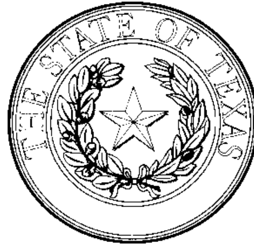
Opinion issued August 4, 2020



In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00512-CV

DEMOCRATIC SCHOOLS RESEARCH, INC. D/B/A THE BRAZOS SCHOOL FOR INQUIRY AND CREATIVITY, Appellant

V.

TIFFANY ROCK, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2018-68015

O P I N I O N

Tiffany Rock sued her former employer, Democratic Schools Research, Inc., doing business as The Brazos School for Inquiry and Creativity (the School), for racial discrimination and retaliation under the Texas Commission on Human Rights Act (TCHRA), Chapter 21 of the Texas Labor Code. The School filed a plea to the

jurisdiction asserting governmental immunity from Rock's claims, which the trial court denied, and the School filed this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8). In one issue, the School contends that it is a governmental unit entitled to immunity from Rock's claims because: (1) participating in jurisdictional discovery prior to a decision on a plea to the jurisdiction does not waive immunity; (2) Rock did not state a prima facie case of discrimination as required to waive immunity under the TCHRA; (3) Rock did not state a prima facia case of retaliation as required to waive immunity under the TCHRA; and (4) Rock did not show that the School's legitimate, non-discriminatory, and non-retaliatory reasons for terminating Rock's employment were false or pretextual. The School also filed a motion to strike the appendix to Rock's brief for including matters outside the record, and it asks for attorney's fees on appeal.

We reverse the trial court's order denying the School's plea to the jurisdiction and remand the case to the trial court with instructions to (1) determine whether to award costs, including attorney's fees and expenses, and (2) render a judgment dismissing the case for lack of jurisdiction over Rock's claims.

Background

The School is a "free, open enrollment public charter school accredited by the Texas Education Agency" and has three campuses in Houston and Bryan, Texas. In

2006, the School hired Rock as a computer teacher and promoted her to assistant principal and then principal soon afterwards. In 2016, Rock was the highest paid of the three campus principals and the highest paid employee in the district under the level of superintendent. Katy Greenwood, a Caucasian, was the Superintendent of the School's campuses and she directly supervised Rock, an African American, and the other two campus principals, who were also African American. Greenwood reported to the School's board of trustees. Jerry Deal, a Caucasian, was an assistant superintendent who did not directly supervise Rock, but he assumed some of her duties when the School, through Greenwood, terminated Rock's employment in April 2017, shortly before the end of the school year, for insubordination and a hostile attitude.[1]

Rock began disagreeing with the School's administrative policies in November 2016, during a time when the School was experiencing low enrollment. Rock asked to meet with the board of trustees to discuss her grievances, but Greenwood told Rock that employees "are not routinely entitled to meet with the [board] to air issues and concerns," which "must be addressed through the chain of command." She asked Rock to "outline all issues and concerns you have right away and send them to me for consideration."

[1] The record does not indicate whether Greenwood supervised Deal.

In response to Greenwood's request for an outline of her issues and concerns, Rock complained to Greenwood about staffing shortages and told Greenwood she had "yet to receive any resumes for potential candidates" to fill vacant positions. She also told Greenwood that morale was low among the staff at Rock's campus and that, after Greenwood had met with the staff two months earlier for a reason Rock did not explain, the staff were "no longer willing to do more than what [was] required of their job duties." Greenwood explained that "an all-time low in enrollment" and the busing costs at Rock's campus, which were $10,000 more per month than the other campuses, caused the staffing shortages at Rock's campus, but she had sent resumes to Rock the previous day. Greenwood found Rock's comments "troublesome" and "problematic," and Greenwood was "at a loss to know why morale is low," considering that the "[t]eachers all got a raise this year." Greenwood promised to review the operations of Rock's campus.

In December 2016, Rock sent Greenwood an email that serves as the basis of Rock's claims in this lawsuit. In her lengthy email, Rock complained primarily of wide-ranging administrative issues, including busing contracts, staffing shortages, the School's allocation of its resources, and board of trustees' meetings being held in a closed forum without public notice.

Rock's email also discussed rumors, including phone calls between Greenwood and other teachers and a phone call that Rock had received "from a

teacher who felt threatened because she received the message that '[l]oose lips sink ships.'" Rock did not identify who made the statement or the teacher to whom it was made. Nor did she report what information or misinformation the "loose lips" were spreading. Rock accused Greenwood of low morale at Rock's campus, alleging that experienced African American teachers were paid less than new Caucasian teachers and that "essential staff" at her campus had been fired. Rock also told Greenwood, "In addition, your racial statements more so the one that was made when we were discussing staffing 'My campus is too Black' is offensive and appalling and should not have been said [whether] you feel that way or not."

Greenwood responded to some of Rock's administrative complaints but told Rock to file a formal grievance if she had a specific complaint. Rock refused to file a formal grievance with the School, relying instead on her lengthy email, which she told Greenwood was her formal grievance and she "anticipate[d] [Greenwood's] response . . . ." Greenwood again asked Rock to file a formal grievance so Greenwood could attempt to resolve it, and she gave Rock the School's employee grievance form.

Rock never filed an employee grievance form with the School. In January 2017, Greenwood responded to Rock's December 2016 email. Greenwood had identified 32 possible complaints in Rock's email, and Greenwood responded to each complaint in a 13-page chart.

Greenwood wrote that her comment that Rock's campus was "too black" was a reference to another campus, not Rock's campus, although Greenwood acknowledged that Rock's campus also had the same diversity issues. Greenwood also noted that, "in terms of staff diversity, [the other campus] was too black and that [the campus] needed [H]ispanic teachers. 100% of one race does not meet diversity goals." Greenwood continued, "The word 'black' which you are now trying to turn into a racial slur was not used that way and is in fact the word used in our PEIMS records to identify race[.]"[2]

Greenwood also told Rock that the allegation that African American teachers were paid less than Caucasian teachers was unjustified and unproven and that the School's "[w]age averages by race will show there is no bias in salary at the [School] in terms of race, age, sex or disability." Greenwood reminded Rock that it was the principals, including Rock, who made recommendations to Greenwood regarding teachers' salaries. Greenwood also told Rock that the "loose lips sink ships" rumor was "completely false, distorted and based on hearsay and your own interpretation."

