funds. Terry believed these audits revealed the CAFD was not providing the customer service needed in relation to training, assistance, and consultation regarding the proper accounting and management for CAFs and SAFs.

In June 2013, Terry was named the permanent CFO of the DISD. He decided the DISD needed a department that “provided financial and accounting support services to campuses, especially the principals and office managers who handle tasks relative to CAFs and SAFs.” He determined Central Administration, particularly the CAFD, needed to be restructured and refocused to “shift work away from the principals so that the principals could focus on the instruction taking place at their campus.” He believed this change would help meet the superintendent’s systems priority number twenty-three for Central Administration to improve its customer service to the campuses. Terry also determined it was necessary to centralize the accounting for CAFs and SAFs to Oracle and eliminate the use of EPES. He decided the head of the new department should have strong accounting knowledge and knowledge of the Public Funds Investment Act and be able to implement the centralization and expanded support to campuses.

On June 24, 2013, Terry sent an email to Pumphrey advising her that CAFs were incorrectly being accounted for as an agency fund with the debits and credits to a liability account and the accounting should be corrected during the next fiscal year. Terry also advised Pumphrey that the CAFD was to be moved to the DISD’s Administration Building where most of the departments within the FASD were located.⁵

On July 19, 2013, the OPR issued a report on its investigation into Allen’s complaint against Terry and King. As relevant to this appeal, the OPR substantiated that Terry “used language qualifying as bullying and harassing” against Holmes-Partee and the M/WBE

⁵ The CAFD completed the relocation in December 2013.

Department in violation of the DISD's policies. The OPR did not substantiate Allen's allegations of retaliation and discrimination.

Edward Sorola began working for the DISD as the Executive Director of Financial Services in July 2013. Although, as posted, the position preferred the Executive Director of Financial Services be a certified public accountant (CPA), Terry waived the requirement because Sorola had the highest test scores and best interview of the applicants for the position. On August 23, 2013, as part of the reorganization of the FASD, Terry moved the CAFD out of Accounting Services to report directly to Sorola.

In the Fall of 2013, Terry began reorganizing the FASD. Terry created two new departments, the Financial Analytics and Control Department and the FASCD. Terry wanted a licensed CPA to head each department. Terry intended the FASCD to replace the CAFD, but not to be limited to activity funds. Rather, due to the centralization of the accounting for the activity funds, Terry "envisioned an expanded role for [the FASCD] that would provide support to campuses for a wide variety of financial and accounting issues that campuses encounter."

Because the FASCD would be an independent department, rather than a department within Accounting Services, Terry determined the head of the FASCD should hold a Director-level position. In Terry's opinion, the Director of the FASCD should be a licensed CPA with experience in school and government accounting because (1) the individual (i) needed significant accounting knowledge, (ii) to know the difference between CAFs and SAFs and how they should be treated at an accounting level, (iii) to understand how to properly characterize debits and credits, and (iv) needed to ensure monthly reconciliation of all activity funds at the DISD's 228 campuses; (2) of the significant change in the scope of work and responsibility of FASCD, including training relating to the chart of accounts, general accounting, grant accounting, grant compliance, accounts payable, activity funds, accounting software, budgeting, and financial

ethics; (3) the individual needed to ensure the accounting processes and procedures at the campus were not cumbersome and the processes, including the appropriate controls, were occurring; (4) the individual would be directly responsible for the provision of accounting practices, including compliance with the Texas Education Agency's Financial Accountability System Resource Guide and Governmental Accounting Standards Board; and (5) a CPA is required to receive a level of continuing education each year that helps ensure the individual remains current with new developments and trends in the field and with their own accounting skills and understanding of accounting standards and practice. In September 2013, the position for Director of the FASCD was posted. The position description indicated the Director would supervise "Manager, Accountant, Specialists." Although the Director position would have been a promotion for Allen, she did not apply for the position.

