Opinion issued August 18, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00289-CV

WEST HOUSTON CHARTER SCHOOL ALLIANCE, Appellant

V.

JEAN PICKERING, Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Case No. 2009-64131

MEMORANDUM OPINION

This interlocutory appeal from the trial court's denial of a school's plea to the jurisdiction arises out of Jean Pickering's claim that the school demoted and constructively discharged her in retaliation for reporting that the school board had

violated the Texas Open Meetings Act. Because we conclude that Pickering failed to initiate the school's grievance procedure before filing her whistleblower action, we reverse the trial court's denial of the school's plea to the jurisdiction and dismiss Pickering's claims against the school for lack of jurisdiction.

Background

Pickering, the school's administrator, filed a suit against West Houston Charter School Alliance and several of its board members, asserting that the school violated the Texas Whistleblower Act by retaliating against her after she reported to the Texas Education Agency that the board was holding meetings in violation of the Texas Open Meetings Act.[1] *See* TEX. GOV'T CODE ANN. § 554.002(a) (West 2004) (prohibiting governmental entity from taking adverse personnel action against public employee who, in good faith, reports violation of law by employer or another public employee to appropriate law enforcement authority); *id.* § 551.001–.146 (governing open meeting requirements for governmental bodies). Pickering alleged two incidents of retaliatory conduct. First, the school board placed her on "a corrective plan at a final warning stage," which Pickering asserted stripped her of her responsibilities and was designed to serve as a demotion. The school board presented the corrective action plan to Pickering at a July 9, 2009

[1] Pickering pled that the individual school board members conspired with the school to violate the Whistleblower Act and asserted a claim against them for intentional infliction of emotional distress. The claims against the individual defendants are not at issue here.

board meeting. Second, Pickering alleged that the board members damaged her reputation in the community and forced her to resign on August 3, 2009, which constituted a constructive discharge.

After Pickering initiated this action, the school filed a plea to the jurisdiction, contending that Pickering failed to initiate a grievance under the school's grievance procedure before filing suit. Pickering responded that the school's grievance procedure did not apply to her and that she had appealed the school's actions by a letter her attorney sent to the school board on July 22, "seeking a fundamentally fair hearing on the matter."

The trial court denied the school's plea to the jurisdiction. In its order, the trial court stated:

> All parties having appeared in open court by and through their attorneys and all parties having agreed on the record that plaintiff by and through her counsel did, on or about July 22, 2009, within 90 days of the claimed adverse employment action[,] g[i]ve written notice to the Defendant's Board of Trustees that the Plaintiff "appeal[ed] the decision to place her on a professional growth plan and specifically request[ed] that as part of that appeal, she be afforded a due process, meaningful hearing pursuant to the mandates of *Ferguson v. Thomas*, before an impartial and academically oriented hearing officer or panel."
>
> Having heard arguments of counsel and considered the documents filed herein, the Court is of the opinion and finds that Plaintiff initiated Defendant's appeal procedures, or that a fact dispute exists as to whether Plaintiff's actions initiated Defendant's appeal procedures, and that Defendant's Plea to the Jurisdiction is not established as a matter of law.

This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (authorizing interlocutory appeal from the grant or denial of a governmental unit's plea to the jurisdiction); *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, No. 09-0794, 2011 WL 2420204, at *5–6 (Tex. June 17, 2011) (holding that an open-enrollment charter school is a "governmental unit" for purposes of section 51.014(a)(8)).[2]

Standard of Review

The school's plea to the jurisdiction is a dilatory plea that seeks dismissal of Pickering's claims against it for lack of subject-matter jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *Univ. of Houston v. Barth*, 178 S.W.3d 157, 160–61 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993); *Barth*, 178 S.W.3d at 161. The existence of subject-matter jurisdiction is a question of law that we review de novo. *State Dep't of Hwys. & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002); *Kamel v. Univ. of Tex. Health Sci. Ctr. at Houston*, 333 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

When a plea to the jurisdiction challenges the existence of jurisdictional facts, we apply a standard of review that mirrors the standard applicable to

[2] West Houston Charter School Alliance is an open-enrollment charter school.

traditional summary judgments. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004); *see also* TEX. R. CIV. P. 166a(c). The school bore the initial burden of establishing that one or more facts necessary to jurisdiction does not exist. *See id.* (observing that this standard protects claimant from having to put on her case simply to establish jurisdiction); *Porretto v. Patterson*, 251 S.W.3d 701, 711 (Tex. App.—Houston [1st Dist.] 2007, no pet.). If the school satisfied its initial burden, the burden shifted to Pickering to put on evidence raising a fact issue on the jurisdictional issue. *Miranda*, 133 S.W.3d at 228; *Patterson*, 251 S.W.3d at 711. In determining whether these burdens have been met, we review the evidence in the light most favorable to Pickering, indulging every reasonable inference in her favor and resolving any doubts in her favor. *Miranda*, 133 S.W.3d at 228.

