Opinion issued August 25, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00088-CV

CITY OF HOUSTON, Appellant

V.

KIMBERLEY R. TRIMMER-DAVIS, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Case No. 2010-11410

MEMORANDUM OPINION

This is an appeal from the trial court's ruling on a plea to the jurisdiction. Kimberley R. Trimmer-Davis sued the City of Houston, alleging that she suffered adverse employment actions, including termination, in retaliation for her opposition to race- and gender-based discrimination. The City filed a plea to the jurisdiction, in

which it argued that it had legitimate nonretaliatory reasons for (1) imposing a one-day suspension based on a finding that Trimmer-Davis was untruthful in her discrimination complaint, (2) failing to expunge the untruthfulness citation from its recordkeeping after the one-day suspension was overturned, and (3) terminating her employment.

The trial court granted the plea as to the City's recordkeeping and denied the plea as to the one-day suspension and termination. Both the City of Houston and Trimmer-Davis appealed. The City argues that Trimmer-Davis failed to raise a question of fact as to whether its nonretaliatory reasons for her suspension and termination were pretextual. Trimmer-Davis argues that there is no evidence of a legitimate nonretaliatory reason why the City maintained a record of her truthfulness and, alternatively, that its argument for maintaining the record is pretext.

We conclude that the court has jurisdiction over Trimmer-Davis's claims regarding the one-day suspension and the City's recordkeeping but not over the claim regarding her termination. We affirm the trial court's denial of the plea to the jurisdiction as to the one-day suspension. We reverse the trial court's grant of the plea to the jurisdiction as to the City's recordkeeping, and we reverse the trial court's denial of the plea to the jurisdiction as to Trimmer-Davis's termination. We remand to the trial court for further proceedings.

Background

I. Trimmer-Davis was suspended for one day after an investigation concluded she was untruthful in her discrimination complaint.

Kimberley Trimmer-Davis worked for the Houston Police Department in the preliminary recruiting unit of the Human Resources Division. She reported to Sgt. Diana Barfield, and she was the only African-American woman in the unit. Trimmer-Davis alleged that while working for Sgt. Barfield, she was denied professional opportunities and her performance was scrutinized more harshly than similarly situated peers. After she was involuntarily transferred to another unit, Trimmer-Davis filed an employment discrimination complaint with the Texas Workforce Commission Civil Rights Division alleging discrimination based on race and gender. She also raised these issues in a complaint filed with the chief of police.

The Internal Affairs Department ("IAD") investigated Trimmer-Davis's allegations. As part of the investigation, Trimmer-Davis filed a voluntary statement alleging that Sgt. Barfield had discriminated against her. The investigation determined that her allegations were unfounded, and the administrative disciplinary committee recommended that Trimmer-Davis be disciplined for untruthfulness, which is a violation of a police department general order. The chief of police accepted the recommendation of the Administrative Disciplinary Committee and imposed a one-day suspension.

II. Trimmer-Davis prevailed on appeal of the one-day suspension, but the untruthfulness finding remained on her record.

Trimmer-Davis appealed to the Civil Service Commission, which overruled the one-day suspension, concluding that it was without "a sufficient basis." Although Trimmer-Davis prevailed on appeal, only the discipline was overruled, and the untruthfulness citation remained on her "complaint history form" in her employee record. For about a year, her applications to transfer to other departments were rejected, sometimes specifically because of the untruthfulness finding. Her request to remove the finding from her complaint history form was denied, but a copy of the final order overruling her suspension was added to the investigation file.

III. Trimmer-Davis was terminated after failing to comply with instructions regarding random drug testing.

Trimmer-Davis sued the City of Houston based on adverse employment actions. About three weeks later, she was selected for random drug testing.

A. The drug tests

According to police department policies, Trimmer-Davis was required to report for testing immediately and provide a urine sample within two hours from the time when she and her supervisor signed the relevant paperwork. She was informed, in writing, that failure to timely provide a sample would be reported as a refusal to test and could result in termination. She was also informed in writing that consumption of an excessive amount of fluid before the test could result in a diluted

sample, and if her sample were diluted, another sample would be required. If the second sample were diluted, an investigation could be initiated.

