Opinion issued December 16, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00669-CV

HITCHCOCK INDEPENDENT SCHOOL DISTRICT, Appellant

V.

DOREATHA WALKER, Appellee

On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Case No. 09CV1439

MEMORANDUM OPINION

Appellant Hitchcock Independent School District appeals the trial court's denial of its plea to the jurisdiction, arguing that appellee Doreatha Walker failed to comply with the statutory prerequisites of the Texas Whistleblower Act. *See*

TEX. GOV'T CODE ANN. §§ 554.005–.006 (Vernon 2004). In two issues, HISD contends that the trial court erred in denying its plea to the jurisdiction because (1) Walker did not properly file a grievance as required by section 554.006(a), and (2) she failed to file suit within the statutory limitations period established by section 554.005. We affirm.

Background

Walker began working for HISD in July 2008 as the director of the district's Head Start program. She began complaining about the possibility of mold growth in the Head Start building later that year, and in February and March 2009, she experienced health problems attributable to the mold. A complaint concerning possible mold growth was filed with the Galveston County Health District by a parent of a Head Start student, and specialist Twyla Issac investigated. Walker spoke with Issac about mold in the building and said that she had gone to the doctor because of respiratory problems. Walker also exchanged numerous emails with HISD Superintendent Dr. Mike Bergman and the HISD Board of Trustees complaining about poor air quality in the building, as well as perceived retaliatory acts taken by Bergman after Walker told the investigator that she believed that mold in the building was making her sick. Walker was suspended on May 1, 2009.

Two days later, Walker filed a complaint with the Texas Education Agency. She believed that HISD was making fraudulent reimbursement requests to the

state, and she alleged that HISD was requesting and receiving reimbursement for funds that had not actually been paid by the district.

Two weeks after the TEA complaint, Bergman advised the HISD Board that he would be changing his recommendation regarding Walker's employment contract and accused Walker of insubordination and incompetency. Walker believed this was a retaliatory act, and pursuant to HISD Board policies she filed a level-one grievance the next day. Across the top of the form, Walker wrote, "Whistle Blower Complaint—Violation of Law." The form required her to state specific facts supporting her complaint. In the space provided, Walker described a conversation she had with the HISD business manager regarding the fraudulent reimbursement claims, and in the margin she also wrote, "And mold." The form contains no other reference to mold and does not provide any specific information about underlying facts that would support a claim of retaliation for complaining about mold.

Walker filed a pro se petition alleging a cause of action under the Whistleblower Act. In her original petition, her whistleblower claim was based on her allegation that HISD took adverse personnel action against her after she reported fraud by HISD to the TEA. Six days after Walker filed suit, the HISD Board of Trustees terminated her employment.

Walker subsequently filed numerous amendments to her petition. In her fourth amended petition, she alleged, for the first time, an additional whistleblower claim based on reports of mold she made to the Galveston County Health District and the Texas Department of Health. HISD filed a plea to the jurisdiction, arguing (1) that the trial court did not have jurisdiction over Walker's mold-based whistleblower claim because she did not properly initiate grievance procedures as required by section 554.006(a) of the Texas Whistleblower Act, and (2) that the whistleblower claim also was not filed within the limitations period. In response, Walker filed a motion to strike the plea, arguing that she had complied with the statutory prerequisites of the Act and that her mold-based whistleblower claim was not barred by limitations.

The trial court denied the plea to the jurisdiction, and HISD filed this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (Vernon 2002). On appeal, HISD reasserts in two issues the same arguments that the trial court erred in denying the plea to the jurisdiction.

Analysis

I. Plea to the Jurisdiction

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case 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.). We review the trial court's ruling on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

When the plea challenges the sufficiency of the claimant's pleadings, the trial court must construe the pleadings liberally in the claimant's favor and deny the plea if the claimant has alleged facts affirmatively demonstrating jurisdiction to hear the case. *Id.* at 226–27. If the pleadings are insufficient but do not affirmatively demonstrate incurable jurisdictional defects, the court should afford an opportunity to replead. *Id.* But if the pleadings affirmatively negate the existence of jurisdiction, the plea may be granted. *Id.* at 227.

