

Opinion issued July 13, 2021



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00886-CV

ALMA SALMAN, Appellant
V.
KIPP, INC., Appellee

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Case No. 2016-44671

MEMORANDUM OPINION

Alma Salman appeals an order granting KIPP, Inc.'s plea to the jurisdiction and dismissing her claims. Salman sued her former employer, KIPP, for retaliation and employment discrimination based on race, national origin, and age in violation of Chapter 21 of the Labor Code. *See* TEX. LAB. CODE § 21.051. KIPP filed a plea

to the jurisdiction asserting governmental immunity from Salman's claims. The trial court granted KIPP's plea to the jurisdiction, and Salman appealed.

On appeal, Salman argues that the trial court erred by granting KIPP's plea to the jurisdiction. She also argues that equitable claims protecting a public employee's speech should be reviewed under Article I, Section 8 of the Texas Constitution instead of under the First Amendment of the United States Constitution.

Having concluded that Salman has not established that KIPP consented to this suit and waived its immunity, we affirm.

Background

KIPP is an open-enrollment charter school and is a "part of the public school system of this state." *See* TEX. EDUC. CODE § 12.105. In 2007, KIPP hired Salman, a Hispanic woman, as the principal of KIPP Sharp College Prep Lower Schools. In 2013, KIPP promoted Salman to Head of Schools and Founding Principal, where she opened and supervised several KIPP campuses around Houston.

In 2015, L. Blanco, a bilingual instructional supervisor for KIPP, reported to Salman that KIPP was misallocating state and federal grant funding intended for bilingual programs. Salman encouraged Blanco to report the financial improprieties, and Blanco agreed. Later, Salman discovered that Blanco no longer worked for KIPP. S. Ali, KIPP Houston's Superintendent, would not discuss with Salman why Blanco no longer worked for KIPP. Salman believed that KIPP terminated Blanco

because she was a Hispanic woman who advocated for bilingual funding, even though she did not know if Blanco reported her funding concerns to the executive team.

Salman challenged KIPP's budgeting during an executive team meeting. According to Salman, KIPP allocated funding for bilingual programs equally across KIPP's schools, even if certain campuses had far fewer students learning English. Salman urged her colleagues to allocate the money proportionally to allow schools with more bilingual students to receive more money. Salman admitted that she got into an "argument" with D. Carter, another KIPP Head of Schools, about KIPP's funding decisions. Days after the meeting, Ali called Salman into her office, told her that her behavior towards Carter and another employee was "disrespectful" and "unprofessional," and asked her to "drop the argument."

Salman also questioned KIPP's sibling-student transfer policies. A Hispanic parent asked Salman to approve a transfer for her child from one KIPP school to another, which Salman supervised. The parent requested the transfer because she wanted her children to attend school together since one of her children attended a KIPP school about 11 miles away from the other KIPP school that had accepted her other child. Salman presented this issue to the executive team and advocated to keep the two children together, but her transfer request was denied.

Besides voicing her concerns about bilingual funding and sibling-student transfer issues, Salman complained that KIPP did not permit her to hire C. Ardoin, an African American woman, as a principal. Salman believed that Ardoin was the best candidate because she was qualified, hardworking, and received the highest scores from the interview committee. When Salman endorsed Ardoin, Ali and Carter disagreed, stating that Ardoin needed a “makeover” and that she was “too ghetto.” Ali encouraged Salman to hire a white woman who had received one of the lowest scores.

In February 2016, after 10 years of service, KIPP recognized Salman as one of its top 10 most influential people. One week later, Ali told Salman that she needed to resign or else she would be terminated. Ali told Salman that she was being fired because she lacked transparency in handling of a sibling-student transfer and her team no longer trusted her. Ali gave Salman a settlement agreement. She also gave Salman a separation agreement and told her that she had 21 days to review and sign it. Ali instructed Salman to leave the building before she could collect her belongings.