The School's Plea to the Jurisdiction

In its plea to the jurisdiction, the school asserted that the trial court lacked jurisdiction over Pickering's whistleblower action because she had not satisfied the Whistleblower Act's requirement that she initiate a grievance before filing suit in district court. In response, Pickering argued that the school's grievance procedure did not apply to Pickering's complaints and, alternatively, the letters she sent to the school board satisfied whatever obligation she had under the grievance procedure. We conclude that the school's grievance procedure applied to Pickering's

complaints and that the evidence demonstrates that Pickering failed to initiate a grievance under that procedure.

A. The Whistleblower Act's grievance initiation requirement

As a prerequisite to initiating suit under the Whistleblower Act, a claimant must first "initiate action under the grievance or appeal procedures" of her governmental employer. TEX. GOV'T CODE ANN. § 554.006(a) (West 2004). This requirement is a jurisdictional prerequisite, such that compliance is essential to the trial court's jurisdiction over a whistleblower action. *Barth*, 178 S.W.3d at 161–62. Section 554.006 does not require a claimant to exhaust her administrative remedies before filing suit; instead, she is only required to initiate the grievance or appeal and allow the grievance authority sixty days in which to render a decision. *See Univ. of Tex. Med. Branch v. Barrett*, 159 S.W.3d 631, 632 (Tex. 2005); *Hitchcock Indep. Sch. Dist. v. Walker*, No. 01-10-00669-CV, 2010 WL 5117912 (Tex. App.—Houston [1st Dist.] Dec. 16, 2010, no pet.) (mem. op.). After the grievance authority issues a decision, or after sixty days if no decision has been issued, then the claimant has two choices: she may either exhaust the remedies available to her under the employer's grievance procedure or terminate the grievance and file suit. *See* TEX. GOV'T CODE ANN. § 554.006(d). The option she chooses determines the time period within which her suit must be filed. *See id.* §§ 554.006(d), 554.005.

The issue here is whether Pickering initiated a grievance under the school's grievance procedure, thus commencing the school's sixty-day period for issuing a decision, regardless of whether she exhausted her administrative remedies under the grievance procedure. *See id.* §§ 554.006(d)(2), 554.005.

B. The evidence on whether Pickering initiated a grievance

In support of its plea to the jurisdiction, the school filed evidentiary exhibits: an affidavit, three letters exchanged between Pickering and the school, and a copy of the school's grievance procedure, which the school sent to Pickering. David Dwyer, former school board president, testified in his affidavit that Pickering did not file a grievance with the school relating to the July 9, 2009 corrective action plan or her August 3, 2009 resignation.

The correspondence exhibits begin with a July 22 letter from Pickering's counsel to the school board, which accused the school board of violating the Texas Open Meetings Act and retaliating against Pickering for reporting the violations to the Texas Education Agency. It then stated:

> I am notifying you that Ms. Pickering appeals the decision to place her on a professional growth plan and specifically requests that as part of that appeal, she be afforded a due process, meaningful hearing pursuant to the mandates of *Ferguson v. Thomas*, before an impartial and academically oriented hearing officer or panel. Specifically, Ms. Pickering requests that the hearing occur on July 27, 2009.

The school responded on July 27. In that letter, counsel for the school defended the school's actions, rejected opposing counsel's interpretation of

Ferguson v. Thomas and the due process implications of the situation, and disagreed that Pickering was entitled to a hearing different from that afforded by the school's grievance procedure. The school's counsel noted that Pickering had the opportunity to express concerns and address issues with the school board at the July 9 meeting, but declined to do so. She then stated:

> However, if she would like to grieve the Board's action, she may do so in accordance with the attached West Houston Charter School Grievance procedure. In lieu of submitting to the School Administrator,[3] as the procedure states, she should address the grievance to the School Board's President, Mr. David Dwyer, c/o Maureen Singleton, Thompson & Horton, 711 Louisiana, Suite 2100, Houston, Texas 77002.