If, however, the plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties. *Id.* If the evidence creates a fact question regarding jurisdiction, then the trial court must deny the plea, and the fact issue will be resolved by the fact-finder. *Id.* at 227–28. But if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

In reviewing the evidence presented in support of the plea to the jurisdiction, we take as true all evidence favorable to the nonmovant. *Id.* We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.* "[T]his

standard generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c) . . . . By requiring the [political subdivision] to meet the summary judgment standard of proof in cases like this one, 'we protect the plaintiffs from having to put on their case simply to establish jurisdiction.'" *Id.* (quoting *Bland*, 34 S.W.3d at 554); *Dallas Cnty. v. Wadley*, 168 S.W.3d 373, 377 (Tex.App.—Dallas 2005, pet. denied) ("[In a plea to the jurisdiction,] the burden is on the government to meet the summary judgment standard of proof.").

II. Texas Whistleblower Act

a. Initiation of administrative remedies

The Texas Whistleblower Act requires a claimant to "initiate action under the grievance or appeal procedures of the employing state or local governmental entity relating to suspension or termination of employment or adverse personnel action" before filing suit. TEX. GOV'T CODE ANN § 554.006(a). This Court has previously held that this statutory prerequisite to suit is jurisdictional. *Barth*, 178 S.W.3d at 161–62; *Tex. S. Univ. v. Carter*, 84 S.W.3d 787, 792 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Although section 554.006 does not require the claimant to exhaust grievance or appeals procedures before filing suit, it does require that such procedures be timely initiated in order to afford the employer an opportunity to resolve the dispute and correct errors before litigation. *Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631, 632 (Tex. 2005); *City of*

Fort Worth v. Shilling, 266 S.W.3d 97, 102 (Tex. App.—Fort Worth 2008, pet. denied). "[T]he Act does not dictate what actions are required to 'initiate' the appeals procedure." *Moore v. Univ. of Houston-Clear Lake*, 165 S.W.3d 97, 102 (Tex. App.—Houston [14th Dist.] 2005 no pet.); *see City of Austin v. Ender*, 30 S.W.3d 590, 594 (Tex. App.—Austin 2000, no pet.). And the statute does not require the use of particular words, nor does it require the employee to state that his grievance or appeal is based on the Whistleblower Act. *Moore*, 165 S.W.3d at 102; *Ender*, 30 S.W.3d at 594. What is required is that the employer be given reasonable notice, that is, fair notice "of the employee's intent to appeal a disciplinary decision and notice of which decision . . . the employee intends to appeal." *Tarrant Cnty. v. McQuary*, 310 S.W.3d 170, 177 (Tex. App.—Fort Worth 2010, pet. denied); *see also Med. Arts Hosp. v. Robinson*, 216 S.W.3d 38, 44 (Tex. App.—Eastland 2006, no pet.); *Montgomery Cnty. Hosp. Dist. v. Smith*, 181 S.W.3d 844, 850 (Tex. App.—Beaumont 2005, no pet.)

In this case, HISD acknowledges that Walker filed a grievance complaining about adverse personnel action that was taken after she made reports to the TEA concerning reimbursement claims made by the district. But HISD argues that the trial court lacks jurisdiction over Walker's mold whistleblower claim because she did not properly initiate grievance procedures with the school district on that subject before filing suit. Specifically, HISD argues that Walker's written

grievance did not contain an allegation that she was suspended for reporting mold to an outside law enforcement authority, and therefore HISD did not have adequate notice of a potential whistleblower action based on those facts. Walker contends that she did properly initiate grievance procedures prior to filing suit and that HISD received adequate notice of her complaint through the numerous emails and letters she exchanged with both the superintendent and the school board, the employee complaint form (which included a reference to mold), and the grievance hearings in which she spoke at length about mold.

HISD's employee-grievance policy encourages employees to informally resolve complaints before taking formal action under the grievance procedures. Prior to filing her grievance, Walker exchanged emails with Bergman and with Monica Cantrell, the president of the HISD Board of Trustees, in which she repeatedly referenced mold, her illness, and alleged retaliation by Bergman. Walker asked Bergman by email to notify the board that children and staff members were complaining about mold in the building. She sent an email to Cantrell with the subject heading "Retaliation Report," stating:

> I am reporting to you as the Board President "Retaliation from Dr. Bergman" . . . . I love my job and I do not want to lose it because of retaliation and fabrications. I do not have a serious health condition that stops me from performing my job as Dr. Bergman stated . . . .

Walker exchanged several other emails with Cantrell and the other members of the board to which she attached an air quality report and stated: "I thought it would be good to send this [report] to everyone . . . since this is what the retaliation is based on."