Trimmer-Davis did not immediately report for testing. She claimed she returned to her home to attend to a health-related personal matter that she was uncomfortable discussing with her male supervisor. She later reported to a testing facility and gave her sample 2 hours and 55 minutes after she signed the acknowledgement form. Her sample was diluted.

Several days later, Trimmer-Davis was again asked to submit to drug testing. Her supervisor reviewed the departmental order regarding drug testing, and Trimmer-Davis signed the acknowledgment form. As before, Trimmer-Davis returned to her home before reporting for testing. This time, her sample was 27 minutes late, and again it was diluted. Trimmer-Davis was required to give a third sample; this time, two sergeants accompanied her to the collection site location.

B. The investigation and termination

An IAD investigation of the irregularities around the drug testing concluded that, on the day of the first test, Trimmer-Davis failed to use sound judgment by choosing to go to a collection site that was closed during one of the two hours in which she could give a sample. The investigation also found that she was insubordinate for going to her home instead of reporting immediately to a collection site. She was further insubordinate by reporting to the collection site late. This failure

to report for sample collection on time was "considered a refusal to take a drug test." As to the second test, the investigation found that Trimmer-Davis again failed to exercise sound judgment by not immediately reporting to a collection site. In addition, on the days of both the first and second tests, Trimmer-Davis was not available while on duty because she went to her residence without informing and obtaining authorization from a supervisor. The investigation also concluded that Trimmer-Davis was untruthful in two written administrative statements that she gave regarding the drug testing. Based on violations of multiple general orders, the chief of police terminated Trimmer-Davis.

IV. Trimmer-Davis alleged further retaliation in connection with her dismissal.

After her termination, Trimmer-Davis filed another discrimination complaint alleging retaliation related to the drug tests and her termination. The City notified the Texas Commission on Law Enforcement Office Standards and Education ("TCLEOSE") that Trimmer-Davis had been dishonorably discharged from her employment due to insubordination and untruthfulness. Trimmer-Davis amended her petition to include a claim that her termination was retaliatory.

Analysis

I. Standard of review on plea to the jurisdiction

A party may challenge a trial court's subject matter jurisdiction by filing a plea to the jurisdiction, which we review de novo. *Univ. of Tex. M.D. Anderson*

Cancer Ctr. v. McKenzie, 578 S.W.3d 506, 512 (Tex. 2019) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)). Ordinarily a plea to the jurisdiction challenges the plaintiff's pleadings, asserting that the alleged facts do not affirmatively demonstrate the court's jurisdiction. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). A plea to the jurisdiction may also challenge the existence of jurisdictional facts or implicate the merits of the plaintiff's cause of action. *See Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770–71 (Tex. 2018). "In those situations, a trial court's review of a plea to the jurisdiction mirrors that of a traditional summary judgment motion." *Mission Consol. Indep. Sch. Dist.*, 372 S.W.3d at 635. Because a plea to the jurisdiction is a dilatory plea, a plaintiff is not required to put on her case simply to establish jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). To avoid dismissal, a plaintiff must establish the existence of a genuine question of material fact on the jurisdictional issue. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 771.

II. Waiver of immunity under the TCHRA: the *McDonnell Douglas* test

Trimmer-Davis pleaded claims for retaliation under chapter 21 of the Texas Labor Code, previously known as the Texas Commission on Human Rights Act ("TCHRA"). *See* TEX. LAB. CODE §§ 21.001–.556. In the trial court, the City challenged jurisdiction based on governmental immunity.

A. Governmental immunity

Governmental units, like the City, are immune from suit unless the State consents. *See Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 770. "The TCHRA waives immunity, but only when the plaintiff states a claim for conduct that actually violates the statute." *Id.*; *see* TEX. LAB. CODE § 21.002 (8)(D) (defining "employer" to include a county, municipality, state agency, or state instrumentality). Thus, a defendant can challenge a trial court's subject matter jurisdiction by contesting the existence of a cause of action, which ordinarily will require the examination of jurisdictional evidence. *See Alamo Heights*, 544 S.W.3d at 770–71.

