AFFIRMED IN PART; REVERSED AND RENDERED IN PART; and Opinion Filed February 10, 2021

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00112-CV

CITY OF FORT WORTH, TEXAS, Appellant
V.
JOEL F. FITZGERALD, SR., Appellee

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-08184

MEMORANDUM OPINION

Before Justices Myers, Osborne, and Carlyle
Opinion by Justice Carlyle

The City of Fort Worth appeals the trial court's order partially denying its plea to the jurisdiction. Dr. Joel F. Fitzgerald, Sr., cross appeals to the extent the trial court granted the plea. We affirm to the extent the trial court denied the plea, reverse to the extent the trial court granted the plea, render judgment denying the City's plea in full, and remand for further proceedings consistent with this memorandum opinion. *See* TEX. R. APP. P. 47.4.

The City hired Fitzgerald as its police chief in 2015. According to Fitzgerald, the City terminated him from that position because he disclosed the City's illegal

practices involving access to the FBI's Criminal Justice Information Systems (CJIS) database. Fitzgerald alleges he began actively investigating the City's misconduct in December 2018 and began reporting violations to the FBI in March 2019.

On May 20, 2019, immediately before a scheduled meeting between Fitzgerald and the FBI, City Manager David Cooke and Assistant City Manager Jay Chapa informed Fitzgerald he was being terminated. Cooke and Chapa allegedly offered Fitzgerald the option of resigning and accepting a cash settlement in exchange for his silence, but only if he accepted the offer on the spot. Chapa told him that if he rejected their offer, the City would terminate him "with cause" and "tie him up in litigation for six years." Fitzgerald rejected the offer, and the City held a press conference that day to announce his termination.

Fitzgerald's attorney sent Chapa a letter the following day stating in pertinent part: "We . . . request administrative review of [the] termination as the timing of the termination occurred one hour before Dr. Fitzgerald was scheduled to present further evidence of CJIS violations to law enforcement." Although Chapa testified he never received the May 21 letter, Fitzgerald's counsel provided evidence it was mailed.

Fitzgerald filed suit against the City on June 6, alleging violations of the Texas Whistleblower Act (TWA), the Texas Open Meetings Act, the Public Information Act, and the Texas Constitution. After Fitzgerald amended his petition to add additional claims, the City filed a series of pleas to the jurisdiction. In its second

plea, which is at issue in this appeal,[1] the City argued that Fitzgerald's whistleblower claims are barred by governmental immunity because Fitzgerald failed to properly initiate the City's internal grievance procedure before filing suit. *See* TEX. GOV'T CODE § 554.006.

In support of its plea, the City attached the affidavit of Larry Lockley, its Employee Labor Relations Division Manager. Lockley testified that, as a "general employee," Fitzgerald was subject to the grievance procedure outlined in section 14.4 of the City's Personnel Rules and Regulations for General Employees (PRRs). He also testified that, based on his review of the Employee Labor Relations Division's records, Fitzgerald did not file a grievance or whistleblower complaint under section 14.4.

Lockley attached a copy of section 14.4 to his affidavit. That section states in relevant part:

> An employee or former employee must file a complaint of retaliation for reporting a violation of law by a public employee ("whistleblower" complaint) not later than the 90th day after the date on which the alleged adverse employment action occurred or was discovered by the employee through reasonable diligence. . . . The date the complaint is received by the Human Resources Employee and Labor Relations Division will be considered the date the complaint is filed. . . .

[1] The first plea, which the trial court granted, concerned Fitzgerald's claim for mandamus relief. The third plea, on which the trial court has not yet ruled, concerns Fitzgerald's claims under the Texas Open Meetings Act, the Texas Public Information Act, and the Texas Constitution.

Section 14.4 also requires that all whistleblower complaints "must be filed in writing with the Human Resources Department's Employee and Labor Relations Division" and must include certain factual information concerning the basis for the complaint.

The preamble to the PRRs, which Lockley attached to his affidavit, states: "These PRRs do not apply to firefighters or police officers as those terms are defined in Texas Local Government Code section 143.003." Lockley did not discuss the police-officer exemption in his affidavit.

At the hearing on the plea, the trial court noted its belief that, at best, the PRRs are ambiguous as to whether they apply to Fitzgerald, given his apparent status as a police officer. Nevertheless, the trial court issued an order partially granting the City's plea.[2] The court concluded that the May 21 letter to Chapa sufficiently initiated the City's internal grievance process. Because Fitzgerald did not wait the required sixty days before filing his lawsuit, *see id.* §554.006(d), the court abated the case to allow the City time to resolve the grievance. *See Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631, 632–33 (Tex. 2005) (holding that if a public employee timely initiates a grievance procedure but fails to wait the required sixty days before filing suit, the proper remedy is to abate rather than dismiss the case).

[2] The City contends that, based on the wording of the trial court's order, the court fully granted its plea on the merits but incorrectly denied its requested relief. Because we affirm to the extent the trial court denied the plea, reverse to the extent the trial court granted the plea, and render judgment denying the plea in full, we need not determine the extent to which the trial court may have granted the plea on the merits.

THE CITY DID NOT PRODUCE SUFFICIENT EVIDENCE OF AN APPLICABLE GRIEVANCE PROCEDURE.

The City contends the trial court erred by not dismissing Fitzgerald's whistleblower claims, because he failed to timely initiate a grievance under section 14.4 of the PRRs. In a cross issue, Fitzgerald contends the trial court erred by abating his case, because he was not required to initiate a grievance under the PRRs.[3]

We review the trial court's ruling de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "In a suit against a governmental unit, the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003). Fitzgerald's petition asserts jurisdiction under the TWA, which provides that "[a] public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter," and "[s]overeign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter." TEX. GOV'T CODE § 554.0035.