Greenwood also explained the School's grievance process to Rock, including what is generally required in a complaint: "[T]ypically, personnel grievances focus on . . . perceived unfair treatment in terms of sex, race, age, or disability, or any other

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[2] Neither the record nor the parties define "PEIMS."

incident that would be considered . . . a violation of equal opportunity laws . . . ." Greenwood further explained that Rock had "not fill[ed] out the grievance form properly to describe" an actionable grievance but instead "forwarded several pages of emails that [Rock] had sent to [Greenwood] previously[.]" Greenwood determined that Rock's allegations "d[id] not meet the standard or criteria of a legitimate grievance" but instead "cover[ed] many unsubstantiated allegations, hearsay, speculation about many things, argumentation, criticism of other employees and criticism of your supervisor, all of which are irrelevant in terms of a legitimate grievance where an incident caused personal harm to you in terms of your job."

Rock thanked Greenwood for her response but asked to appeal the decision to the School's board of trustees. Greenwood promised that the board would receive Rock's complaints. However, before Greenwood could forward Rock's complaints to the board, Rock stopped her and said, "[B]efore you send it to [the board] I would like to sit down and talk with you." The record does not indicate whether Rock followed up on her request to talk to Greenwood or whether the School took any further administrative action on Rock's complaints in her December 2016 email.

In February 2017, Greenwood reviewed Rock's time sheets from September 2016 to January 2017 to answer questions Rock had raised about compensation time she claimed to have earned on four separate days. During her review, Greenwood discovered that Rock was "frequently clocking out before the teachers leave each

day, leaving the campus without contracted supervision on a routine basis[.]" Rock had left the campus early more than 40 out of 114 days, and she "often" left the school during the day for 30 to 90 minutes. As a result of her review, Greenwood concluded that she would not overturn the School's prior decision to charge Rock for two half-days of personal leave and for one full day on which Rock had not clocked in or out and which Rock had asked to count as a personal day.

In March 2017, shortly before she was terminated, Rock became insubordinate and hostile in emails to other administrative officials. In one instance, the director of student accounting had emailed Rock asking her to verify certain students' addresses and, if any were missing or incomplete, to "notify the parents to complete a change of address form (attached) and provide proof of residency." Rock simply responded, "Per my previous emails to Dr. Greenwood and Jerry [Deal] I will not be verifying any 2016–2017 students . . . ."[3]

In another instance, Deal emailed Rock inquiring about disciplinary referrals that Rock had completed. Deal asked Rock about a student whom Rock had reported was "sent home until further investigation" but had not reported as suspended. Rock told Deal that she did not suspend the student, but only sent him home while she investigated the incident. Deal told Rock that sending a student home pending

[3] The record does not include Rock's previous emails to Greenwood or Deal declining to verify students.

further investigation is effectively a suspension and should be reported as a suspension. Rock disagreed, and she told Deal the student was not suspended but that she did not need the student on campus while she investigated the issue. Deal told Rock that he "would assume" that Rock would investigate a credible allegation immediately before taking disciplinary action and again explained that a student who was "temporarily prohibited from going to their regular classes and/or school" has effectively been suspended. Rock responded, "[Deal] please feel free to assume whatever you feel. It was brought to me toward the end of the day and some of the students had already left for the day. Nevertheless the investigation was done when time permitted and the student was not suspended. Please do not continue to harass me on this issue." Deal told Rock that she was not being harassed but he was monitoring discipline reports because of previous disciplinary reporting issues, which he did not explain. He told Rock that her "handling of the incident [was] not being questioned," and he "commend[ed] [Rock] for taking the appropriate steps" in the process. Rock responded, "Yes [Deal] I am being harassed. If it was the matter of changing [the student] from unexcused to excused that was a quick fix and should have been stated 6 emails ago." Rock did not state that she was being harassed because of her race, but rather because Deal continued asking questions to resolve the disciplinary reporting issue that he originally had emailed Rock about.

In a letter from Rock to Greenwood dated April 6, 2017, Rock stated that the letter was her "official documentation of the harassment and retaliation I have endured, after informing the district office of the possibility of enrolled students residing out of the geographical boundaries." Rock's four-page letter generally complained that campus principals were not responsible for verifying and validating student attendance and enrollment data. Her letter did not explain how she was harassed or retaliated against and did not mention race.

On April 11, 2017, the School terminated Rock's employment. Greenwood signed the termination letter, which stated:

> Based on our interactions for the past many months, I have observed on numerous occasions that you did not act with the personal responsibility and accountability that is expected and required of a Principal. Additionally, you have frequently been insubordinate and hostile toward me, which are examples of your not acting with the professionalism that is expected and required of a Principal. For these and other reasons, I have lost confidence in your ability to effectively fulfill the duties of Principal.

After Rock's employment was terminated, Deal assumed some of Rock's duties, while keeping his own duties and title, until the end of the school year when the School could seek out and hire Rock's replacement. In July 2017, the School hired Dr. John Bean, an African American, to replace Rock as principal.

Rock applied for unemployment benefits, which she received. The record does not include Rock's charge of discrimination or retaliation with either the Equal Employment Opportunity Commission (EEOC) or the Texas Workforce

Commission (TWC), but the parties agree that Rock was issued a right-to-sue letter and the record includes the School's position statement responding to Rock's EEOC and TWC charges.

Rock filed the underlying lawsuit against the School alleging race-based discrimination and retaliation under the TCHRA. The School answered, generally denying Rock's allegations and asserting affirmative defenses, including governmental immunity from Rock's claims.

The School filed a plea to the jurisdiction arguing that, as a governmental unit, it was immune from suit and that the TCHRA had not waived its immunity because Rock could not prove at least one element of each of her claims. Regarding her discrimination claim, the School argued that Greenwood's comment that Rock's campus was "too black" concerned staffing and the need to recruit additional Hispanic teachers to match the ratio of students. The School also argued that Rock was replaced by Dr. Bean, an African American, not Deal, a Caucasian who had temporarily assumed some of Rock's duties until Dr. Bean was hired. The School attached as evidence its position statement in response to Rock's charges, Rock's salary history since her hiring in 2006, racial diversity statistics summarizing the racial makeup of students and teachers at the School, a list of each of the School's employees that included each employee's race, job description, and salary, and the School's hiring and complaint policies. The School also argued that Greenwood had

hired and promoted Rock and had given Rock salary increases each academic school year from 2007 to 2016 except for the 2013 school year.

The School addressed Rock's allegations that she was discriminated against because she was assigned various administrative tasks, which Rock characterized as "illegal" or "improper" acts. The School argued that all principals were responsible for the tasks Rock identified and it produced the job description for principals.