One of the purposes of the TCHRA is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964," and when analyzing a retaliation claim brought under the TCHRA, we may rely on analogous federal statutes and the cases interpreting them. *See* TEX. LAB. CODE § 21.001(1); *Mission Consol. Indep. Sch. Dist.*, 372 S.W.3d at 633–34. The TCHRA makes it unlawful for an employer to retaliate against a person who: "(1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing." TEX. LAB. CODE § 21.055. While a cause of action for retaliation under the TCHRA can be established with direct evidence, it is often established with circumstantial evidence

because "retaliatory intent is rarely overt," and "smoking guns are hard to come by." *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 764, 781–82.

B. The *McDonnell Douglas* test

In TCHRA cases that rely on circumstantial evidence, Texas courts apply the three-step burden-shifting evidentiary framework adopted by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for circumstantial-evidence cases brought under Title VII of the Civil Rights Act of 1964. *See Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 764 n.5. In the first step, when a plaintiff establishes, by a preponderance of the evidence, a prima facie case of retaliation, a rebuttable presumption of retaliation arises. *See id.* at 782. In the second step, the burden of production shifts to the defendant to rebut that presumption with evidence of a legitimate, nonretaliatory reason for the challenged adverse employment action. *See id.* In the third step, the burden of production shifts back to the plaintiff to prove that the reasons articulated by the defendant are merely pretext for retaliation. *See id.* The ultimate "burden of persuasion remains at all times" with the plaintiff. *Id.* "All elements of a TCHRA circumstantial-evidence claim are, perforce, jurisdictional." *See id.* at 783.

1. Prima facie case

To establish a prima facie case of a retaliation under the TCHRA, an employee must prove that: (1) she engaged in a protected activity; (2) an adverse employment

action occurred; and (3) a causal link existed between the protected activity and the adverse action. *See id.* at 782; *see Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 822 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

2. Legitimate nonretaliatory reason

To rebut the presumption that arises when the plaintiff makes a prima facie case, the defendant is required to produce evidence to support its legitimate nonretaliatory reason for the adverse employment action. *See Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 782; *Datar v. Nat'l Oilwell Varco, L.P.*, 518 S.W.3d 467, 478 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). The evidence must show that the employment action was not taken with retaliatory animus, but the decision need not be free from all error. *See Carlton v. Hous. Cmty. Coll.*, No. 01-11-00249-CV, 2012 WL 3628890, at *16 (Tex. App.—Houston [1st Dist.] Aug. 23, 2012, no pet.) (mem. op.) ("Misguided or ineffective investigations—even those that cause an aggrieved employee additional discomfort or distress—cannot support a retaliation claim absent evidence of a sinister motive on the part of the employer."); *see also Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 899 (5th Cir. 2002) (an employer "is entitled to be unreasonable so long as it does not act with discriminatory animus").

3. The stated reason is pretext for retaliation

Finally, as to the third step, Texas courts have applied a "but-for" standard of causation when considering circumstantial evidence that the defendant's articulated reasons for the adverse employment action are merely pretext for retaliation. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 783 (applying but-for causation standard as argued by the parties); *Chandler*, 376 S.W.3d at 823 (stating that retaliation plaintiff must show "but for" causal nexus between the protected activity and the adverse employment action). Thus, although the retaliation plaintiff need not show that her protected activity was the sole cause of the adverse employment action, she "must establish that, in the absence of [her] protected activity, [her] employer's prohibited conduct would not have occurred when it did." *Smith v. Harris Cty.*, No. 01-18-00247-CV, 2019 WL 1716418, at *5 (Tex. App.—Houston [1st Dist.] Apr. 18, 2019, no pet.) (mem. op.).

In some cases, the same circumstantial evidence that may support a prima facie case can be relevant to the showing that the defendant's nonretaliatory reason for the adverse employment action was pretextual. *E.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Ptomey v. Tex. Tech. Univ.*, 277 S.W.3d 487, 496–97 (Tex. App.—Amarillo 2009, pet. denied). Circumstantial evidence that the plaintiff's protected activity was a but-for cause of the employer's adverse action "may include (1) the employer's failure to follow its usual policies

and procedures in carrying out the challenged employment actions; (2) discriminatory treatment in comparison to similarly situated employees; (3) evidence that the stated reason for the adverse employment decision was false; (4) the temporal proximity between the employee's conduct and the challenged conduct; and (5) knowledge of an employee's discrimination charge or suit by those making the adverse employment decision." *Smith*, 2019 WL 1716418, at *5. However, at this stage, "the plaintiff must offer some evidence from which the jury could infer that retaliation was the real motive." *White v. Denton Cty.*, 655 Fed. Appx. 1021, 1025 (5th Cir. 2016).