At Terry's request, Sorola conducted an overview of management issues with the CAFD and summarized his findings in an October 22, 2013 memo. In Terry's opinion, Sorola's findings "confirmed and reiterated the need for fundamental changes with [the DISD's] central management of CAFs and SAFs." Terry finalized the reorganization of the CAFD and, on October 23, 2013, sent a memorandum to the DISD's Director of Employee Relations stating that (1) because of the creation of the Director of FASCD position, the Manager role was no longer necessary and the position should be eliminated, (2) it had been decided "to upgrade all [FASCD] staff roles to Accountant III positions," and (3) all current CAFD staff would reapply for the Accountant III positions as part of the reorganization. On December 19, 2013, Zemanek, who has a Bachelor of Science Degree and a Masters of Business Administration and is a licensed CPA, was hired to be the Director of the FASCD.

Zemanek starting working for the DISD on January 6, 2014. On January 10, 2014, Allen and the other individuals employed by the CAFD were notified their positions had been

eliminated in the reorganization. Because “all duties of [Allen’s position] were either eliminated, changed, or were subsumed within the Director’s position,” her final day of work was January 10, 2014. The Specialists’ last day of work was February 28, 2014, because the processing work they performed needed to continue during the reorganization process. All employees of the CAFD were invited to apply for open positions in the DISD. The Specialists employed by the CAFD applied for the Accountant positions in the FASCD, took the required tests for the positions, and interviewed for the positions. Because their test scores and interview rankings were higher than other applicants for the Accountant positions, all Specialists in the CAFD were hired for new positions in the FASCD. Allen did not apply for any of the open positions in the FASCD but, over the next several months, applied for other positions within the DISD. She was not hired for any of the positions. On June 16, 2014, Allen filed a complaint of race discrimination and retaliation with the Texas Workforce Commission Civil Rights Division, and subsequently filed this suit, contending her termination violated the TCHRA.

Analysis

In its first three issues, the DISD argues the trial court erred by denying its plea to the jurisdiction on Allen’s race discrimination claim because Allen offered no direct evidence of discrimination and failed to establish, through circumstantial evidence, a prima facie case that she was replaced by an individual outside the protected class or that she was treated less favorably than similarly situated individuals outside her protected class.

Standard of Review

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case without regard to whether the asserted claims have merit. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). Generally, a plea to the jurisdiction challenges whether the plaintiff has alleged facts that affirmatively demonstrate the trial court’s jurisdiction to hear the case. *Id.*

Because subject matter jurisdiction presents a question of law, we review a trial court's ruling on a plea to the jurisdiction de novo. *Westbrook v. Penley*, 231 S.W.3d 389, 394 (Tex. 2007); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

It is the plaintiff's burden to plead facts that affirmatively establish the trial court's subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Miranda*, 133 S.W.3d at 226. In determining whether a pleader has met this burden, we look to the allegations in the plaintiff's pleadings, construe them liberally in favor of the plaintiff, and look to the pleader's intent. *Id.* Although we are required to construe the allegations in favor of the plaintiff, we are not bound by legal conclusions. *Univ. of Tex. Sw. Med. Ctr. v. Saunders*, No. 05-15-01543-CV, 2016 WL 3854231, at *2 (Tex. App.—Dallas July 13, 2016, pet. denied) (mem. op.).

If a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised. *Miranda*, 133 S.W.3d at 227. "This standard mirrors our review of summary judgments" where the reviewing court takes as true all evidence favorable to the non-movant, indulging every reasonable inference and resolving any doubts in the non-movant's favor. *Id.* at 228. If there is no question of fact as to the jurisdictional issue, the trial court must rule on the plea to the jurisdiction as a matter of law. *Id.* at 228. However, if the jurisdictional evidence creates a fact question, the trial court should deny the plea. *Id.* at 227–28.

Immunity From Suit

A claim of governmental immunity from suit or liability is properly asserted in a plea to the jurisdiction. *Garcia*, 372 S.W.3d at 636. Governmental entities such as the DISD are

immune from suit unless the government has clearly and unambiguously waived its immunity. See TEX. GOV'T CODE ANN. § 311.034 (West 2013); *Garcia*, 382 S.W.3d at 636; *Mullins v. Dallas Indep. Sch. Dist.* 357 S.W.3d 182, 185 (Tex. App.—Dallas 2012, pet. denied) (absent express waiver of immunity by legislature, school districts are immune from suit and liability). The TCHRA provides a limited waiver of immunity when the plaintiff alleges a violation within the scope of the statute. *Garcia*, 372 S.W.3d at 636 (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008)).⁶ Absent a pleading stating a claim under the TCHRA, the governmental entity's immunity from suit has not been waived. *Id.*