The final correspondence in the record is Pickering's resignation letter to Dwyer on August 3, 2009. In the letter, Pickering attacked Dwyer's leadership of the school board, made accusations regarding his wife's service on a school committee, asserted that the corrective action plan was based on false claims, complained of the process by which the corrective action plan was adopted, and stated that the board's actions against her had undermined her authority with staff. Pickering then gave two weeks' notice of her resignation, which she asserted was forced by the "illegal conduct of your Board and the clear intent to damage my career."

[3] Pickering was the school administrator.

The record does not contain any evidence filed by Pickering with respect to the school's plea to the jurisdiction. In the text of her response, Pickering relied on a letter she sent the school board on July 9, 2009. But she did not attach that letter to her response or otherwise make it part of the record. Thus, although it is undisputed that Pickering sent the school board a letter on this date, the letter itself is not in the record. Pickering appended the letter to her appellate brief, but we may not consider material appended to an appellate brief that is not in the record. *E.g.*, *Sowell v. The Kroger Co.*, 263 S.W.3d 36, 38 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding that requests for disclosure filed as an appendix to appellate brief could not be considered because they were not made part of the record); *Till v. Thomas*, 10 S.W.3d 730, 733–34 (Tex. App.—Houston [1st Dist.] 1999, no pet.) ("We cannot consider documents attached to an appellate brief that do not appear in the record.").

C. Pickering is not excluded from the school's grievance procedure

Pickering contends in her brief that the school's grievance policy does not apply to a dispute between the school's administrator, Pickering, and the school board. In support of this argument, Pickering relies exclusively on the language of the school's grievance procedure. The procedure addresses grievances by an employee:

> The Board will provide an opportunity at its regular and/or special meetings for employees to present grievances for consideration and response.
>
> Any employee who requests a hearing before the Board to complain of the employee's conditions of employment, the failure to promote, or termination may do so by submitting a request to the School Administrator [Pickering] within ten (10) calendar days of the incident or his or her receipt of notification of the event that forms the basis of the person's complaint. The Board may hear the complaint at a regular or special Board meeting mutually convenient to the School and the employee, and as permitted by law. The board will hear grievances involving appointment, employment, evaluation, reassigned duties, discipline, or dismissal/termination of an employee in closed session unless the employee makes a written request that the hearing be conducted in open session.

The school's grievance procedure also provides for the submission of documents, the right to be represented by counsel, and time limits on the employee's presentation of the grievance and the administration's response. The procedure requests that the employee submit any documents she intends to rely on at the meeting at least one week before the meeting. Finally, it provides that the board will provide a response to the employee within twenty days of the meeting at which the employee's grievance is presented.

We do not agree that the school's grievance procedure does not apply to Pickering's complaints. The procedure specifically states that "[a]ny employee" may request a hearing by submitting the request to the school administrator within the ten-day period, and it specifically lists "the employee's conditions of employment" and "termination" among the topics upon which a grievance may be

filed. By its plain language, the grievance procedure applied to Pickering and the complaints she maintains here. *See Davis v. Dallas Cnty. Schs.*, 259 S.W.3d 280, 283–84 (Tex. App.—Dallas 2008, no pet.) (rejecting argument that procedure that authorized grievance concerning "conditions of work" did not apply to retaliatory discharge claim); *cf. City of Houston v. Williams*, No. 09-0770, 2011 WL 923980, at *15 (Tex. Mar. 18, 2011) (holding that grievance procedures in collective bargaining agreement did not apply to retired firefighters, where procedures only allowed for grievance by union or "bargaining unit firefighter," which was defined to include only full-time employees); *see also Tucker v. City of Houston*, No. 01-00-01194-CV, 2001 WL 754487, *2–3 (Tex. App.—Houston [1st Dist.] July 5, 2001, pet. denied) (holding that city's appeal procedure applied to employee and employee's letter stating that he would not pursue appeal provisions of city's procedure did not initiate grievance or appeal procedure).

We can, however, see how the procedure may have left Pickering uncertain as how she should go about requesting a hearing, since she is the person to whom such requests are submitted under the policy. On July 27, 2009, the school sent Pickering a copy of the grievance procedure and requested that if she wished to submit a grievance, she submit it to the school board president, Dwyer, at the address provided in the letter. While Pickering did not have this information when she sent the July 22 letter that she contends was sufficient to initiate the school's

grievance procedure, she did send that letter to Dwyer and the other board members.