Regarding Rock's retaliation claim, the School argued that Rock lacked evidence of all essential elements of her claim. The School argued that Rock's December 2016 email complaints did not notify the School that Rock reasonably believed discrimination was at issue. Rather, the School argued, Rock complained about administrative tasks that did not violate the TCHRA. The School's plea included evidence showing that Rock and the other campus principals had been asked to verify students' addresses and correct wrong or incomplete ones, which the School relied on to argue that Rock was not asked to perform illegal tasks but rather that all principals were required to verify their students' addresses.

The School further argued that it had legitimate, non-discriminatory and non-retaliatory reasons for terminating Rock. The School relied on the termination letter stating that Rock was insubordinate and hostile towards Greenwood, Rock's direct supervisor, on several occasions and that Rock had refused to complete duties required of a campus principal. The School's evidence also included Rock's emails

with Greenwood, Deal, and the director of student accounting and Greenwood's letter to Rock regarding the review of Rock's time sheet. The School also attached as evidence an unsworn declaration from Deal, which stated that Rock had begun refusing to sign reports "that she had signed for many years in the past as principal." The School argued that it was Rock's disrespectful and insulting attitude towards Greenwood and other staff members, not discrimination or retaliation, that led to her discharge.

Rock responded to the School's plea to the jurisdiction by arguing that the School waived its immunity by participating in discovery. Rock also contended that she had stated a prima facie case of discrimination because she was replaced by Deal, a Caucasian, and that the School had asked her to perform illegal actions by requiring her to sign student enrollment reports. Rock also argued that all members of the board of trustees, Greenwood, Deal, and the director of student accounting were Caucasians and that Rock had asked to complain to the board, but Greenwood had denied her request in an email Rock included as evidence. Rock relied primarily on her December 2016 email complaints that Greenwood's "too black" comment was offensive and unprofessional and that Caucasian teachers were paid more than African American teachers. Rock also attached as evidence a TWC determination of unemployment benefits, which determined that Rock was eligible for benefits

because its investigation found that Rock was terminated "for a reason that was not misconduct connected with the work."

Regarding her retaliation claim, Rock argued that she had engaged in a protected activity by reporting discrimination, harassment, and retaliatory conduct to Greenwood, specifically referring to Greenwood's comment that Rock's campus was "too black." Rock also argued that she had complained to Greenwood about retaliation and harassment because Rock had raised enrollment issues and had threatened to report the issues to the Texas Education Agency (TEA), and that Rock was not retaliated against until after threatening to report the School to the TEA. Rock argued that a causal link existed between her engaging in protected activity and the School's terminating her and that the School's reasons for terminating her were false and pretextual. Rock argued that her prior "exemplary record" as principal and the proximity in time between her reporting her complaints and her termination showed that her discharge was motivated by race.

Rock's evidence also included her affidavit, in which she averred that she had never been reprimanded by the School and that Greenwood had retaliated against her, but she provided no further information about retaliation. Rock also included a letter from herself to Greenwood dated April 6, 2017, just a few days before her discharge, in which Rock stated that the letter was her "official documentation of the harassment and retaliation I have endured, after informing the district office of the

possibility of enrolled students residing out of the geographical boundaries." Rock's four-page letter generally complained that campus principals were not responsible for verifying and validating student attendance and enrollment data. Rock's letter did not state that any specific action had been taken against her or how she was harassed or retaliated against. This letter did not mention race.

The School replied in support of its plea, arguing that it had not waived immunity by participating in discovery pursuant to its plea to the jurisdiction; that Deal, a Caucasian, had only temporarily assumed some of Rock's duties after she was terminated, but that Rock was replaced by Dr. Bean, an African American; that Rock's administrative complaints did not relate to activities protected by the TCHRA; that Rock's email complaint to Greenwood, including the "too black" comment, did not constitute protected activity because it did not sufficiently notify the School that Rock was complaining of race-based discrimination; and that Rock did not produce evidence showing that the School's reasons for her discharge were false or pretextual. The School's reply included Greenwood's responses to Rock's complaints, including the 13-page chart responding to each of the 32 complaints identified in Rock's December 2016 email.

On June 24, 2019, the trial court held a hearing on the School's plea to the jurisdiction. At the end of the hearing, the trial court denied the School's plea and signed an order the same day. This interlocutory appeal followed. The School has

also filed a motion to strike the appendix Rock filed with her appellate brief, and it seeks attorney's fees on appeal.

Standard of Review

We review de novo a trial court's ruling on a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *see Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018) ("Immunity from suit may be asserted through a plea to the jurisdiction . . . ."). A plea can challenge a plaintiff's failure to plead jurisdictional facts or challenge the existence of evidence supporting those facts. *Alamo Heights*, 544 S.W.3d at 805; *Miranda*, 133 S.W.3d at 226. When a plea challenges the existence of evidence supporting jurisdictional facts and the plea includes evidence, courts review the relevant evidence to determine if a fact issue exists. *Alamo Heights*, 544 S.W.3d at 805 (quoting *Miranda*, 133 S.W.3d at 227). In those cases, our review mirrors that of a traditional summary judgment motion. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012) (citing *Miranda*, 133 S.W.3d at 228); *see* TEX. R. CIV. P. 166a(c) (providing that judgment "shall be rendered forthwith if [the pleadings and competent evidence] show that . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law"). We take as true all evidence favorable to the plaintiff and indulge every reasonable inference and resolve any doubts in the plaintiff's favor. *Miranda*, 133 S.W.3d at

228. If the movant disputes jurisdictional facts alleged in the petition, the movant has the burden to show evidence that negates the facts alleged. *Alamo Heights*, 544 S.W.3d at 805.

If the movant's evidence shows that the plaintiff's allegations are not true, the burden shifts to the plaintiff to offer evidence disputing the movant's evidence. *Id.* If the plaintiff's evidence creates a fact issue, the court must deny the plea. *Id.* But if the evidence is undisputed or does not raise a fact issue, the trial court must grant the plea to the jurisdiction and dismiss the case. *Id.* (citing *Mission Consol.*, 372 S.W.3d at 635); *Miranda*, 133 S.W.3d at 228.

Motion to Strike

We first address the School's motion to strike documents that Rock attached as an appendix to her brief and referenced in her brief. The School argues that none of the documents in Rock's appendix are included in the appellate record. Rock contends that the evidence in her appendix is part of the record and was produced by the School.