Section 21.051 of the TCHRA provides that an employer commits an unlawful employment practice if it fails or refuses to hire, discharges, or otherwise discriminates in any manner against an employee in connection with compensation or the terms, conditions, or privileges of employment because of the employee's race, color, disability, religion, sex, national origin, or age. TEX. LAB. CODE ANN. § 21.051(1) (West 2015). A TCHRA plaintiff can prove discrimination by either direct or circumstantial evidence. *Garcia*, 372 S.W.3d at 634. "The first method, rather straightforward, involves proving discriminatory intent via direct evidence of what the defendant did and said." *Id.* But because direct evidence of discrimination is often "hard to come by," the plaintiff can also rely on circumstantial evidence using "the burden-shifting mechanism of *McDonnell Douglas*." *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). "Under this framework, the plaintiff is entitled to a presumption of

⁶ The TCHRA "is a comprehensive fair employment practices act and remedial scheme, modeled after Title VII of the federal Civil Rights Act of 1964" which "provides the framework for employment discrimination claims in Texas." *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 502–03 (Tex. 2012). The TCHRA was "'enacted to address the specific evil of discrimination and retaliation in the workplace,' as well as to coordinate and conform with federal anti-discrimination and retaliation laws under Title VII." *Id.* at 504 (citing *City of Waco v. Lopez*, 259 S.W.3d 147, 153–55 (Tex. 2008)). Accordingly, in interpreting the TCHRA, we consider not only the plain language of the statute and state case-law precedent, but also look to federal law for guidance in situations where the TCHRA and Title VII contain analogous statutory language. *Id.* at 505.

discrimination if she meets the ‘minimal’ initial burden of establishing a prime facie case of discrimination.” *Id.*⁷

To establish a prima facie case of race discrimination, the plaintiff must show she was (1) a member of a protected class, (2) qualified for her position, (3) suffered an adverse employment action, and (4) replaced by someone not in the protected class (true replacement case), or was treated less favorably than similarly situated individuals outside the protected class (disparate treatment cases). *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008) (per curiam); *Michael v. City of Dallas*, 314 S.W.3d 687, 690–91 (Tex. App.—Dallas 2010, no pet.). “The 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,” but “she will only be required to submit evidence if the [employer] presents evidence negating one of those basic facts.” *Id.* at 637. Although the precise elements of this showing will vary depending on the circumstances, the plaintiff’s burden at this stage of the case ‘is not onerous.’” *Id.* at 634. A plaintiff need only raise a fact issue as to the challenged prima facie element to survive a plea to the jurisdiction. *Id.* at 635. The DISD challenges only whether Allen established the fourth element of her prima facie case.

Direct Evidence of Racial Discrimination

In its first issue, the DISD argues Allen failed to provide any direct evidence that her termination was due to racial discrimination. “Direct evidence of discrimination is evidence that, if believed, proves the fact of discrimination animus without inference or presumption.” *Jespersen v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 653–54 (Tex. App.—Dallas 2012, no pet.); *see also Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). “If an

⁷ Once the plaintiff establishes a prima facie case, the burden shifts to the governmental entity to rebut the presumption of discrimination by articulating a “legitimate, nondiscriminatory reason” for the employment action. *McDonnell Douglas*, 411 U.S. at 802. It then becomes the plaintiff’s burden to show that the reason offered was a pretext for discrimination. *Id.* at 807. However, only the prima facie elements of the plaintiff’s case are jurisdictional. *Garcia*, 372 S.W.3d at 635–38; *Mesquite Indep. Sch. Dist. v. Mendoza*, 441 S.W.3d 340, 343 n.2 (Tex. App.—Dallas 2013, no pet.).

inference is required for the evidence to be probative as to the employer's discriminatory animus in making the employment decision, the evidence is circumstantial, not direct." *Jespersen*, 390 S.W.3d at 653–54; *see also Sandstad*, 309 F.3d at 897–98. Courts have tended to find that insults or slurs against a protected group constitute direct evidence of discrimination. *Jespersen*, 390 S.W.3d at 654.

