Opinion issued December 11, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00327-CV

CORNELIUS C. SULLIVAN, JR., D.D.S., Appellant

V.

THE UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT HOUSTON DENTAL BRANCH, PETER T. TRIOLO, JR., D.D.S., CATHERINE M. FLAITZ, D.D.S., AND JAMES T. WILLERSON, M.D., Appellees

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On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2007-11197

MEMORANDUM OPINION

Appellant, Cornelius C. Sullivan, Jr., D.D.S., brings this interlocutory appeal from an order granting the plea to the jurisdiction filed by appellees, the University of Texas Health Science Center at Houston Dental Branch, Peter T. Triolo, Jr., D.D.S., Catherine M. Flaitz, D.D.S., and James T. Willerson, M.D. In three issues, Sullivan contends the trial court erred by granting the plea to the jurisdiction and dismissing his (1) claims for age discrimination under the Age Discrimination Employment Act of 1967 (ADEA),[1] (2) his discrimination claims under the Texas Commission on Human Rights Act (TCHRA),[2] and (3) his due process claims under the United States and Texas constitutions.[3] We conclude the trial court did not err by granting the plea to the jurisdiction and dismissing Sullivan's claims. We affirm.

Background

The University of Texas Health Science Center at Houston Dental Branch ("the University") employed Sullivan through a series of term contracts as an associate professor for 15 years, until he was terminated on September 1, 2004. At the time of his termination, the University's budget for fiscal year 2004–2005 listed Sullivan as

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1 29 U.S.C. §§ 621–634 (LexisNexis 2002 & Supp. 2008).

2 TEX. LAB. CODE ANN. §§ 21.001–.556 (Vernon 2006).

3 U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19.

a salaried associate professor. Triolo, Flaitz, and Willerson held administrative positions with the University at the time of Sullivan's termination.

After his termination, Sullivan filed a complaint with the Equal Employment Opportunity Commission (EEOC) on April 28, 2005, 240 days after he was terminated. On the form Sullivan filed, he indicated that the complaint was to be dual-filed with both the EEOC and the Texas Commission on Human Rights. The EEOC issued Sullivan a right-to-sue-letter. Sullivan filed suit in federal court, but the court dismissed the suit for lack of jurisdiction. Sullivan then refiled suit against the University, Triolo, Flaitz, and Willerson in state court, asserting causes of action against the University for age discrimination in violation of the TCHRA, violation of the ADEA, and violation of his right to due process under both the United States and Texas constitutions. Sullivan also asserted a cause of action against Triolo, Flaitz, and Willerson for defamation.

The University, Triolo, Flaitz, and Willerson filed a plea to the jurisdiction. The trial court granted the plea to the jurisdiction, dismissing all of Sullivan's claims except for his claim for defamation.

Plea to the Jurisdiction Standard of Review

A plea to the jurisdiction is a dilatory plea that challenges the trial court's subject matter jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d

217, 225–26 (Tex. 2004). Whether the plaintiff has alleged facts that demonstrate subject-matter jurisdiction is a question of law, which we review de novo. *Id.* at 226. Although we are not to reach the merits of the plaintiff's case, when the plea to the jurisdiction challenges the existence of jurisdictional facts, we consider the relevant evidence submitted by the parties that is necessary to resolve the jurisdictional issue. *Id.* at 227. This procedure generally mirrors that of a summary judgment under rule of civil procedure 166a(c). *Id.* at 228. The plaintiff has the initial burden to plead facts affirmatively showing the trial court has subject matter jurisdiction. *Id.* at 226. The governmental unit then has the burden to assert that the trial court lacks subject matter jurisdiction and must support that contention with evidence. *Id.* at 228. If it does so, the plaintiff must raise a material fact issue regarding jurisdiction to survive the plea to the jurisdiction. *Id.* If the evidence creates a fact issue concerning jurisdiction, the plea to the jurisdiction should be denied. *Id.* If the evidence is undisputed or fails to raise a fact issue concerning jurisdiction, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.*

Waiver of Sovereign Immunity

In his first issue, Sullivan contends the trial court erred by granting the University's plea to the jurisdiction on the ground that Sullivan did not plead a valid waiver of immunity for his ADEA claims. Sullivan asserts that the TCHRA waives

the States' immunity for claims of age discrimination under the ADEA. Sullivan contends that because the TCHRA has been interpreted to be substantially equivalent to the ADEA, "[t]he clear deference given by the TCHRA to federal authority establishes waiver of sovereign immunity under violations of age discrimination in employment." Sullivan cites no authority that expressly supports his position.