III. The one-day suspension

A. The City challenges only the third step of *McDonnell Douglas* in this appeal.

In its second plea to the jurisdiction, the City offered nonretaliatory reasons for the alleged adverse employment actions to satisfy the second prong of *McDonnell Douglas*.[1] It then argued that Trimmer-Davis was unable to satisfy the

[1] The court initially assumed jurisdiction based on its conclusion that Trimmer-Davis made a prima facie case in multiple pleas and motions, all of which alleged that Trimmer-Davis could not make a prima facie case of retaliation under the first prong of the three-pronged *McDonnell Douglas* burden-shifting test. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (setting forth the procedure for assessing a disparate-treatment claim when direct evidence of discrimination or retaliation is lacking). The trial court found that Trimmer-Davis made a prima facie case and assumed jurisdiction.

After the Texas Supreme Court held that all three prongs of the *McDonnell Douglas* burden-shifting test are jurisdictional, *see Alamo Heights Independent School*

third prong of the *McDonnell Douglas* test by showing that the City's reasons were pretextual and that the protected activity was a but-for cause of the one-day suspension. The City has not raised a challenge on appeal about Trimmer-Davis's ability to make a prima facie case for retaliation. Trimmer-Davis has not argued that the City failed to proffer evidence of its legitimate nonretaliatory reason for the suspension. We therefore limit our review to the third step, whether Trimmer-Davis has met her burden to raise a question of fact about whether the City's reason for the one-day suspension was pretextual.

The City's legitimate, nonretaliatory reason for Trimmer-Davis's one-day suspension is that she was found untruthful after an investigation. The City argues that even if its decision were in error, Trimmer-Davis has not shown that it was retaliatory.

B. The evidence raises a question of fact about whether the City's reason for the suspension was pretext for retaliation.

This case is novel because the suspension was inextricably linked to Trimmer-Davis's protected activity. The internal investigation was made based on her complaint alleging that Sgt. Barfield had discriminated against her based on her race and gender. Logically, that alone could satisfy the but-for standard of causation because the investigation that led to the suspension would not have occurred if

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District v. Clark, 544 S.W.3d 755, 783 (Tex. 2018), the City again challenged jurisdiction.

Trimmer-Davis had not filed the complaint. *See Smith*, 2019 WL 1716418, at *5. The circumstantial evidence also supports a conclusion that Trimmer-Davis raised a question of fact about the true reason for the City's action because it is some evidence from which a factfinder could infer that retaliation was the real motive. *See White*, 655 Fed. Appx. at 1025.

Policies and procedures. First, in concluding that Trimmer-Davis had been untruthful, the City did not follow its usual policies and procedures. In testimony at the Civil Service Commission hearing on the one-day suspension, Assistant Chief Brian Lumpkin explained that the IAD process begins with a police officer's voluntary statement or a sworn complaint from a citizen. First, a sergeant (investigator) assigned to IAD will collect witness statements and evidence. Then the investigator's supervisor, a lieutenant, reviews and scrutinizes the work, writes a summary, and recommends whether to sustain the allegation. Then the IAD investigation and summary are sent to the captain of IAD, who reviews and signs off or requests additional work. If a citation is issued, it ordinarily goes to the person who is the target of the complaint. However, the IAD "has a responsibility to take whatever action is necessary against any employee that is untruthful in an investigation . . . ." Capt. Fremin, of the Special Operations Division, testified in his deposition that he was aware of situations when employees who made allegations were found to be untruthful. He said: "[Y]ou cannot allow a person to pin outrageous

or fabrications—however the person may deem it—against other employees and let that go without any type of action being taken.

Assistant Chief Lumpkin also explained the difference between an IAD finding of "unfounded" as opposed to "not sustained." He testified that a finding that a complaint is unfounded meant that it was untrue as opposed to a finding of "not sustained," which indicated that veracity of the allegations depended on the credibility of the parties involved and had been resolved against the complainant.