Documents attached as exhibits or appendices to briefs do not constitute formal inclusion of such documents in the record on appeal, and we cannot consider matters outside the record in our review. *Dauz v. Valdez*, 571 S.W.3d 795, 811 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (citing, among others, *Samara v. Samara*, 52 S.W.3d 455, 456 n.1 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)); *Maher*

v. Maher, No. 01-14-00106-CV, 2016 WL 4536283, at *5–6 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet.) (granting motion to strike documents outside of record contained in appendix to brief and references in brief to such documents) (citing *Robb v. Horizon Cmtys. Improvement Ass'n, Inc.*, 417 S.W.3d 585, 589 (Tex. App.—El Paso 2013, no pet.), and *Bencon Mgmt. & Gen. Contracting, Inc. v. Boyer, Inc.*, 178 S.W.3d 198, 210 (Tex. App.—Houston [14th Dist.] 2005, no pet.)); *Crossley v. Staley*, 988 S.W.2d 791, 794 (Tex. App.—Amarillo 1999, no pet.) (same); *Siefkas v. Siefkas*, 902 S.W.2d 72, 74 (Tex. App.—El Paso 1995, no writ) ("Material outside the record that is improperly included in or attached to a party's brief may be stricken.").

None of the documents Rock included in her appendix are included in the record on appeal. Accordingly, we grant the School's motion, strike Rock's appendix to the extent it contains evidence outside the appellate record, and strike references in Rock's brief to evidence outside the record.

Governmental Immunity

The School asserts that it is an open-enrollment charter school and, as such, it is a governmental unit entitled to immunity from suit unless waived. TEX. EDUC. CODE ANN. § 12.1056(b) ("An open-enrollment charter school is a governmental unit as defined by Section 101.001, Civil Practice and Remedies Code, and is subject to liability only as provided by Chapter 101, Civil Practice and Remedies Code, and

only in the manner that liability is provided by that chapter for a school district."); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3) (defining "governmental unit" to include "a political subdivision of this state, including any . . . school district"). Rock does not dispute that the School is a governmental unit, but she contends that the School waived its immunity by requesting disclosures in its answer and by responding to Rock's discovery requests.

A. Governing Law

Sovereign immunity is a common-law doctrine that "prohibits suits against the state unless the state consents and waives its immunity." *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018) (citing *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017)). Political subdivisions of the state, including school districts, are also entitled to such immunity—referred to as governmental immunity—unless waived. *E.g.*, *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Governmental immunity has two components—immunity from liability and immunity from suit. *E.g.*, *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). Immunity from suit defeats a trial court's subject-matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Nazari*, 561 S.W.3d at 500; *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Immunity from liability protects governmental entities from money judgments even if the Legislature has expressly given consent to sue. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d

849, 853 (Tex. 2002). The Texas Supreme Court has long recognized that it is the Legislature's sole province to waive or abrogate governmental immunity. *Nazari*, 561 S.W.3d at 500; *Tooke*, 197 S.W.3d at 332. A plaintiff who sues a governmental entity must establish the state's consent to suit; otherwise, governmental immunity from suit defeats a trial court's subject-matter jurisdiction. *IT-Davy*, 74 S.W.3d at 855; TEX. GOV'T CODE ANN. § 311.034.

Because a court should not act until it determines that it has subject-matter jurisdiction to do so, including determining whether immunity deprives the court of subject-matter jurisdiction, "a court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554, 555 (Tex. 2000); *see Miranda*, 133 S.W.3d at 227 ("The United States Supreme Court and all of the federal circuits have authorized federal district courts to consider evidence in deciding motions to dismiss for lack of subject matter jurisdiction."). The purpose of a dilatory plea, such as a plea to the jurisdiction, "is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached." *Blue*, 34 S.W.3d at 554. If the jurisdictional issue implicates the merits of a plaintiff's claims and evidence is presented with the plea, a trial court may consider the

evidence to determine whether a fact issue exists and, if none exists, may grant the plea as a matter of law. *See Miranda*, 133 S.W.3d at 227–28.

B. Analysis

Rock contends that the School's participation in discovery by sending disclosure requests to Rock and by responding to requests sent to it in relation to its plea to the jurisdiction waived its immunity. However, the Texas Supreme Court has repeatedly recognized that discovery may be necessary to resolve jurisdictional issues. *E.g.*, *id.* at 233 ("[T]he determination of whether immunity was waived may require consideration of extrinsic facts after reasonable opportunity for targeted discovery."); *Blue*, 34 S.W.3d at 554 ("[T]he issues raised by a dilatory plea are often such that they cannot be resolved without hearing evidence. And because a court must not act without determining that it has subject-matter jurisdiction to do so, it should hear evidence as necessary to determine the issue before proceeding with the case."). Accordingly, the School's requests for discovery and its responses to Rock's own discovery requests regarding its immunity from suit were not improper and did not waive its immunity.

As support, Rock relies solely on *City of Galveston v. Gray*, which reviewed a trial court's refusal to rule on the City's plea to the jurisdiction and its order forcing the City to participate in discovery on the merits as opposed to discovery on jurisdictional issues. 93 S.W.3d 587, 589, 591 (Tex. App.—Houston [14th Dist.]

2002, pet. denied). The appellate court agreed with the City that "a governmental unit's entitlement to be free from suit is effectively lost if the trial court erroneously assumes jurisdiction and subjects the government unit to pre-trial discovery and the costs incident to litigation." *Id.* at 591. That was not the case here. Thus, Rock has not provided any authority supporting her argument that a governmental entity waives its immunity simply by requesting disclosures or by responding to discovery requests, and the caselaw is to the contrary. *See, e.g.*, *Blue*, 34 S.W.3d at 554, 555.

We hold that the School did not waive its immunity from suit by requesting disclosures or by responding to Rock's discovery requests.

TCHRA

A. Governing Law

The TCHRA provides for statutory waiver of governmental immunity from suit for lawsuits brought under the Act. *Alamo Heights*, 544 S.W.3d at 805 (quoting *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008), and *Mission Consol.*, 372 S.W.3d at 636). Under the TCHRA, an employer commits an unlawful employment practice if, because of an employee's race, the employer "fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment." TEX. LAB. CODE ANN. § 21.051(1); *Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 813 (Tex. App.—Houston

[1st Dist.] 2012, pet. denied). The Texas Legislature patterned the TCHRA after federal law to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments." *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 474 (Tex. 2001) (quoting TEX. LAB. CODE ANN. § 21.001(1)). When analyzing a claim brought under the TCHRA, we therefore look to state cases as well as to the analogous federal statutes and the cases interpreting those statutes. *Id.* at 476; *Chandler*, 376 S.W.3d at 814.