The United States Supreme Court has held the ADEA does not validly waive the states' sovereign immunity to a suit for damages by an individual. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91, 120 S. Ct. 631, 650 (2000). The ADEA, therefore, does not waive the state's immunity. *See id.* Moreover, nothing in the TCHRA waives the State's immunity for ADEA claims; the TCHRA waives immunity only for TCHRA claims for "unlawful employment practices." *See* TEX. LAB. CODE ANN. §§ 21.002(4), 21.254 (Vernon 2006) (holding section 21.254 waivesing immunity by authorizing "complainant" to bring action and defining "complainant" as "an individual who brings an action or proceeding *under this chapter*"); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008). Sullivan does not identify any waiver of the State's immunity from suit for a private cause of action for damages for violations of the ADEA. We hold the trial court did not err by granting the plea to the jurisdiction concerning Sullivan's claims under the ADEA.

We overrule Sullivan's first issue.

Timeliness of Filing

In his second issue, Sullivan contends the trial court erred by granting the University's plea to the jurisdiction because his state law complaint was timely filed.

"Texas law requires that a complaint of unlawful employment practices be filed with the EEOC or the Texas Commission on Human Rights within 180 days after the alleged unlawful employment practice occurred." *Davis v. Autonation USA Corp.*, 226 S.W.3d 487, 491 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996)); *see* TEX. LAB. CODE ANN. § 21.202 (Vernon 2006) (entitled "Statute of Limitations"). "This time limit is mandatory and jurisdictional." *Davis*, 226 S.W.3d at 491 (citing *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 486 (Tex. 1991)). "Failure to timely file an administrative complaint deprives Texas trial courts of subject-matter jurisdiction." *Id.* (citing *Czerwinski v. Univ. of Tex. Health Sci. Ctr.*, 116 S.W.3d 119, 122 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Vincent v. W. Tex. State Univ.*, 895 S.W.2d 469, 473 (Tex. App.—Amarillo 1995, no writ)).

Here, Sullivan did not file his complaint until April 28, 2005—240 days after his termination. Thus, the trial court lacked jurisdiction. *See Davis*, 226 S.W.3d at 492.

Sullivan nevertheless contends that he timely filed his complaint under the ADEA and argues that this should save his state complaint. Several courts have addressed Sullivan's contention and rejected it. *DeMoranville v. Specialty Retailers, Inc.*, 909 S.W.2d 90, 92 (Tex. App.—Houston [14th Dist.] 1995), *rev'd on other grounds by* 933 S.W.2d 490 (Tex. 1996) (noting that, although ADEA time limit for filing can be extended to 300 days, Texas 180 day limit is "not affected"); *see Pope v. MCI Telecomms. Corp.*, 937 F.2d 258, 264 (5th Cir. 1991) (noting that Texas "was under no obligation to—and did not—provide a statute of limitations that matches that contained within title VII," and therefore Texas's strict 180-day limitations period must be followed for state claims under Texas law); *Klebe v. Univ. of Tex. Sys.*, No. 03-05-00527-CV, 2007 WL 2214344, at *3 (Tex. App.—Austin July 31, 2007, no pet.) (mem. op.) (holding complainant asserting TCHRA claims not entitled to 300-day limit of ADEA, but had to comply with 180-day limit of Texas law). We likewise reject Sullivan's attempt to apply the federal limitations period to his state law claims.

To support this contention, Sullivan cites to *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 108 S. Ct. 1666 (1988) and *Balli v. El Paso Independent School District*, 225 S.W.3d 260 (Tex. App.—El Paso 2006, pet. granted, judgment vacated w.r.m.). However, neither case addresses whether filing a federal complaint

with the EEOC that may be timely under federal law can save a state law complaint that was filed after the 180-day deadline provided by Texas law, which is the issue before us. In *Commercial Office Products*, the Supreme Court addressed the timeliness of filings under federal law, not state law.[4] In *Balli*, the El Paso court of appeals addressed whether a filing with the EEOC constituted a "nominal" filing with the Commission. Neither opinion addresses whether federal procedures, which include an extension of the 180-day filing deadline to 300 days in certain circumstances, can or should be applied to the filing of a state complaint.