Walker was suspended on May 1, 2009. Prior to that date, she discovered the reimbursement requests made by the district, and she filed a report with the TEA, notifying them that she believed HISD was committing fraud against the state. She filed a level-one grievance on May 20, which stated that the facts supporting her allegations of retaliation by the district were supported by the report she made to the TEA "[a]nd mold." The words "and mold" written on the form were the only clue indicating a possible mold-related whistleblower claim, but HISD was already aware that Walker had complained to both Bergman and the Galveston County Health District inspector about mold. Additionally, the board had already been informed that Walker believed that Bergman was retaliating against her because she had complained about mold.

Departing from its own grievance policy,[1] HISD required Walker to present her grievance claim to Bergman at a level-one conference, even though she

[1] HISD's grievance policy states:

> Whistleblower complaints shall be filed within the time specified by law and may be made to the Superintendent or designee beginning at Level Two. Time lines for the employee and the District

objected. At the conference, Walker spoke primarily about her report to the TEA concerning HISD's fraudulent reimbursement claims. But she mentioned the reports she made about mold and discussed at length her perception of retaliatory acts Bergman had taken against her over the course of several months. Walker also described documents, including ten emails about mold, that she believed were relevant to her whistleblower complaint.

Walker appealed the denial of her complaint to the HISD Board of Trustees. During the appeals hearing, which she recorded, Walker stated that she initially complained to Bergman about mold in September 2008. She also stated that she spoke with the inspector from the Galveston County Health District on February 12, 2009, and described subsequent retaliatory actions taken by Bergman.

HISD contends that Walker has not satisfied the statutory requirements of section 554.006 because she did not describe her mold whistleblower complaint in detail on the initial grievance form; she did not allege during her conference with Bergman that her suspension or any other adverse employment action was in

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> set out in this policy may be shortened to allow the Board to make a final decision within 60 calendar days of the initiation of the complaint.
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> Complaints alleging a violation of law by a supervisor may be made to the Superintendent or designee. Complaints alleging a violation of law by the Superintendent may be made directly to the Board or designee.

retaliation for reporting mold to an outside authority; and the only reason she mentioned mold during the conference was to explain why she had been absent from work during late February and March. Based on these contentions, HISD argues the trial court lacked jurisdiction over Walker's mold-based whistleblower claim because she failed to satisfy the statutory requirement of initiating a grievance before filing suit on the claim. *See* TEX. GOV'T CODE ANN. § 554.006(a). To support its argument, HISD relies primarily on *Tarrant County v. McQuary*, 310 S.W.3d 170 (Tex. App.—Fort Worth 2010, pet. denied), and *Medical Arts Hosp. v. Robinson*, 216 S.W.3d 38 (Tex. App.—Eastland 2006, no pet.).

In *McQuary*, the plaintiff, a nurse, sued her former employer alleging a violation of the Texas Whistleblower Act. *McQuary*, 310 S.W.3d at 172. McQuary sent two letters to her employer in which she complained that she had not received any employee evaluations and that her immediate supervisor instructed her to disregard her job description. *Id.* at 174–76. The employer filed a plea to the jurisdiction arguing that McQuary did not satisfy the statute's jurisdictional prerequisites because she failed to provide notice during the administrative appeal of her termination that she was alleging retaliation in violation of the Act. *Id.* The Fort Worth Court of Appeals reversed the trial court's denial of the plea because the communications between McQuary and her

employer did not put it on notice that a whistleblower claim was being asserted. *Id.* at 172, 177–79.

In *Robinson*, the Eastland Court of Appeals reversed the trial court's denial of a plea to the jurisdiction because the plaintiff did not provide any notice to her employer that she believed she was being retaliated against for reporting illegal activity to the Texas Labor Board or that she intended to assert a whistleblower claim against them. *Robinson*, 216 S.W.3d at 43–44. Robinson spoke with her supervisor about her termination and told him that she disagreed with his decision but did not indicate to him or to her employer that she intended to file a whistleblower claim. *Id.* at 40. She also failed to file a written grievance or bring her retaliation claim to her employer's attention before filing her lawsuit. *Id.* at 41.