Trimmer-Davis's claims that Sgt. Barfield discriminated against her based on race and gender were supported by her own voluntary statement and corroborated in significant parts by the affidavit of her colleague, Frances Dominguez, who was one of only several women in the preliminary recruiting unit of the Human Resources Division. In particular, Dominguez averred that for about six months after Sgt. Barfield was assigned to that unit, women were excluded from recruiting events, despite having previously been afforded an active role in those activities. She maintained that such action was not justified based on productivity alone because the productivity statistics were flawed to the detriment of the female officers and that flaw had been reported to their supervisors.

Some of Trimmer-Davis's other claims were refuted by the affidavits or testimony of her supervisors, specifically: Capt. Ready, Sgt. Barfield, Sgt. Trahan,

and Lt. Rusinski. While each supervisor's testimony was consistent with the others, their recollections differed from Trimmer-Davis's.

The IAD found that Trimmer-Davis's complaint was unfounded, i.e., untrue, as opposed to "not sustained." It is axiomatic that testimonial evidence is subject to an assessment of credibility. *E.g.*, *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005) ("Jurors are the sole judges of the credibility of the witnesses and the weight to give their testimony."); *see also Goodman v. State*, 66 S.W.3d 283, 285–86 (Tex. Crim. App. 2001) (explaining that a factfinder is entitled to believe the testimony of a "modern-day Cretan Liar").[2] The fact that the supervisors corroborated each other's testimony may properly be considered by a factfinder making a credibility determination, but it does not transform the evidence into the type that is not subject to a credibility determination at all. Here, the IAD investigation resolved the credibility issue against Trimmer-Davis: the investigators believed her supervisors and disbelieved her. But that did not mean that her

[2] "History credits Epimenides, a 6th century B.C. philosopher, for introducing the semantical paradox known as the Cretan Liar. Epimenides, himself a Cretan, reputedly asserted, 'All Cretans are liars.' If all Cretans are indeed liars, as Epimenides says, then Epimenides himself must be lying when he states that all Cretans are liars." *Goodman v. State*, 66 S.W.3d 283, 285 n.3 (Tex. Crim. App. 2001). In *Goodman*, which was decided before the Court of Criminal Appeals discarded the factual sufficiency standard in criminal cases, *see Brooks v. State*, 323 S.W.3d 893 (Tex. 2010), the Court of Criminal Appeals posited a hypothetical in which a witness with five prior perjury convictions gave testimony directly adverse to that of a dozen boy scouts. *Id.* at 286. The Court noted that the jury, as factfinder, was entitled to believe the Cretan Liar and disbelieve the boy scouts. *Id.*

statement necessarily was a lie. Under the police department's standards, the finding should have been "not sustained"—not believed—as opposed to "unfounded," untruthful.

Falsity of the adverse employment decision. Trimmer-Davis appealed her one-day suspension to the Civil Service Commission, which overruled the one-day suspension, concluding that it was without "a sufficient basis." This is some evidence of the falsity of the basis for the one-day suspension.

Other circumstantial evidence of retaliatory animus. After the IAD investigation determined that Trimmer-Davis's allegations were unfounded, an internal disciplinary process ensued. Although she was not the final decision maker, Assistant Chief Vicki King determined that Trimmer-Davis violated the general order regarding truthfulness and recommended in writing that she be disciplined within a specified category of discipline that included a one-day suspension. This written recommendation was forwarded to a committee that recommended the one-day suspension in accordance with the citation and category of discipline determined by Assistant Chief King. That disciplinary recommendation was presented to the chief of police, who, as the final decisionmaker, reviewed all of the information before imposing the one-day suspension for untruthfulness. Thus, Assistant Chief King's determination, as a critical part of the process, necessarily had an influence on the imposition of the one-day suspension.

Assistant Chief King testified by deposition about the disciplinary process that led to the one-day suspension. She testified that she believed Trimmer-Davis had lied to avoid responsibility for her poor performance and productivity. She said that Trimmer-Davis did not accept criticism from her supervisors and "in order to stay and to get what she wanted, she pushed back a little bit." Assistant Chief King said that Trimmer-Davis's allegations surfaced when "she was starting to be held accountable for her performance." While she said that she recommended less discipline for Trimmer-Davis's "disrespect" violation related to the filing of her complaint, she testified that the truthfulness violation was different: "But the truthfulness, when you *start making things up to get other people in trouble*, to cover for your poor productivity, I really have a very, very difficult time with that."