Ali emailed a letter to Salman revoking the settlement agreement. The letter stated that Salman was being investigated for misusing school funds, stealing school property, and using KIPP employees to perform personal tasks. Ali requested Salman to return all of KIPP’s property. The next day, Ali reported the allegations

to the Texas Education Agency, even though KIPP's investigation was not finished. Salman immediately returned the computers and devices to KIPP. Still, the TEA sanctioned Salman's teacher certificate.

About a month later, Ali sent a letter to the TEA stating that KIPP had concluded its investigation and determined that it could not "confirm [Salman's] illegal activity." The TEA eventually removed the sanction from Salman's teaching certificate.

Salman filed a charge of discrimination with the Texas Workforce Commission and the Equal Employment Opportunity Commission. She checked the boxes reflecting that her discrimination claim was based on race, national origin, retaliation, age, and "other." The charge described Salman's opposition to Blanco's termination "for reporting the fraud and discriminatory financial management." She also included her concerns about KIPP's misallocation of bilingual funds to non-bilingual students. Salman alleged that KIPP fired her for "pretextual reasons." The TWC and the EEOC closed their investigations and sent Salman right-to-sue letters.

Salman filed this suit and asserted six claims against KIPP: (1) discrimination based on her race (Hispanic), national origin (Mexico), and age (early 50's) under Section 21.051 of the Labor Code; (2) discrimination (hostile work environment) under Section 21.051 of the Labor Code; (3) retaliation under Section 21.055 of the Labor Code; (4) due course of law in violation of Article I, Section 19 of the Texas

Constitution; (5) equal protection in violation of Article I, Sections 3 and 3a of the Texas Constitution; and (6) free speech in violation of Article I, Section 8 of the Texas Constitution.

KIPP answered, generally denying Salman's allegations and asserting affirmative defenses, including governmental immunity from Salman's claims. KIPP attached a letter from Ali that listed the reasons that KIPP fired Salman. The letter stated that KIPP fired Salman because Ali "lost confidence in [Salman's] ability to perform the duties and responsibilities of [her] position in a professional and effective manner." Ali provided several reasons:

- Salman acted unprofessionally toward peers and subordinates many times;
- Salman discouraged or thwarted the enrollment of children with special needs or children who appeared to have special needs;
- Salman often missed responding to emails promptly;
- Salman missed scheduled meetings with KIPP administrators and other KIPP employees;
- Salman often reported late to meetings or was noticeably distracted during meetings (e.g., leaving the meeting, taking calls during meetings);
- Salman developed strained relationships with KIPP's partner organizations, including KIPP Care, the Connect Community, and the Houston Center for Literacy; and
- Salman acted inappropriately in connection with a student transfer in these respects: Salman spoke in an unprofessional and

demeaning manner toward another Head of School and the Director of Strategic Projects during a meeting to discuss the student transfer on February 17, 2016; in later conversations, Salman misrepresented information to KIPP about the student transfer; and Salman acted solely in accordance with her own self-interests rather than the interests of KIPP or the student.

KIPP filed a plea to the jurisdiction arguing that, as a governmental unit, it was immune from suit and that the Labor Code had not waived its immunity because Salman could not prove her claims. As for her discrimination claims, KIPP argued that Salman failed to allege any details related to race, national origin, retaliation, or “other,” as denoted in her charge. It argued that Salman’s allegations only addressed retaliation relating to the student bilingual funding issues, which could not establish a retaliation claim because she never complained of an unlawful employment practice, and therefore did not engage in a protected activity necessary to support a retaliation claim. KIPP argued that Salman could not establish a prima facie case of discrimination or prove that KIPP’s legitimate, nondiscriminatory or non-retaliatory reasons for terminating her employment were pretextual, as Ali’s letter demonstrated. KIPP also argued that Salman’s charge and deposition testimony lacked specificity to establish a hostile work environment claim. Finally, KIPP asserted that Salman could not establish any of her constitutional claims. For instance, it argued that Salman’s free speech claim failed because she spoke in her role as an employee, not a private citizen, as required by the Texas Constitution. In support of its plea to the jurisdiction, KIPP attached a transcript of Salman’s

deposition, a transcript of Ali's deposition and her affidavit, Carter's affidavit, Blanco's letter showing that KIPP eliminated her position, Salman's termination letter, and Ali's pre-investigation and post-investigation letters to the TEA.