We conclude there was some uncertainty in the policy as to whom Pickering should submit her request for hearing, at least until July 27, 2009. But this uncertainty did not prejudice her because her letter was sent to the appropriate official. More importantly, such uncertainty does not excuse her from her obligation to initiate a grievance under the school's grievance policy. *See Univ. of Tex. Med. Branch v. Hohman*, 6 S.W.3d 767, 775 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.) ("When it is unclear whether the employer has a post-termination grievance procedure, or it is unclear what the procedure is, and the terminated employees timely notify the employer that they are invoking the grievance procedure, terminated employees have adequately implicated the grievance procedures.") (citing *Beiser v. Tomball Hosp. Auth.*, 902 S.W.2d 721, 724 (Tex. App.—Houston [1st Dist.] 1995, writ denied)); *see also Berry v. Bd. of Regents of Tex. S. Univ.*, 116 S.W.3d 323, 325 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("To the extent the steps in such a [grievance] procedure are unclear, as in this case, an employee's request to ranking officials of the employer to invoke the procedure (*i.e.*, whatever it may be) can hardly be denied effect, but an employee is not relieved of the requirement to initiate a grievance."). The school's grievance procedure clearly informed Pickering that to initiate a grievance

she needed to request a hearing before the school board. We therefore review the evidence to determine if Pickering submitted a request for a hearing before the school board to any board member or other appropriate person associated with the school.

D. Pickering did not comply with the school's grievance procedure

Pickering's petition asserts two incidents on which her claims rest: the July 9 corrective action plan and Pickering's August 3 "constructive discharge." In its plea to the jurisdiction, the school asserts that Pickering failed to initiate a grievance within ninety days of both incidents, as required by the Whistleblower Act. TEX. GOV'T CODE ANN. § 554.006(b).[4] We therefore turn to that issue.

1. Pickering's alleged constructive discharge

School board president Dwyer's affidavit states that Pickering did not initiate a grievance relating to her alleged August 3, 2009 constructive discharge. The only communication in the record that makes any reference to Pickering's resignation or constructive discharge is her August 3rd resignation letter, which does not request a hearing or make any mention of a grievance or appeal, though she had a copy of the grievance procedure at that time. Pickering's timeline of

[4] Both the statute and the school's grievance procedure allow for this deadline to run from the date an incident is discovered through reasonable diligence, but the record establishes that Pickering was aware of these incidents as of July 9 and August 3, respectively.

events in her petition does not indicate she had any communications with the school board after her August 3rd resignation. Nor does she contend on appeal that she initiated or attempted to initiate a grievance with respect to her August 3rd resignation. The trial court's ruling is expressly based on Pickering's July 22 letter, which predated Pickering's resignation. This letter does not reference Pickering's resignation. The record thus establishes that Pickering did not initiate a grievance with respect to the August 3, 2009 constructive discharge alleged in her petition. *See Jordan v. Ector Cnty.*, 290 S.W.3d 404, 406 (Tex. App.—Eastland 2009, no pet.) (holding that grievance filed before employee's termination could not satisfy section 554.006 with respect to her whistleblower claim based on retaliatory termination). The trial court therefore erred in denying the school's plea to the jurisdiction with respect to Pickering's constructive discharge claim.

2. Pickering's alleged demotion

On appeal, Pickering relies extensively on her July 9 letter to the school board to show that she initiated a grievance regarding her "demotion" via the corrective action plan. But we cannot determine whether this letter was sufficient to initiate grievance because we cannot consider its contents, which were not made part of the record. *See Sowell*, 263 S.W.3d at 38; *Till*, 10 S.W.3d at 733–34. Although the letter's existence is not disputed, the mere existence of a letter from Pickering to the school board does not establish compliance with the school's

grievance procedure. We cannot tell whether the letter notified the school that Pickering sought to invoke its grievance procedure. *See Hohman*, 6 S.W.3d at 775 (noting that, when grievance procedure is unclear, employee may satisfy statutory requirement by timely notifying employer that she is invoking the grievance procedure); *Berry*, 116 S.W.3d at 325 (noting that when grievance procedures are unclear, an employee's request to ranking officials to invoke the grievance procedure will be effective). The July 9 letter, therefore, is not evidence that Pickering initiated the school's grievance policy for her alleged demotion.