Assistant Chief King's testimony about the dim view she took of what she characterized as an attempt "to get other people in trouble" was illuminated by the report of Melvin L. Tucker, whom Trimmer-Davis retained as an expert in police practices. The trial court overruled the City's objection to Tucker's report, and the City did not challenge that ruling on appeal. Tucker averred that he had experience with police departments and was a former chief of police. He also said that he had consulted on similar cases involving the City. He opined that police department culture encouraged a code of silence, whereby officers support each other's favorable accounts in cases such as this one where liability may be imposed. He also

stated that this code of silence was acknowledged by a former City of Houston police chief in a prior case.

* * *

Trimmer-Davis's burden in the third step of the *McDonnell Douglas* test, as applied in the context of a plea to the jurisdiction, is a burden of production. She is not required to conclusively prove at this stage of litigation that the City's nonretaliatory reason for the one-day suspension was pretext for retaliation. All she was required to do was produce some evidence of pretext. While an ultimate factfinder may resolve the question differently upon full exposition of the case, at this point we conclude that Trimmer-Davis's circumstantial evidence, considered together, raised a question of fact about the true reason for the one-day suspension. *See White*, 655 Fed. Appx. at 1025. We therefore conclude that the court properly denied the City's plea to the jurisdiction.

IV. The City's recordkeeping

In her cross-appeal, Trimmer-Davis argues that the trial court erred by granting the City's plea to the jurisdiction on her claim regarding the City's refusal to remove an erroneous "untruthfulness" citation from the Department's files.

In her live pleading, Trimmer-Davis alleged that the inclusion of that finding in the files prevented her from obtaining interviews and job transfers within the police department. She also alleged that the City violated chapter 143 of the Texas

Local Government Code, which pertains to municipal civil service rules for firefighters and police officers. She contends that the untruthfulness finding should have been removed from her file as part of the City's statutory obligation to restore her to her "prior position" after she successfully appealed the one-day suspension. *See* TEX. LOC. GOV'T CODE § 143.118 (Appeal of Disciplinary Suspension).[3]

In its plea to the jurisdiction, the City argued that it could not legally expunge all records of the untruthfulness finding because it is statutorily required to maintain certain records. In particular, the City relied on section 143.1214 of the Local Government Code, which provides for expungement of documents when the disciplinary action is entirely overturned on appeal:

> The human resources director for the department promptly shall order that the records of a disciplinary action that was taken against a . . . police officer be expunged from each file maintained on the . . . police officer by the department if the disciplinary action was entirely overturned on appeal . . . . Documents that must be expunged under this subsection include all documents that indicate disciplinary action was recommended or taken against the fire fighter or police officer, such as the recommendations of a disciplinary committee or a letter of suspension. . . . This subsection does not require that records of an

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[3] Section 143.118 provides, in relevant part:

> If the commission finds that the period of disciplinary suspension should be reduced, the commission may order a reduction in the period of suspension. The commission may reverse the department head's decision and instruct the department head to immediately restore the fire fighter or police officer to the person's prior position and to repay the person for any lost wages.

TEX. LOC. GOV'T CODE § 143.118(b).

internal affairs division or other similar internal investigative division be expunged.

Id. § 143.1214(a). The statute also requires the retention of an "investigatory file":

> (b) The department shall maintain an investigatory file that relates to a disciplinary action against a . . . police officer that was overturned on appeal, or *any document in the possession of the department that relates to a charge of misconduct* against a . . . police officer, regardless of whether the charge is sustained, *only* in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:
>
> (1) to another law enforcement agency or fire department;
> (2) to the office of a district or United States attorney; or
> (3) in accordance with Subsection (c).
>
> (c) The department head or the department head's designee may forward a document that relates to disciplinary action against a . . . . police officer to the director or the director's designee for inclusion in the . . . police officer's personnel file maintained under Sections 143.089(a)-(f) only if:
>
> (1) disciplinary action was actually taken against the . . . police officer;
> (2) the document shows the disciplinary action taken; and
> (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Id. § 143.1214(b), (c).