A public employee bringing claims under the TWA must "initiate action under the grievance or appeal procedures of the employing state or local governmental entity" before filing suit. *Id.* § 554.006(a). Moreover, "[t]he employee must invoke the applicable grievance or appeal procedures not later than the 90th day after" the

[3] Because we reverse on the ground that the City failed to present sufficient evidence of an applicable grievance procedure, we need not address Fitzgerald's alternative arguments.

alleged violation occurred or was discovered through reasonable diligence. *Id.* § 554.006(b). These statutory prerequisites are both mandatory and jurisdictional. *See Smith v. Univ. of Tex. Sw. Med. Ctr. of Dallas*, 101 S.W.3d 185, 189 (Tex. App.—Dallas 2003, no pet.).

The City relies on Lockley's affidavit as proof that Fitzgerald failed to initiate its grievance process. Because the City's challenge is based on evidence purporting to negate the existence of jurisdictional facts, our standard of review "generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c)." *Miranda*, 133 S.W.3d at 228. As the movant, the City must meet "the summary judgment proof standard for its assertion that the trial court lacks jurisdiction." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). In determining whether the City has met its burden, we take as true all evidence favorable to Fitzgerald, drawing every reasonable inference and resolving all doubts in his favor. *City of Dallas v. Prado*, 373 S.W.3d 848, 853 (Tex. App.—Dallas 2012, no pet.).

Lockley testified that "[t]he City's PRRs for General Employees, including section 14.4, applied to Joel Fitzgerald because he was employed as a general employee while he was an employee of the City of Fort Worth." The preamble to the PRRs attached to Lockley's affidavit, however, expressly states that "[t]hese PRRs do not apply to firefighters or police officers as those terms are defined in Texas Local Government Code section 143.003." Section 143.003 defines a "police

officer" as "a member of a police department or other peace officer who was appointed in substantial compliance with this chapter or who is entitled to civil service status." TEX. LOC. GOV'T CODE § 143.003(5).

Fitzgerald appears to meet this definition. It is at least reasonable to infer that the chief of police is "a member of" the City's police department. Moreover, the record contains the separation paperwork the City filed with the Texas Commission on Law Enforcement classifying Fitzgerald as a "peace officer" and noting that he was appointed by the Fort Worth Police Department. There is no evidence suggesting Fitzgerald's appointment was not "in substantial compliance" with the local government code. Thus, viewing the evidence in the light most favorable to Fitzgerald, we conclude he qualified as a "police officer" within the meaning of the exemption outlined in the preamble to the PRRs.

The City does not explain on appeal why the PRRs should apply to Fitzgerald, despite his apparent status as a "police officer." Instead, it relies solely on Lockley's statement that the PRRs applied to Fitzgerald as a "general employee."[4] Lockley's conclusory testimony, which neither discusses the exemption for "police officers"

[4] Although it does not make this argument on appeal, the City argued in the trial court that only police officers who are entitled to civil-service protection should qualify as "police officers" under the exemption to the PRRs. As the trial court correctly pointed out, however, that limitation is inconsistent with the specific definition incorporated into the PRRs. The City also argued, without providing any evidence, that "general employees" cannot also be "police officers" under the City's classification criteria. But there is no record evidence suggesting those terms are mutually exclusive and, in any event, the City is bound by the plain language of the PRRs it seeks to enforce against Fitzgerald. If the City wishes to hold a particular employee to the terms of a given set of PRRs, the City must ensure there is no ambiguity as to whether those PRRs apply.

nor provides any facts underlying his conclusion that Fitzgerald was a "general employee," is insufficient to establish section 14.4's applicability. *See Staev v. Azouz*, No. 05-04-00546-CV, 2005 WL 1111423, at *4 (Tex. App.—Dallas May 11, 2005, no pet.) (mem. op.) ("Conclusory testimony is 'not competent summary judgment evidence.'" (quoting *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994))).

At oral argument, the City argued it should not matter whether Fitzgerald qualifies as "a police officer" because he also failed to comply with the City's grievance procedures applicable to police officers. But there is no record evidence of any other potentially applicable grievance procedures, much less evidence establishing Fitzgerald's noncompliance with them.

On this record, the City failed to meet its burden of establishing Fitzgerald's noncompliance with an applicable grievance procedure. We affirm the trial court's order to the extent it denies the City's plea to the jurisdiction, reverse the trial court's order to the extent it grants the City's plea, render judgment denying the plea in full, vacate the trial court's order of abatement, and remand for further proceedings consistent with this opinion.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CITY OF FORT WORTH, TEXAS, Appellant No. 05-20-00112-CV V. JOEL F. FITZGERALD, SR., PH. D., Appellee	On Appeal from the 191st Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-19-08184. Opinion delivered by Justice Carlyle. Justices Myers and Osborne participating.

In accordance with this Court's opinion of this date, the trial court's order granting and denying in part the City's second plea to the jurisdiction is **AFFIRMED** in part and **REVERSED AND RENDERED** in part. We **REVERSE** that portion of the trial court's order that grants the City's second plea to the jurisdiction, we **VACATE** the portion of the order abating the case, and we **RENDER** judgment denying the City's second plea to the jurisdiction in full. In all other respects, the trial court's order is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellee Joel F. Fitzgerald, Sr., Ph. D., recover his costs of this appeal from appellant City of Fort Worth, Texas.

Judgment entered this 10th day of February, 2021.