"Texas courts follow the settled approach of the U.S. Supreme Court in recognizing two alternative methods of proof" in discrimination and retaliation cases. *Mission Consol.*, 372 S.W.3d at 634 (discrimination); *see Alamo Heights*, 544 S.W.3d at 781–82 (retaliation). First, an employee can prove discriminatory or retaliatory intent by direct evidence of what the employer did and said. *Mission Consol.*, 372 S.W.3d at 634; *see Alamo Heights*, 544 S.W.3d at 781–82. "Direct evidence of discrimination is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." *Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 433 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (citation omitted); *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). "If an inference is required for the evidence to be probative as to the employer's discriminatory animus in making the [adverse] employment

decision, the evidence is circumstantial, not direct." *Donaldson*, 495 S.W.3d at 433; *Sandstad*, 409 F.3d at 897–98.

Courts have tended to find that insults or slurs against a protected group constitute direct evidence of discrimination. *Donaldson*, 495 S.W.3d at 433. If the employee produces direct evidence of discrimination, the burden of proof shifts to the employer to show that legitimate reasons would have led to the same decision regardless of any discriminatory motives. *Toennies*, 47 S.W.3d at 476.

In the absence of direct evidence, courts apply the *McDonnell Douglas* burden-shifting framework. *Mission Consol.*, 372 S.W.3d at 634 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973)). Initially, the plaintiff-employee must meet the minimum initial burden of establishing a prima facia case of discrimination, which entitles the employee to a presumption of discrimination. *Id.* (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981), and *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003)). The presumption of discrimination is "merely an evidence-producing mechanism that can aid the plaintiff in his ultimate task of proving illegal discrimination by a preponderance of the evidence." *Id.* To establish a prima facie case of discrimination based on circumstantial evidence, the employee must show that (1) she was a member of a protected class; (2) she suffered an adverse employment action; and (3)

she was treated differently than similarly situated persons outside of her protected class. *Mission Consol.*, 372 S.W.3d at 640.

If the employee establishes a prima facie case of discrimination, the burden of production shifts to the defendant-employer to rebut the presumption by articulating some legitimate, non-discriminatory reason for the employment decision. *Alamo Heights*, 544 S.W.3d at 782 (citing *Burdine*, 450 U.S. at 254–55). If the employer rebuts the presumption of discrimination, the burden of production shifts back to the employee to show that the employer's stated reason was a pretext for discrimination. *Toennies*, 47 S.W.3d at 477 (citing *McDonnell Douglas*, 411 U.S. at 805–07, and *Burdine*, 450 U.S. at 256). Although the burden of production shifts between the employee and employer in circumstantial-evidence cases, in both direct- and circumstantial-evidence cases, the burden of persuasion remains at all times with the employee. *Alamo Heights*, 544 S.W.3d at 782 (citing *Burdine*, 450 U.S. at 253).

Regardless of whether the employee attempts to prove her case by direct or circumstantial evidence of discrimination, the TCHRA's discrimination provision addresses only "ultimate employment decisions" such as hiring, granting leave, discharging, promoting, or compensating. *Ptomey v. Tex. Tech. Univ.*, 277 S.W.3d 487, 492 (Tex. App.—Amarillo 2009, pet. denied) (quoting *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 340 (5th Cir. 2003)); *McCoy v. City of Shreveport*, 492 F.3d 551, 559–60 (5th Cir. 2007); *see* TEX. LAB. CODE ANN. § 21.051(1) (providing

that employer commits unlawful employment practice if it, on basis of race, “fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment”).

Rock’s case depends on circumstantial evidence. Therefore, we apply the *McDonald-Douglas* burden-shifting analysis.

B. Racial Discrimination

1. Workplace comments

Rock alleges that the School discriminated against her based on her race by requiring her to sign documents illegally, by accusing her of creating problems, by telling her that her campus was “too black” regarding staffing, and by threatening her that “loose lips sink ships.” None of these actions, by themselves, constitute the type of “ultimate employment decisions” that the TCHRA discrimination provision addresses. *See Ptomey*, 277 S.W.3d at 492; *McCoy*, 492 F.3d at 559–60; *see* TEX. LAB. CODE ANN. § 21.051(1)

For workplace comments, such as Greenwood’s “too black” comment, to provide sufficient evidence of discrimination, the comments must be (1) related to the employee’s protected class, (2) proximate in time to an adverse employment decision, (3) made by an individual with authority over the employment decision at issue, and (4) related to the employment decision at issue. *Donaldson*, 495 S.W.3d

at 433 (citing *Chandler*, 376 S.W.3d at 821); *Clark v. Champion Nat'l Sec., Inc.*, 952 F.3d 570, 581 (5th Cir. 2020).

While Greenwood's single "too black" comment is tangentially related to Rock's race and was made by the person who ultimately terminated Rock's employment, the evidence, taken in the light most favorable to Rock, does not sufficiently show discrimination because Rock does not identify an adverse employment action that occurred proximate in time to Greenwood's comment, nor has she presented any evidence that the comment related to an adverse employment decision. *See Donaldson*, 495 S.W.3d at 433; *Clark*, 952 F.3d at 581. Rather, the comment referred to the School's failure to meet diversity guidelines. The TCHRA allows consideration of race and other protected classes when "combined with objective job-related factors to attain diversity in the workplace," which the unrebutted evidence indicates this was. TEX. LAB. CODE ANN. § 21.125(a).

Rock also alleges that the School discriminated against her because it made a threat that "loose lips sink ships." Rock's complaint to Greenwood expressly stated that Rock had heard about the comment from a teacher, whom Rock did not identify, and that that teacher "felt threatened because she received the message that '[l]oose lips sink ships.'" Rock did not identify who made the alleged threat or allege that anyone, including Greenwood, directed the comment towards Rock. Rock also produced no evidence showing that the comment related to Rock's race or her

termination or that it was made proximate in time to her termination. *See Donaldson*, 495 S.W.3d at 433; *Clark*, 952 F.3d at 581.

We conclude that these comments are legally insufficient to show discrimination.