The City argues that it removed the record of the untruthfulness finding and one-day suspension from publicly available records, but it maintained the records for limited internal use. To support this argument, the City relies on testimony from Sgt. James Iglinsky, a supervisor in the Disciplinary Action Unit, who testified:

"Once a cite has 'overturned' next to it, it falls off and does not appear on the public" records.

This evidence is insufficient to meet the City's burden to show a nonretaliatory reason for its action because Trimmer-Davis's complaint did not allege that the City improperly maintained a record of the untruthfulness finding in a publicly available document. Instead, she alleged that the untruthfulness finding improperly remained in her personnel file and was considered whenever she applied for an internal transfer. Section 143.089 of the Texas Local Government Code requires that a document "relating to disciplinary action taken against the . . . police officer or to alleged misconduct by the . . . police officer" must be removed from the employee's personnel file "if the commission finds that: (1) the disciplinary action was taken without just cause; or (2) the charge of misconduct was not supported by sufficient evidence." TEX. LOC. GOV'T CODE § 143.089(c).

The City failed to meet its burden of production under *McDonnell Douglas* because despite the voluminous record on appeal, the evidence does not clearly show how the City keeps its records. For example, in deposition testimony from several police department employees, employee records are alternatively referred to as: an employee resume, a departmental resume, a complaint history form, a "3 x 5", a disciplinary history, an investigatory file, the IAD file, a divisional file, and a personnel file. Assistant Chief King testified that the departmental resume,

disciplinary history, and "3 x 5" were all the same document, but the employee complaint history and the IAD file were two distinct types of records. Sgt. Ferguson and Assistant Chief Munden contradicted Assistant Chief King, testifying that that the employee complaint history form is the same document as the "3 x 5." Sgt. Ferguson testified about a "divisional file," and Assistant Chief Munden testified that the departmental resume is included in the IAD file. Sgt. Iglinsky's testimony contradicted Assistant Chief King's testimony that the complaint history was separate from the IAD file. Sgt. Iglinsky testified that the complaint history was an electronic document that could be printed in two forms—one for public release and another internal version. He implied that the complaint history form was retained in the IAD file, saying that the untruthfulness finding would appear on the complaint history form even if it had been overturned because "nothing in the IAD file would be modified or changed."

In short, the evidence in the appellate record is too contradictory and confusing to allow a conclusion that the City retained its records in accordance with a statute. Because the record is muddled, we cannot conclude that the City met its burden of production to show that its legitimate nonretaliatory reason for retaining the untruthfulness finding in Trimmer-Davis's file was compliance with a statute. We conclude that because the City did not meet its burden under the second step of

the *McDonnell Douglas* test, the presumption of retaliation was not rebutted.[4] We hold, therefore, that the trial court erred by granting the City's plea to the jurisdiction as to the recordkeeping claim.

V. Termination

As to Trimmer-Davis's claim that she was terminated in retaliation for filing complaints against Sgt. Barfield and for filing suit against the City, the City argues that it terminated her employment for the legitimate nonretaliatory reason that she violated other general orders when she was selected for random drug testing. The City also contends that Trimmer-Davis failed to raise a question of fact as to whether her violation of general orders surrounding the drug testing was the real reason for her dismissal.

The City has not raised a challenge on appeal about Trimmer-Davis's ability to make a prima facie case for retaliation. Trimmer-Davis has not argued that the City failed to proffer evidence of its legitimate nonretaliatory reason for her termination. We therefore limit our review to the third step, whether Trimmer-Davis has met her burden to raise a question of fact about whether the City's reason for the termination was pretextual.

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[4] The City did not challenge Trimmer-Davis's ability to make a prima facie case regarding her claim relating to the City's recordkeeping.

In response to the second plea to the jurisdiction, Trimmer-Davis relied on evidence relating to the code of silence, including the report and verifying affidavit of Melvin Tucker, evidence that the administrative disciplinary committee found that she was confused about drug testing procedures not malingering in her statements to the IAD investigating the drug testing issues, evidence that the samples were diluted but nevertheless tested negative, and evidence that Assistant Chief King had expressed a dim view of her prior report alleging Sgt. Barfield had discriminated against her.