Allen contends that Terry's "wannabe" comment, "along with his tolerance for racist behavior and Anglo-centric staff," is direct evidence that she was terminated because of her race. We first note that Allen's argument requires us to consider the remark in combination with other circumstances, necessarily requiring an inference that the comment is probative of Terry's discriminatory animus in deciding to terminate Allen.

Further, even considering the evidence in the light most favorable to Allen, we cannot conclude she established Terry's "wannabe" comment is direct evidence that she was unlawfully terminated due to her race. Statements and remarks may serve as direct evidence of discrimination only if they are (1) related to the employee's protected class, (2) close in time to the employment decision, (3) made by an individual with authority over the employment decision, and (4) related to the employment decision at issue. *Reyes*, 272 S.W.3d at 593; *Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 644 (Tex. App.—Houston [1st Dist.] 2015, no pet.). If the alleged workplace comment does not meet these four requirements, the comment is treated as a "stray remark" that, standing alone, is insufficient to establish discrimination. *Reyes*, 272 S.W.3d at 592; *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 380 (5th Cir. 2010).

Allen has failed to establish that Terry's "wannabe" was anything other than a "stray remark." There is no evidence the comment was related to Allen's protected class. Rather, Terry directed the comment at the W/MBE Department, which consisted of one African-

American woman, one Hispanic woman, and one Hispanic man. Further, the comment was made approximately five months before Terry decided to eliminate the Manager's position and over seven months before Allen's termination. *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 764 (5th Cir. 2016) ("This court has discounted isolated remarks made within as little as four months of an employment decision.")⁸ Finally, there is no evidence the comment related to the decision to terminate Allen.⁹ Although the OPR's investigation of the "wannabe" comment began during its investigation of Allen's retaliation complain, it appears wholly unrelated to her termination, and she has not presented evidence to show otherwise. *See Reyes*, 272 S.W.3d at 592–93. Accordingly, we cannot conclude the comment is direct evidence that Allen was terminated because of her race. *See Jespersen*, 390 S.W.3d at 653–54. We resolve the DISD's first issue in its favor.

True Replacement

The DISD contends in its second issue that Allen failed to provide circumstantial evidence of racial discrimination based on a true replacement theory because she failed to establish that she was replaced by Zemanek.¹⁰ The TCHRA does not define the word "replace." *See* TEX. LAB. CODE ANN. § 21.002 (West 2015) (setting out definitions applicable to the TCHRA). Allen argues we should use the common meaning of the term. *See* TEX. GOV'T CODE ANN. § 311.011(a) (West 2013). The common meaning of the word "replace" is "(1) to restore to a former place or position; (2) to take the place of especially as a substitute or successor; or (3)

⁸ Allen argues the comment related to the decision to terminate her employment because Terry decided to reorganize the CAFD shortly after making the comment. However, the September 2013 position description for the FASCD Director stated the Director would supervise a Manager and other employees, and there is no evidence that Terry decided to eliminate Allen's position prior to October 2013.

⁹ Allen contends that because Terry made both the comment he could terminate Allen for insubordination and the "wannabe" comment in May 2013, the "wannabe" comment is related to her termination. However, Terry did not terminate Allen in May 2013, and there is no evidence Terry's comment that Allen had been insubordinate was based on Allen's race.

¹⁰ Because the Manager's position was eliminated, we question whether this is a "true replacement" case, as opposed to a "reduction in force" case. *See Garcia*, 372 S.W.3d at 639 (setting out distinction in cases claiming age discrimination). However, Allen pleaded her claim as a "true replacement" claim, and we will analyze whether she established a prima facie case in support of her claim as pleaded.

to put something or something new in the place of.” *Replace*, MERRIAM-WEBSTER.COM, www.merriam-webster.com/dictionary/replace (last visited Nov. 28, 2016). Based on this definition, Allen asserts that she was replaced by Zemanek because all her job duties were “subsumed” into Zemanek’s position; the organizational structure of the CAFD and the FASCD were the same, although there were different job titles; the employees of the CAFD and the FASCD, other than Allen, remained the same; and the CAFD and the FASCD had the same offices.