2. Disparity in teachers' pay

Rock further alleges that the School discriminated against her by paying African American teachers less than Caucasian teachers, by calling it a "sacrifice" to increase African American teachers' pay, and by Greenwood's causing confusion by firing an African American teacher. But Rock does not allege that she was paid less than Caucasian teachers, and the unrebutted evidence produced by the School shows that, in fact, these allegations were untrue. Rock's allegations involving third-party teachers do not show that Rock suffered an adverse employment action because of discrimination against herself or as a direct result of a discriminatory policy that prevented African American teachers from being paid as much as Caucasian teachers. *See Ptomey*, 277 S.W.3d at 492 ("In a discrimination case, '[a]n adverse employment action means an ultimate employment decision, such as hiring, granting leave, discharging, promoting, and compensating [employees].") (quoting *Foley*, 355 F.3d at 340); *McCoy*, 492 F.3d at 559–60. Furthermore, the record shows that Rock herself received the second-highest salary in the district and that African American teachers received pay commensurate with Caucasian teachers.

We conclude that Rock has failed to show discriminatory disparity in pay.

3. Replacement by a person outside the protected class

Rock also alleges that, after she was terminated, she was replaced by Deal, a person outside of her protected class. On appeal, Rock concedes that she was not replaced by Deal, but she argues that her duties were distributed to him and that this shows discrimination.

A terminated employee can show that others who were similarly situated were treated more favorably by showing that the employee was replaced by someone outside of her protected class. *See Donaldson*, 495 S.W.3d at 434. A terminated employee is "replaced" when another person fills the terminated employee's position and is assigned the terminated employee's former job duties. *E.g.*, *Russo v. Smith Int'l, Inc.*, 93 S.W.3d 428, 436 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (age discrimination) (citing *Baker v. Gregg Cty.*, 33 S.W.3d 72, 81 (Tex. App.—Texarkana 2000, no pet.) (same)); *Dallas Indep. Sch. Dist. v. Allen*, No. 05-16-00537-CV, 2016 WL 7405781, at *8 (Tex. App.—Dallas Dec. 22, 2016, pet. denied) (race discrimination) (citing *Baker*, 33 S.W.3d at 81). "[A] terminated employee is not replaced by a person who temporarily assumes the terminated employee's job duties or a person who only takes over a part of those duties. When a terminated employee's job duties are distributed among other employees after termination,

those employees do not replace the terminated employee." *Russo*, 93 S.W.3d at 436 (quoting *Baker*, 33 S.W.3d at 81–82).

Rock's employment was terminated shortly before the end of the school year, and the School admits that Deal assumed some of Rock's duties, while maintaining his own duties, until the School could hire Rock's replacement. The School hired Dr. Bean, who was a member of Rock's protected class, as principal at Rock's campus in July 2017. Deal thus only temporarily assumed Rock's duties until the School hired a permanent replacement. *See id.* ("[A] terminated employee is not replaced by a person who temporarily assumes the terminated employee's job duties . . . .") (quoting *Baker*, 33 S.W.3d at 81–82). Thus, we conclude that Rock was not replaced by Deal. This argument is therefore without merit.

4. Rock's termination

Although Rock's employment was terminated, which is an adverse employment action, Rock does not show that she was treated differently from similarly situated persons in other classes. Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 584 (Tex. 2017). The situations and conduct of the employees in question must be nearly identical. *Id.* Employees who hold different jobs are not similarly situated and ordinarily a plaintiff is not similarly situated to her subordinate. *Id.* Here, Rock, as

principal, and the teachers had different supervisors and different standards governing their job duties, and teachers are subordinate to principals. *See id.*

The only person Rock alleges was similarly situated to her is Deal, who did not replace Rock. There is no evidence that Rock and Deal's circumstances were comparable in all material respects, including similar standards, supervisors, and conduct. *See id.* Deal was an assistant superintendent, while Rock was a principal, and Deal only temporarily assumed some of Rock's duties after her termination while keeping his own duties and title.

The only persons who were similarly situated to Rock were the other two campus principals, both of whom were members of Rock's protected class, and her replacement, Dr. Bean, who was likewise a member of her class. We therefore conclude that Rock failed to raise a fact issue on her racial discrimination claim. *See Garcia*, 372 S.W.3d at 635 ("If a fact issue exists, the trial court should deny the plea. But if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law.") (citing *Miranda*, 133 S.W.3d at 227–28).

We hold that the trial court erred in denying the School's plea to the jurisdiction on Rock's discrimination claim. *See id.* at 637 ("Chapter 21 of the Labor Code waives immunity from suit only when the plaintiff actually states a claim for conduct that would violate the TCHRA.").

C. Retaliation

The TCHRA also prohibits an employer from retaliating against an employee for engaging in protected activities, which consist of: (1) opposing a discriminatory practice; (2) making or filing a charge; (3) filing a complaint; and (4) testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing. TEX. LAB. CODE ANN. § 21.055; *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 137 (Tex. 2015). As discussed above, the *McDonnell Douglas* burden-shifting framework also applies to retaliation claims brought under the TCHRA. *Alamo Heights*, 544 S.W.3d at 782. At all times under this framework, the employee maintains the burden of persuasion but the burden of production shifts between the employer and the employee. *Id.* (citing *Burdine*, 450 U.S. at 253). Initially, the employee must establish a prima facie case of retaliation by showing 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. *Id.* If the employee establishes a prima facie case of retaliation, the burden of production shifts to the employer to articulate a legitimate, non-retaliatory purpose for the adverse employment action. *Id.* (citing *Burdine*, 450 U.S. at 254–55). If the employer provides evidence of a legitimate reason for the adverse action, the burden of production shifts back to the employee to prove that the adverse action would not have occurred "but for" the protected activity. *Id.* (citing *Univ. of Tex. Sw. Med. Ctr.*

v. Nassar, 570 U.S. 338, 351–52 (2013)). "The but-for causation standard is significantly more difficult to prove than prima facie causation." *Id.* An employee's subjective beliefs of retaliation are merely conclusions that are not competent evidence. *Tex. Div.-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994); *Chandler*, 376 S.W.3d at 823.

The TCHRA does not protect employees from all retaliatory employment actions, only from actions that are "materially adverse," which "means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Alamo Heights*, 544 S.W.3d at 788 (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 67–68 (2006), and *Montgomery Cty. v. Park*, 246 S.W.3d 610, 614 (Tex. 2007)).

1. Protected activity

The parties dispute whether Rock engaged in a protected activity and whether a causal link existed between any protected activity and Rock's termination. Rock contends that she engaged in protected activity by emailing her complaints about Greenwood's "too black" staffing comment and disparity in teacher's pay. Rock argues that Greenwood's response and Rock's request to appeal Greenwood's response to the board of trustees show that Rock filed an internal complaint and therefore engaged in protected activity. The School argues that Rock's email was

insufficient to notify it that Rock reasonably believed unlawful discrimination was at issue and, therefore, Rock's email did not constitute a protected activity.