There is no dispute that Trimmer-Davis violated General Order 300-17, which governs employee drug testing, by reporting late, going to her home instead of directly to the sample collection location, and giving a diluted sample. General Order 300-17 expressly provides that "[a]ny employee who refuses to consent to a drug test is subject to disciplinary action up to an including termination . . . ." It also provides that "any actions or omissions by the employee which interfere with the timely administration of the drug test will be taken as evidence of refusal to take a drug test." Because Trimmer-Davis did not "timely" provide a sample, that was considered refusal to take the test and subjected her to the possibility of termination.

To meet her burden on the third step of the *McDonnell Douglas* test as to her termination, Trimmer-Davis had to provide some evidence that her protected activities—filing a complaint and then a lawsuit—were a "but for" cause of her

termination. *See Chandler*, 376 S.W.3d at 823. Here, however, the irregularities that occurred during the drug testing interrupted any direct, but-for causation from her protected activities and established an independent basis for her dismissal. In addition, Trimmer-Davis's circumstantial evidence did not raise a question of fact about the City's true reasons for terminating her.

First, Trimmer-Davis argues that the City's failure to comply with its own procedures was circumstantial evidence that the City's proffered reason was false. In particular she argues that members of the administrative disciplinary committee believed she was confused about testing and that her drug tests were diluted but negative. While this may raise a fact question about error in internal processes, it does not raise a question of fact about retaliatory animus. *See McCoy v. Tex. Instruments, Inc.*, 183 S.W.3d 548, 555–56 (Tex. App.—Dallas 2006, no pet.) ("Federal and state laws protecting employees against discrimination and retaliation were not intended to be vehicles for judicial second-guessing of employment decisions nor intended to transform courts into personnel managers.") (quoted by *Chandler*, 376 S.W.3d at 816).

Second, Trimmer-Davis argues that the City's reason for her termination was pretextual because of the temporal proximity of the adverse employment action to her exercise of a protected activity. Her random drug test was scheduled just 10 days after the City was served with notice of her lawsuit, and she was terminated six

months later. But Trimmer-Davis is not challenging the drug test request as an adverse employment action, and we express no opinion about whether that is an adverse employment action, and her termination was too far removed from the filing of her complaint and lawsuit to be raise an inference that her termination was in retaliation for her protected activities. *Smith*, 2019 WL 1716418, at *13 ("While temporal proximity may indeed raise an inference of retaliation, the events must be very close in time."); *see also Fields v. Teamsters Local Union No. 988*, 23 S.W.3d 517, 529 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (noting proximity may establish causal connection when protected activity and adverse employment action are separated by weeks, as opposed to months and years).

Finally, while Trimmer-Davis's evidence regarding the code of silence and Assistant Chief King's testimony and negative comments may tend to show that a retaliatory animus was a motivating factor behind her termination, it does not establish but-for causation. *See Smith*, 2019 WL 1716418, at *5 (in third step of *McDonnell Douglas* test, retaliation plaintiff must show that adverse employment action would not have occurred at that time but for her protected activity).[5] Thus,

[5] *But see Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 783 (noting that the Supreme Court of Texas has not yet determined the appropriate causation standard for a TCHRA retaliation claim); *cf. Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (noting that because the *McDonnell Douglas* burden shifting test "arose in a context where but-for causation was the undisputed test, it did not address causation standards" but Congress later amended Title VII to permit a plaintiff to recover based on a showing that discrimination was

her evidence does not raise a question of fact about the City's true reason for her termination.

Trimmer-Davis's evidence did not logically establish a question of fact about whether the City's nonretaliatory reason for her termination was pretextual. Accordingly, we conclude that the court lacked jurisdiction and erred by denying the City's plea to the jurisdiction on this claim.

Conclusion

We affirm the trial court's denial of the City's plea to the jurisdiction as to the one-day suspension, and we reverse the trial court's grant of the City's plea as to its recordkeeping and the trial court's denial of the City's plea as to the termination. We remand to the trial court for further proceedings.

Peter Kelly
Justice

Panel consists of Justices Kelly, Hightower, and Countiss.

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a "motivating factor" in an adverse employment action); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 479–80 (Tex. 2001) (recognizing that the TCHRA establishes "'a motivating factor' as the plaintiff's standard of causation in a TCHRA unlawful employment practice [i.e., discrimination] claim").