The DISD, on the other hand, argues we should apply the reasoning of the Texarkana Court of Appeals in *Baker v. Gregg County*, 33 S.W.3d 72 (Tex. App.—Texarkana 2000, no pet.), in determining whether Allen was replaced by Zemanek. The *Baker* court concluded that, for purposes of an age discrimination claim under the TCHRA:

[A] terminated employee is replaced by another person when the terminated employee’s position is filled by that person and that person is assigned the terminated employee’s former job duties. Consequently, a terminated employee is not replaced by a person who temporarily assumes the terminated employee’s job duties or a person who only takes over a part of those duties. . . . A determination of whether an employee was actually replaced by another requires an inquiry into the job position and duties performed by the terminated employee, and an inquiry into the work performed by the person who is alleged to have replaced that employee.

Id. at 81–82 (internal footnote omitted). The “touchstone” of the analysis is “the similarity of jobs held by the protected class employee” and the person who allegedly replaced her. *Russo v. Smith Int’l, Inc.*, 93 S.W.3d 428, 436 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (applying analysis set out in *Baker*).

We conclude the analysis set out in *Baker* to determine whether a terminated employee was replaced under the TCHRA is consistent with the common meaning of the term “replaced” advanced by Allen. Under either definition, what must be shown is that Zemanek took or was

placed in Allen's job or position. This necessarily requires a showing that Zemanek performed the same job duties as Allen.

The position description for the CAFD Manager stated the Manager was to:

Manage and direct staff in performing complex, advanced-level accounting and audit work for activity funds of all district campuses in accordance with generally accepted accounting and auditing practices, principles and procedures. Participate in the developments and implementation of new and revised financial systems, guidelines, policies and procedures. Provide training and assistance to campuses and departments on activity funds guidelines, policies and procedures.

The position description also listed twenty "Major Responsibilities" for the Manager of the CAFD, of which fifteen specifically related to activity funds, two related to payments to vendors (apparently from either CAFs or SAFs), two related to the supervision of staff, and one related to service on the financial services management team. Allen stated that, as Manager of the CAFD, she (1) directly supervised between four and seven specialists who were responsible for monthly reconciliation of activity funds accounts, bank reconciliations, preparing journal entries, reviewing check requests and supporting documentation for appropriateness, processing check requests in Oracle and training officer managers and financial clerks on EPES and Oracle; (2) developed revisions to the Activity Funds Manual, the Teachers/Sponsors' Handbook, Board of Control procedures, and activity fund forms; (3) developed training materials, including online training, and served as the instructor for activity fund certification classes for principals, officer managers, financial clerks, teachers, and other employees of the DISD; (4) assisted with the investigations of activity funds by reviewing the financial records and preparing a report of all identified discrepancies; (5) assisted the DISD's internal and external auditors with review of activity fund records and notified internal audit or investigators of potential problems identified during the review; (6) provided daily assistance to schools and campus administrative offices (learning communities) and departments by addressing questions and concerns relating to the proper use of activity funds, fundraisers, procurement requirements, sales tax, and balancing

issues; (7) compiled information for the Accounting Department relating to sales tax and 1099 reporting for payments from campuses' activity funds; and (8) developed an audit plan and audit workpapers for desk audits of activity funds at campuses.

In contrast, the position description for the Director of the FASCD stated the function of the position was to, "Ensure the delivery of high quality training, customer service, and support to campuses, in support of the Superintendent's 32 Systems priority #23 to improve customer service." The position listed seven major responsibilities, none of which related solely to activity funds. Zemanek stated that one of her "primary duties and responsibilities" as the Director of the FASCD has been "implementing, leading, collaborating and facilitating the centralization of CAFs and SAFs at the campus level and with various departments within" the DISD. This process took from January 6, 2014, through June 30, 2015, and was "an extraordinarily large task." After the centralization, the EPES software is no longer used in the DISD and the centralization of CAFs and SAFs into Oracle "transformed the majority of the processing role" previously performed by the CAFD. Zemanek stated she also led the centralization of banking and payment processes for all activity funds, and the FASCD has been instrumental in assisting in the automation of many of the financial and accounting related functions performed by campuses and FASCD employees. A number of tasks, such as bank reconciliations and journal entries, that were previously done manually have been automated, and the FASCD is working with other DISD departments to implement a system to allow for credit card and electronic check processing at the campuses and on the DISD and campus websites.