An employee engages in protected activity by, among other things, filing an internal complaint, opposing a discriminatory practice, or making a charge of discrimination with the EEOC. TEX. LAB. CODE ANN. § 21.055. Rock does not contend that the School retaliated against her for filing a charge of discrimination with the EEOC or the TWC. She did make internal complaints, but we have concluded that these were not close in time to her termination and that the evidence did not substantiate the substance of these complaints as racially discriminatory.

When an employee files an internal complaint or opposes a discriminatory practice, the employee's complaint must, at a minimum, alert the employer to the employee's reasonable belief that unlawful discrimination is at issue. *See Alamo Heights*, 544 S.W.3d at 786. In *Alamo Heights Independent School District v. Clark*, the court considered whether a teacher had engaged in protected activity by sending a letter to the principal complaining about sexual harassment. *Id.* The court described the letter as follows:

> [A] handful of Clark's allegations contain a sexual component, but an overwhelming number did not. Among the more than four dozen incidents of harassment Clark catalogued in the May 14 letter, her broad-ranging complaints included mistreatment directed not only toward her but to all the other coaches, both male and female, as well as parents and students. She never even hinted that she believed she was targeted because of her gender or any other protected trait. Indeed, she ascribed the behavior and motives such as thinking she is a 'snotty'

> Alamo Heights mom and disliking her teaching and parenting style, and she said what ultimately impelled her to make a formal complaint was [a female coach's] crude comment about [that female coach's] use of the restroom.

Id.

The court acknowledged that, while "'[m]agic words' are not required to invoke the TCHRA's anti-retaliation protection," complaining only of "offensive" behavior is not enough. *Id.*; *see Carrozza*, 876 S.W.2d at 314 ("[An employee's] subjective beliefs are no more than conclusions and are not competent summary judgment evidence."); *Chandler*, 376 S.W.3d at 823 (same). There must be some evidence of racial motivation, such as behavior that signifies an employee's belief that her protected status motivated the behavior. *See Alamo Heights*, 544 S.W.3d at 787.

Like the employee's letter in *Alamo Heights*, Rock's email contained an "overwhelming number" of administrative complaints with only a "handful" of statements relating to race. *See id.* at 786. While accusing Greenwood of low morale at Rock's campus, Rock mentioned that she was offended and appalled by Greenwood's comment, in the context of staffing, that Rock's campus was "too black." But this comment was made by Greenwood in the context of the school's need to comply with racial diversity requirements, not as a racially insensitive or demeaning remark. Rock's email also blamed the School's paying of African American teachers less than comparably placed Caucasian teachers for low morale

at her campus. But the record refutes this claim. Rock complained only of behavior she considered offensive, but that does not invoke the TCHRA's anti-retaliation protection. *See id.*

Greenwood's response to Rock's complaints and Rock's request to appeal Greenwood's decision further show that the School did not know Rock was complaining of unlawful discrimination. Greenwood repeatedly requested that Rock file a formal grievance and, when Rock refused, Greenwood parsed through Rock's email and identified and responded to 32 separate complaints that she could discern, none of which properly described an actionable complaint. Greenwood even agreed to send Rock's complaints to the board of trustees, even though staff members were not routinely allowed to air their grievances with the board, until Rock stopped her. The School's response to Rock's complaints shows that it was not alerted to Rock's reasonable belief that unlawful discrimination was at issue. *See id.*

2. Adverse Employment Action

It is undisputed that Rock's termination constituted an adverse employment action. *See id.* at 788–89 ("Termination is unquestionably a materially adverse employment action."). Rock does not contend that she was subjected to any other adverse employment action.

3. Causation

Rock argues that she established a causal link between her December 2016 email complaint and her termination because the threat that "loose lips sink ships" shows that the School "predetermin[ed]" to terminate her and that the School has not articulated a non-retaliatory basis for her termination. Rock further argues that the School did not follow its policy because it did not investigate her claims of discrimination and retaliation even though Greenwood was aware of Rock's allegations. Rock also argues that the School cut her time in June 2016, as indicated in Greenwood's February 2017 letter, which Rock contends shows that the School retaliated against her for sending her December 2016 email complaint. The School argues that Rock cannot establish a causal link between her December 2016 email and her April 2017 termination because there is no temporal proximity. The School further argues that Rock never filed a formal complaint, which would trigger the School's policies regarding investigations, and that Greenwood offered to send Rock's email to the board until Rock stopped her.

An employee asserting a retaliation claim must establish that, but for engaging in protected activity, the employer's prohibited conduct would not have occurred when it did. *Alamo Heights*, 544 S.W.3d at 782 (citing *Nassar*, 570 U.S. at 351–52). However, the employee need not establish that the protected activity was the sole cause of the employment action. *Datar v. Nat'l Oilwell Varco, L.P.*, 518 S.W.3d

467, 477–78 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *Donaldson*, 495 S.W.3d at 441–42. To determine whether an employee established a causal link between a protected activity and an adverse employment decision, we consider all of the circumstances, including: (1) temporal proximity between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) expression of a negative attitude toward the employee's protected activity; (4) failure to adhere to relevant established company policies; (5) discriminatory treatment in comparison to similarly situated employees; and (6) evidence the employer's stated reason for the employment decision is false. *Alamo Heights*, 544 S.W.3d at 790; *Donaldson*, 495 S.W.3d at 444.

Rock has not offered any evidence or argument that the School expressed a negative attitude toward Rock's protected activity, if any. To the extent Rock argues that the "loose lips" comment is an expression of a negative attitude, the only evidence of the comment is Rock's own email in December 2016, in which she stated that the comment was made to another teacher. As we discussed above, there is no evidence that the comment was made about or directed towards Rock. Moreover, as we also discussed above, Rock has not produced evidence of discriminatory treatment compared to similarly situated employees.