This case is distinguishable from both *McQuary* and *Robinson* because HISD was aware of both Walker's reports about mold problems and her allegation that she had suffered retaliation as a consequence. Walker met with an inspector from the Galveston County Health District and reported that she, her staff, and her students had been negatively affected by mold in the building. Walker emailed Bergman to say that he needed to notify the board that a number of children and staff members were sick because of mold and that requiring them to attend school and work in the building was a violation of the law. She sent an email to all of the members of the HISD Board of Trustees, and attached the air quality report. She

also reported that she perceived retaliation from Bergman, which she believed was based on her complaints about mold. She filed a written grievance that included the words "and mold." And throughout the grievance process, which included a conference with Bergman and a hearing before the HISD Board of Trustees, Walker repeatedly mentioned complaints about mold and perceived retaliation stemming from both her reports of mold and her report to the TEA. Although some of these references are, as HISD contends, made only in passing, the number of times she mentioned mold during the formal grievance hearings when combined with her emails and letters to Bergman and the board, signaled multiple whistleblower claims and were adequate to prompt the board to investigate her complaints further. *See Moore*, 165 S.W.3d at 103 (concluding that employer was not prevented from investigating employee's claim when the claimant raised facts supporting whistleblower claim at grievance hearing).

In determining whether Walker's actions satisfied the requirements of section 554.006, we construe all of the evidence relevant to the jurisdictional issue in her favor. *See Moore*, 165 S.W.3d at 103; *see also City of New Braunfels v. Allen*, 132 S.W.3d 157, 161 (Tex. App.—Austin 2004, no pet.) (recognizing that the Act should be liberally construed to effect its purpose because it is remedial in nature). The purpose of the initiation provision of the Act 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. *Moore*, 165 S.W.3d 103; *Ender*, 30 S.W.3d at 594. Although the statute requires that the employer be given fair notice of an employee's unlawful retaliation claim, *McQuary*, 310 S.W.3d at 179, it does not require the employee to use particular words, nor does it require a specific statement that a whistleblower claim is contemplated. *Moore*, 165 S.W.3d at 102; *Ender*, 30 S.W.3d at 595 ("We refuse to hold handwritten complaints drafted by employees to the same exacting standard we might apply to pleadings drafted by attorneys."). Walker did not specifically state in her written grievance that Bergman had retaliated against her for reporting mold to the Galveston County Health District and the Texas Department of Health. But we cannot conclude that HISD was deprived of an opportunity to clarify or investigate Walker's allegations. *See Moore*, 165 S.W.3d at 103. The words "and mold," considered in the context of all of the emails and letters received by Bergman and the board members, and the statements concerning retaliation for mold reports made by Walker throughout the grievance process were sufficient to put HISD on notice of her mold whistleblower claim. Accordingly, we hold that Walker satisfied the section 554.006 requirement of initiation of procedures for administrative remedies. *See* TEX. GOV'T CODE ANN. § 554.006. We overrule HISD's first issue.

b. Limitations

In its second issue, HISD argues that even if Walker properly initiated the appeals process, limitations barred her mold-based whistleblower claim.

Section 554.005 provides that "a public employee who seeks relief under [the Texas Whistleblower Act] must sue not later than the 90th day after the date on which the alleged violation of [the Act] occurred or was discovered by the employee through reasonable diligence." TEX. GOV'T CODE ANN. § 554.005. While the employee is participating in the employer's grievance or appeals process, the statute of limitations is tolled. *Id.* § 554.006(c). If the employer has not made a final decision before the 61st day after the procedures are initiated, the employee may elect to exhaust applicable procedures or terminate procedures under section 554.006(a).[2]

The limitations provision is mandatory but not jurisdictional. *Dallas Cnty. v. Hughes*, 189 S.W.3d 886, 888 (Tex. App.—Dallas 2006, pet. denied). The proper avenue for raising the limitations defense is in a motion for summary judgment, not a plea to the jurisdiction. *Id.*; *Moore*, 165 S.W.3d at 100; *Allen*, 132

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[2] TEX. GOV'T CODE ANN. § 554.006(c). If the employee elects to exhaust the employer's grievance or appeals procedures, the employee must sue "not later than the 30th day after the date those procedures are exhausted . . . ." *Id.* § 554.006(d)(1). If, however, the employee elects to terminate the employer's grievance procedures, the employee must sue within the time remaining under section 554.005. *Id.* § 554.006(d)(2).

S.W.3d at 161–64. Because limitations is a defensive issue rather than a jurisdictional one, the trial court correctly denied HISD's assertion of limitations through a plea to the jurisdiction. We overrule HISD's second issue.

Conclusion

We affirm the trial court's order denying HISD's plea to the jurisdiction.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Higley and Massengale.