Zemanek stated she is also responsible for facilitating and providing training and problem resolution to campuses and other DISD departments regarding budgetary, financial, and accounting issues. This training and problem resolution is not limited to activity funds, but relates to any finance and accounting issues the campus or the department is encountering.

Zemanek coordinates and provides seven monthly training sessions for DISD personnel regarding accounting, financial, and operational issues in all areas, including finance, procurement, budget, risk management, special revenue, operations, and Human Capital Management. She coordinates and provides an annual financial ethics training for campus and department personnel and leads a mentorship program that facilitates training and communication between experienced campus office managers and office managers or financial clerks who are inexperienced, new to the DISD, or want peer support.

In Zemanek's opinion, the supervisory role she has at FASCD is different from the Manager role over the CAFD. According to Zemanek, the Manager of the CAFD oversaw "a processing unit solely related to CAFs and SAFs." Each campus input its financial information into EPES, provided the information to the CAFD, and the CAFD entered the information into Oracle and transferred it to other DISD departments. After centralization was completed, this function of the CAFD has been "all but eliminated." The FASCD is not limited to activity funds and "provides financial and accounting support to campuses beyond activity funds in various forums."

Allen does not dispute that Zemanek has job duties and responsibilities as the Director of the FASCD that Allen did not have as the Manager of the CAFD. Rather, as to Zemanek's description of her job duties and responsibilities that do not relate to activity funds, Allen stated she was "willing and able to perform" the centralization of activity funds into Oracle and she "was qualified, and had a great deal of experience, in performing the tasks performed by Ms. Zemanek and could have continued in that role[.]" Allen also stated that, in her opinion, a CPA was not required to be able to perform Zemanek's job responsibilities and points to the fact that Sorola, who is Zemanek's supervisor, is not a CPA. Allen believes the requirement that the

Director of the FASCD be a CPA was a “sham” requirement intended to prevent her from applying for the position.¹¹

The evidence established that all jobs in the CAFD, including Allen’s position as Manager, were eliminated when the CAFD was reorganized into the newly-created FASCD. The FASCD had much broader responsibilities than the CAFD, and all positions in the CAFD were “upgraded” to higher level positions in the FASCD. Allen’s responsibilities and duties as Manager of the CAFD were eliminated, changed, or “subsumed” into the responsibilities and duties of the higher-level Director’s position, but the Director’s position had additional duties and responsibilities. All employees of the CAFD were invited to apply for other positions. Allen did not apply for the Director of the FASCD position, which would have been a promotion, or for any other position in the FASCD. The other employees of the CAFD, all of whom were African-American women, completed a test and an interview for the new “upgraded” positions in the FASCD and were hired for those positions because they were the best candidates. On this record, we cannot conclude Allen established that she was replaced by Zemanek. *See Baker*, 33 S.W.3d at 81–82; *Wang v. Univ. of Tex. at Austin*, No. 04-13-00065-CV, 2013 WL 5570824, at *3 (Tex. App.—San Antonio, Oct. 9, 2013, no pet.) (mem. op.) (plaintiff failed to establish prima facie case of discrimination when evidence established no one replaced her and person who plaintiff believed replaced her performed job which required different experience and responsibilities). We resolve the DISD’s second issue in its favor.

¹¹ Although Allen has not brought a failure to promote claim, it appears her actual complaint is that Terry required the Director of the FASCD to be a CPA; in her opinion, a person could perform the job without being CPA; and the CPA requirement was intended to preclude her from qualifying for the position. To establish a prima facie case of discrimination due to an employer’s failure to promote, the employee must show (1) she is a member of a protected class; (2) she sought and was qualified for an available employment position; (3) despite her qualifications, she was not selected for the position; and (4) the employer selected someone not in the employee’s protected class or continued to seek applicants with the employee’s qualifications. *Anderson*, 458 S.W.3d at 645. Allen cannot establish a failure-to-promote claim because she did not apply for the position of Director of the FASCD and, therefore, did not provide the DISD with the opportunity to waive the CPA requirement if she was the best candidate, as it did when it hired Sorola. On this record, Allen was not qualified for the Director’s position and her subjective beliefs about Terry’s reasons for requiring the FASCD Director to be a CPA are insufficient to establish a prima facie case of employment discrimination. *Michael*, 314 S.W.3d at 691–92.