In her July 22 letter, relied on by the trial court, Pickering complained of the board's negative appraisal of her performance and specifically stated that Pickering "appeals the decision to place her on a professional growth plan," but does not contend that such action constituted a demotion. She then requested that "as part of that appeal, she be afforded due process, meaningful hearing pursuant to the mandates of *Ferguson v. Thomas*, before an impartial and academically oriented hearing officer or panel." Essentially, Pickering communicated a desire to appeal the school board's decision to place her on a corrective action plan but not a desire to do so through the school's grievance procedure, which only entitled her to a hearing before the board. Instead, Pickering's counsel wanted the school to create a certain type of hearing procedure for Pickering so that her claims could be heard

by a different authority, presumably because her complaints related to alleged misconduct by board members themselves.

Although Pickering's counsel represented that Pickering had a due process right to this type of hearing, he provided no basis for that assertion. The evidence demonstrates that Pickering was an at-will employee of the school. At-will employees generally have no property right in their continued employment that will support a due process claim, and the existence of a grievance procedure does not, alone, create such a property right. *See Cnty. of Dallas v. Wiland*, 216 S.W.3d 344, 353–54 (Tex. 2007) (stating that administrative system that provides at-will employees procedures for hearing and deciding grievances does not, alone, create property rights); *Trostle v. Combs*, 104 S.W.3d 206, 211 (Tex. App.—Austin 2003, no pet.) ("A protected property interest in employment, process, or benefit exists only when an employee has a 'legitimate claim of entitlement' to the employment, process, or benefit. . . . The presumption that employment in Texas is at will is difficult to overcome.") (internal citations omitted); *see also Hitchcock v. Bd. of Trs. Cypress-Fairbanks Indep. Sch. Dist.*, 232 S.W.3d 208, 217–18 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (rejecting due process, open courts, and equal protection challenges to school's fifteen-day deadline for initiating grievance procedure).

In her July 27 response to Pickering's July 22 letter, the school's counsel told Pickering that the due process rights she invoked were not applicable to her as an at-will employee. The school's counsel invited Pickering to initiate a grievance pursuant to the school's grievance procedure, which she provided to Pickering as an attachment to the letter, and advised Pickering on where to send a request for hearing. Pickering did not respond or take further action to initiate a grievance. Pickering's only further communication with the school was her August 3 resignation letter.

We conclude that Pickering's July 22 letter put the school on notice that Pickering wished to challenge the board's decision to place her on a corrective action plan. *See Hitchcock Indep. Sch. Dist. v. Walker*, No. 01-10-00669-CV, 2010 WL 5117912, at *6 (Tex. App.—Houston [1st Dist.] Dec. 16, 2010, no pet.) (holding that properly filed grievance contained sufficient reference to basis for retaliation claim to satisfy section 554.006's initiation requirement).[5] But Pickering's request for a hearing before a different grievance authority, and her decision not to take any further action after the school declined that request and

[5] The facts of this case are, in some ways, the inverse of the facts in *Walker*. In *Walker* it was undisputed that Walker properly filed a level one grievance according to the school's grievance procedure, but the parties disputed whether the substance of that grievance was sufficient to put the school on notice of Walker's whistleblower claim. *Walker*, 2010 WL 5117912, at *6. Here, there is little dispute that the school understood the nature of Pickering's retaliation complaint, but the parties disagree about whether Pickering properly filed a grievance in accordance with the school's grievance procedure.

provided her with a copy of the school's grievance procedure, demonstrates that Pickering neither expected nor desired a hearing before the school board—the only grievance process recognized in the school's grievance procedure. The school's July 27 letter made Pickering aware that it did not believe she had initiated a grievance, and her subsequent conduct demonstrates that she also did not believe she had initiated the school's grievance procedure by her July 22 letter. She never responded that she felt her July 22 letter was sufficient and no request to Dwyer was necessary. She never inquired when her hearing before the board would be. She never submitted any documents in anticipation of a hearing. Rather, her conduct indicates that she believed she was entitled to an independent grievance authority and was unwilling to have her grievance heard by the school board, as provided in the school's grievance procedure.