We conclude that the extension of time under the ADEA does not apply to state law claims under the TCHRA. *See Pope*, 937 F.2d at 264; *DeMoranville*, 909 S.W.2d at 92. Accordingly, we hold Sullivan's complaint was untimely and the trial court lacked jurisdiction. *See Davis*, 226 S.W.3d at 491.

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[4] The Supreme Court stated the issues as follows:

> The primary question presented is whether a state agency's decision to waive its exclusive 60-day period for initial processing of a discrimination charge, pursuant to a worksharing agreement with the EEOC, "terminates" the agency's proceedings within the meaning of § 706(c) of Title VII, 78 Stat. 260 . . . , so that the EEOC immediately may deem the charge filed. In addition, we must decide whether a complainant who files a discrimination charge that is untimely under state law is nonetheless entitled to the extended 300-day federal filing period of [statute].

EEOC v. Commercial Office Products Co., 486 U.S. 107, 110, 108 S. Ct. 1666, 1668 (1988).

We overrule Sullivan's second issue.

Due Process

In his third issue, Sullivan challenges the trial court's granting of the University's plea to the jurisdiction, asserting that he properly pleaded a cause of action and waiver of immunity. Although the University, Triolo, Flaitz, and Willerson do not dispute that sovereign immunity is waived for due process claims, they assert the trial court properly ruled it lacked jurisdiction on the ground that Sullivan lacks standing to bring a due process claim because he has no protected property interest in continued employment.

In order to bring a due process claim, the plaintiff must assert a property interest that is protected by the Fourteenth Amendment of the United States Constitution or article I, section 19 of the Texas Constitution. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570–71, 92 S. Ct. 2701, 2705–06 (1972) (noting "due process appl[ies] only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property"); *see also Concerned Cmty. Involved Dev., Inc. v. City of Houston*, 209 S.W.3d 666, 671 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("The Due Process Clause is only activated when there is some substantial liberty or property interest which is deserving of procedural protections."). If the plaintiff does not assert a protected

property interest, the trial court lacks jurisdiction over the suit. *See Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863, 870 (Tex. 2005) (holding Yeo "asserted no interests protected by article I, section 19 of the Texas Constitution" and her claims "must therefore be dismissed"); *Concerned Cmty. Involved Dev., Inc.*, 209 S.W.3d at 672 (holding plaintiff lacked standing to bring due process claims absent protected property interest); *Stafford Mun. Sch. Dist. v. L.P.*, 64 S.W.3d 559, 564 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (holding trial court lacked jurisdiction over due process claim in absence of "a constitutionally protected property or liberty interest").

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Yeo*, 171 S.W.3d at 870 n.19 (quoting *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709). An employee under a term contract has no vested property interest in the renewal of the contract and the employee cannot show an entitlement to renewal when the employer "merely declined to offer him another year of employment." *Govant v. Houston Cmty. Coll. Sys.*, 72 S.W.3d 69, 76 (Tex. App.—Houston [14th dist.] 2002, no pet.).

In his petition, Sullivan alleged the University violated his right to due process by terminating him because he had a "vested property right" in his employment by

virtue of the University including him as a "salaried employee in the [University's] Budget for FY 2004–2005." Sullivan cites no authority to support his position that the University's budget containing his salary for the coming year modified his year-to-year contract employment to "a legitimate claim of entitlement" in employment for the fiscal year 2004–2005. *See Yeo*, 171 S.W.3d at 870 n.19 (quoting *Roth*, 408 U.S. at 577, 92 S. Ct. at 2709). We conclude that Sullivan did not plead facts showing he had a protected property interest that should be protected by due process. Accordingly, we hold the trial court did not err by granting the plea to the jurisdiction and dismissing Sullivan's due process claims.

We overrule Sullivan's third issue.[5]

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[5] In his reply brief and at argument, Sullivan also asserted that he had a protected property interest in his reputation. However, Sullivan did not assert that the University injured his reputation in his pleadings or in his reply to the University's plea to the jurisdiction. He argued this for the first time in his reply brief to this Court. "An issue raised for the first time in a reply brief is ordinarily waived." *N.P. v. Methodist Hosp.*, 190 S.W.3d 217, 225 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). We therefore decline to address Sullivan's contention that he had a protected property interest in his reputation. *See id.*

Conclusion

We affirm the judgment of the trial court.

Elsa Alcala
Justice

Panel consists of Justices Taft, Keyes, and Alcala.