Disparate Treatment

In its third issue, the DISD argues Allen failed to provide circumstantial evidence of racial discrimination based on a disparate-treatment theory because she did not establish that she was treated less favorably than similarly situated individuals outside the protected class. “Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct.” *Ysleta Indep. Sch. Dist. v. Monanarez*, 177 S.W.3d 915, 917 (Tex. 2005) (per curiam) (internal footnotes omitted). The Fifth Circuit has articulated a similar standard, concluding employees are similarly situated if their circumstances are “nearly identical” *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259–60 (5th Cir. 2009). “The employment actions being compared will be deemed to have been taken under nearly identical circumstances when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories.” *Turner v. Kan. City S. Ry. Co.*, 675 F.3d 887, 893 (5th Cir. 2012). “Employees with different responsibilities, supervisors, capabilities, work rule violations, or disciplinary records are not considered to be ‘nearly identical.’” *Reyes*, 272 S.W.3d at 594; *see also Lee*, 574 F.3d at 260.

In her brief, Allen offered Jordan Roberts and Zemanek as comparators for purposes of showing disparate treatment. Allen first argues that Roberts, an “Hispanic/Anglo male,” was moved from his position as Director of the Grants Compliance Department to a new Manager position rather than being terminated, and that she was not provided the same accommodation.¹² There is no evidence that Roberts’s department was reorganized or that his position was eliminated. Accordingly, the circumstances surrounding his transfer to a Manager’s position are

¹² Allen contends, based on evidence that was struck by the trial court, that Roberts was demoted for performance issues and she was not given the same accommodation. To the extent Allen is arguing her termination was based on performance issues, we note that Allen had the opportunity to apply for an Accountant III position in the FASCD, which would have been a demotion.

not comparable in all material respects to Allen’s termination following the elimination of her position.

Allen also contends that Zemanek was allowed a year-and-a-half to transition all the campuses to Oracle while Allen was not given the same time period to “fix coding.” Zemanek was responsible for transitioning all of the DISD’s campuses to Oracle and stated this transition took approximately eighteen months to complete. Allen, on the other hand, was requested to account for CAFs as revenue and debits, rather than as liabilities; a task that, in Allen’s opinion, would “have required several months.” Again, the circumstances surrounding Zemanek and Allen are not comparable in all material respects.

We conclude Allen failed to establish that she was treated less favorably than similarly situated or “nearly identical” individuals outside her protected class. Accordingly, Allen failed to establish a prima facie case based on a disparate-treatment theory. We resolve the DISD’s third issue in its favor.¹³

Conclusion

Because Allen failed to create a fact question through either direct or circumstantial evidence as to whether her termination was unlawfully based on her race, she did not invoke the TCHRA’s limited waiver of immunity. Therefore, the trial court did not have jurisdiction over this suit. *See Garcia*, 372 S.W.3d at 636.

¹³ Based on our resolution of the DISD’s first three issues, we need not address its fourth issue in which it urges we should not consider evidence improperly admitted by the trial court. *See TEX. R. APP. P. 47.1.*

We reverse the trial court's order denying the DISD's plea to the jurisdiction on Allen's discrimination claim and render judgment dismissing the case for lack of jurisdiction.

/Michael J. O'Neill/
MICHAEL J. O'NEILL
JUSTICE, ASSIGNED

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

DALLAS INDEPENDENT SCHOOL
DISTRICT, Appellant

No. 05-16-00537-CV V.

FAIRY ALLEN, Appellee

On Appeal from the 116th Judicial District
Court, Dallas County, Texas,
Trial Court Cause No. DC-15-02580.
Opinion delivered by Justice O’Neill,
Justices Lang-Miers and Stoddart
participating.

In accordance with this Court’s opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that this case is **DISMISSED** for want of jurisdiction.

It is **ORDERED** that appellant Dallas Independent School District recover its costs of this appeal from appellee Fairy Allen.

Judgment entered December 22, 2016.