Merely complaining of the school board's action, without attempting to comply with the grievance procedure provided by the school, does not satisfy section 554.006's requirement that a claimant initiate a grievance or appeal before filing suit. *See Ruiz v. Austin Indep. Sch. Dist.*, No. 03-02-00798-CV, 2004 WL 1171666, at *7 (Tex. App.—Austin May 27, 2004, no pet.) (holding that employee who had copy of grievance procedure did not satisfy section 554.006 by raising concerns in meetings with school and its attorneys when employee failed to formally initiate a grievance). The purpose of section 554.006's initiation

requirement is "to afford the governmental entity with the opportunity to investigate and correct its errors and to resolve disputes before incurring the expense of litigation." *Walker*, 2010 WL 5117912, at *6. The school's grievance procedure provided a process by which the school could conduct such an investigation, allowing for the presentation of the grievance by the complainant or her counsel, response from a representative of the administration, and the submission of documents. By declining to participate in a hearing before the school board, Pickering denied the school a full opportunity to investigate her allegations and to adequately develop a basis for resolving her complaints. *See Aguilar v. Socorro Indep. Sch. Dist.*, 296 S.W.3d 785, 789–90 (Tex. App.—El Paso 2009, no pet.) (holding that claimant did not satisfy section 554.006's initiation requirement when she filed a grievance but then refused to participate in school's arbitration hearing and observing that "[b]y not complying with the arbitrator's requests for information or presenting information that would allow the arbitrator to reach a decision, Aguilar's action did not serve the purpose of the statute—to afford the employer 'the opportunity to correct its errors by resolving disputes before being subjected to the expense and effort of litigation.'").

Pickering contends that the school owed her a duty to respond to her "appeal" by informing her that it was denying her request for a "meaningful hearing" that complied with due process before "an impartial and academically

oriented hearing officer or panel" but would grant her a hearing before the board or a hearing pursuant to the written grievance procedure. But the statute places the onus on Pickering to initiate the grievance procedure, and the school provided her with its written grievance procedure and told her where to send her request for hearing. *See* TEX. GOV'T CODE ANN. § 554.006(a) ("A public employee must initiate action under the grievance or appeal procedures of the employing state or local governmental entity . . ."). Pickering elected not to do so.

We hold that a claimant does not properly initiate a grievance when she communicates her complaints but conditions her request for appeal on the provision of a grievance process that she knows to be different than the process in the school's grievance procedure and declines to initiate a grievance under the school's existing procedure after it has been provided to her. *See Ruiz*, 2004 WL 1171666, at *7 (holding claimant did not initiate grievance procedure by making school aware of her whistleblower claims when school informed her of its grievance procedure and claimant failed to take further action); *cf. Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 353–54 (Tex. 2005) ("We also decline to adopt our dissenting colleague's view that administrative procedures can be ignored if a creative applicant convinces a court that some other procedure was just as good. An employee's letter, phone call, or chance conversation with a member might

give a board 'the first chance to consider his grievance,' but exhaustion of administrative remedies generally requires compliance rather than avoidance.").[6]

3. Summary

There were no disputed facts in this case: the parties agree on what communications were made and when. The dispute here is over the legal import of those communications. Specifically, did the July 22 letter initiate the school's grievance procedure? We hold that the evidence—the grievance policy, the July 22 letter, the July 27 letter, the August 3 letter, and the affidavit—satisfied the school's initial burden of proving that Pickering did not initiate a grievance with respect to its July 9 corrective action plan or Pickering's August 3 resignation. *See Miranda*, 133 S.W.3d at 228; *Porretto*, 251 S.W.3d at 711. The burden then shifted to Pickering to come forward with evidence raising an issue of fact as to whether she initiated a grievance under the school's grievance procedure. *See Miranda*, 133 S.W.3d at 228; *Patterson*, 251 S.W.3d at 711. Pickering presented no evidence, and we find no evidence in the record, raising a fact question as to whether she "initiate[d] action under the [school's] grievance or appeal procedures." TEX. GOV'T CODE ANN. § 554.006(a). The trial court therefore erred in denying the

[6] Although *McCarty* analyzes whether a party has exhausted administrative remedies, rather than whether a party has initiated an administrative process, its reasoning is analogous to the extent that a whistleblower claimant may be required to comply with the employer's procedure for initiation of a grievance rather than engaging in conduct aimed at avoiding, rather than commencing, the process outlined in the employer's grievance or appeal procedure.

school's plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 228; *Patterson*, 251 S.W.3d at 711.

Conclusion

We hold that the evidence before the trial court on the school's plea to the jurisdiction conclusively established that Pickering failed to initiate a grievance in accordance with the school's grievance procedure. Because initiation of a grievance or appeal is a jurisdictional prerequisite to suit under the Whistleblower Act, the trial court erred in denying the school's plea to the jurisdiction. We reverse the trial court's order and dismiss Pickering's claims against the school for lack of jurisdiction.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Brown and Huddle.