a. Temporal proximity

Temporal proximity between protected activity and an adverse employment decision can be evidence of a causal connection when a person with input into the employment decision was aware of the protected activity and when the proximity is "very close." *Alamo Heights*, 544 S.W.3d at 790 (quoting *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007)). This Court has held that four months between an employee's engaging in protected activity and the employee's termination, without more, does not raise a fact issue regarding a causal link. *Green v. Lowe's Home Ctrs., Inc.*, 199 S.W.3d 514, 523 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Here, Rock sent her email on December 7, 2016, and her employment was terminated on April 11, 2017. The four-month lapse between Rock's allegation of engaging in protected activity and her termination does not alone raise a fact issue on causation. *Id.*

b. Knowledge of protected activity

Greenwood was the recipient of Rock's December 2016 email and thus Greenwood had knowledge of the email. However, as we discussed above, Rock's email was insufficient to alert the School to Rock's reasonable belief that unlawful discrimination was at issue. *See Alamo Heights*, 544 S.W.3d at 786. Greenwood repeatedly asked Rock to file a formal grievance with additional information, but Rock refused. This factor weighs against causation.

c. Failure to adhere to policies

Rock contends that the School violated its policies by not investigating her complaints. The School's evidence included its policies and procedures for employee complaints, which encouraged employees to discuss concerns and complaints with their immediate supervisors through informal conferences that were aimed at efficient resolution at the lowest possible administrative level. The School's policies also provided for a formal complaint process, which required "timely filing a written complaint form" that was available from human resources. The policy further provided, "The formal complaint process provides all employees with an opportunity to be heard up to the highest level of management. Once all administrative procedures are exhausted, employees can bring concerns or complaints to the Board . . . ."

The uncontroverted record evidence shows that Greenwood explained the School's employee complaint policies and procedures to Rock and that Greenwood repeatedly asked Rock to complete a formal complaint, which would have triggered the School's formal complaint policies and procedures. Rock refused to initiate a formal complaint on the required form, choosing instead to rely on her email with its myriad complaints, most of which were administrative. Despite Rock's refusal to initiate the formal complaint process, Greenwood investigated Rock's claims and provided a detailed response to all the claims that she could discern from Rock's

email. Greenwood also agreed to elevate Rock's complaints to the board of trustees, which was not permitted under the School's policies until the employee had exhausted the administrative remedies available under the formal complaint process. We conclude that the School did not violate its policies because Greenwood investigated Rock's informal complaint and Greenwood agreed to send Rock's informal complaint to the board of trustees but Rock halted the process. This factor also weighs against causation.

d. Evidence that the School's stated reasons were false

The School offered into evidence Rock's termination letter, which stated that Rock's employment was terminated for insubordination and a hostile attitude, as well as emails showing Rock's insubordination and hostile attitude towards Greenwood, Deal, and the director of student accounting. Rock has not offered any evidence showing that the School's reasons for her termination were false or pretextual.

Nor has Rock offered any evidence showing that, but for her December 2016 complaint email, she would not have been terminated. Rock argues that her time was cut in June 2016, which is six months before she sent her December email and ten months before her termination. The only evidence in the record regarding Rock's time is a February 2017 letter from Greenwood to Rock, which stated, "Sheila Galloway has requested that I review your time and effort *with the intent of*

answering questions you have raised" regarding four days that Rock had been charged with compensation time. (Emphasis added). The letter indicates that Rock had previously been charged personal days, which she had apparently disputed. The letter does not indicate when Rock was charged the disputed personal days, but Rock argues without supporting evidence that her time was "cut" in June 2016. The School could not have retaliated against Rock in June 2016 for an email Rock later sent in December.

Moreover, Greenwood's February 2017 letter did not cut Rock's time, but explained its reasons for having previously charged her with personal time. According to the letter, Greenwood had discovered that Rock had repeatedly left work during the day and had repeatedly left work early. Because Rock's timesheets showed that she had left early on two separate days that Rock had questioned, Greenwood concluded that Rock's time for those two days, which included two half-days of personal leave, would stand. The School also determined that it would count one full day of personal leave for a separate day that Rock had not clocked in, which Rock agreed to because, in fact, she had not clocked in that day. The uncontested evidence thus shows that Rock was charged personal leave at some time prior to Greenwood's February 2017 letter (which Rock contends was in June 2016), and that Greenwood had investigated the days Rock disputed and responded to Rock in February 2017 by explaining that Rock was charged personal leave because her time

sheets showed she was absent from work on those particular days. There is no evidence in the record supporting Rock's argument that she replied to Greenwood in March 2017 complaining that the investigation was retaliatory. But even if Rock had complained in March 2017, the uncontroverted evidence still shows that the supposed retaliation occurred before Rock sent her December 2016 email.

There is no genuine dispute of material fact regarding Rock's engagement in a protected activity or whether a but-for causal link exists between any protected activity and Rock's termination, both of which are essential elements of her retaliation claim. *See Alamo Heights*, 544 S.W.3d at 782. We therefore conclude that Rock failed to raise a fact issue on her retaliation claim. *See Garcia*, 372 S.W.3d at 635 ("If a fact issue exists, the trial court should deny the plea. But if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law.") (citing *Miranda*, 133 S.W.3d at 227–28). We hold that the trial court erred in denying the School's plea to the jurisdiction. *See id.* at 637 ("Chapter 21 of the Labor Code waives immunity from suit only when the plaintiff actually states a claim for conduct that would violate the TCHRA.").

Attorney's Fees

The School requests costs, including attorney's fees and expenses, contending that Rock's lawsuit is frivolous, unreasonable, groundless, and lacks merit because

Rock did not produce evidence showing that her discharge violated the TCHRA. In a proceeding under the TCHRA, "a court may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." TEX. LAB. CODE ANN. § 21.259(a). An award of attorney's fees generally rests in the sound discretion of the trial court. *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 761 (Tex. 2012). Accordingly, we remand to the trial court to determine whether to allow the School costs, including reasonable attorney's fees or expenses, as a prevailing party and the amount of costs, if any.

Conclusion

In summary, the trial court erred in denying the School's plea to the jurisdiction on Rock's racial discrimination and retaliation claims. Rock failed to establish a prima facie case of racial discrimination because she failed to establish that she was treated differently from similarly situated employees outside of her protected class. Rock failed to establish a prima facie case of retaliation because she did not file a formal complaint and her informal email complaint included two race-related statements amongst numerous administrative complaints, which did not alert the School to Rock's reasonable belief that unlawful discrimination was at issue. Even if Rock's email constituted engagement in a protected activity, Rock did not show that her email was the but-for cause of her termination.

Accordingly, we reverse the trial court's order denying the School's plea to the jurisdiction and remand the case to the trial court with instructions to (1) determine whether to award the School costs, including attorney's fees and expenses, and (2) render a judgment dismissing the case for lack of jurisdiction over Rock's claims. We grant the School's motion to strike documents included in Rock's appendix that are not part of the appellate record, and we dismiss any other pending motions as moot.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.