Salman filed two amendments to her petition and a sur-reply brief and abandoned her due course of law and equal protection claims under the Texas Constitution. In response to the plea, Salman argued that the Labor Code did not require her to present proof of her claims in her pleadings for the trial court to have subject matter jurisdiction. She contended that she only had to present plausible proof of the elements of her claim. Salman attached a transcript of her deposition and her affidavit as well as Ardoin's.

The trial court held a hearing. There, Salman waived her discrimination claims. After the hearing, the trial court signed an order granting KIPP's plea and dismissed all of Salman's claims with prejudice. Salman filed an interlocutory appeal¹ challenging the trial court's grant of KIPP's plea and the dismissal of her remaining claims—the retaliation claim under Chapter 21 of the Labor Code and the free speech retaliation claim under the Texas Constitution.

Plea to the Jurisdiction

Salman argues that the trial court erred by granting KIPP's plea to the jurisdiction.

¹ See TEX. CIV. PRAC. & REM. CODE § 51.014(8).

A. Standard of review

We review de novo a trial court’s ruling on a plea to the jurisdiction. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 805 (Tex. 2018); *Fallon v. Univ. of Tex. MD Anderson Cancer Ctr.*, 586 S.W.3d 37, 55–56 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (en banc). A governmental unit may file a plea to the jurisdiction to challenge a plaintiff’s failure to plead jurisdictional facts or challenge the existence of evidence supporting those facts. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). “[W]hen a plea to the jurisdiction challenges the existence of jurisdictional facts with supporting evidence, the standard of review mirrors that of a traditional summary judgment: all the evidence is reviewed in the light most favorable to the plaintiff to determine whether a genuine issue of material fact exists.” *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) (citing *Miranda*, 133 S.W.3d at 227–28); 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”); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000) (“[A] court deciding a plea to the jurisdiction . . . may consider evidence and must do so when necessary to resolve the jurisdictional issues raised.”).

When reviewing a plea to the jurisdiction, we take as true all evidence favorable to the plaintiff and indulge every reasonable inference and resolve any doubts in the plaintiff's favor. *See Miranda*, 133 S.W.3d at 228. If the defendant disputes jurisdictional facts alleged in the petition, then the defendant has the burden to show evidence that negates the facts alleged. *Clark*, 544 S.W.3d at 805. And if the defendant's evidence shows that the plaintiff's allegations are not true, then the burden shifts to the plaintiff to offer evidence disputing the movant's evidence. *Id.* The court must only deny the plea if the plaintiff's evidence creates a fact issue. *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. *Miranda*, 133 S.W.3d at 228.

B. Applicable law

Generally, sovereign immunity deprives a trial court of subject-matter jurisdiction for lawsuits in which the state is a defendant unless the state consents and waives its immunity. *Nazari v. State*, 561 S.W.3d 495, 500 (Tex. 2018). School districts, as political subdivisions of the state, are entitled to governmental immunity, unless it waives such immunity. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Governmental immunity consists of immunity from liability and immunity from suit. *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 a governmental unit properly asserts its immunity 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 consented to sue. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002).

A plaintiff has the burden of establishing that a governmental unit has consented to her suit. If a plaintiff fails to carry her burden, then her claims are barred by governmental immunity, and the trial court lacks subject matter jurisdiction and must dismiss the cause with prejudice. *See Hampton v. Univ. of Tex.—M.D. Anderson Cancer Ctr.*, 6 S.W.3d 627, 629 (Tex. App.—Houston [1st Dist.] 1999, no pet.). The purpose of a plea to the jurisdiction “to establish a reason why the merits of the plaintiff[’s] claims should never be reached.” *Blue*, 34 S.W.3d at 554.

KIPP is a governmental unit entitled to governmental immunity unless it has consented and waived it. TEX. EDUC. CODE § 12.1056; TEX. CIV. PRAC. & REM. CODE § 101.001(3). Salman contends that she alleged specific facts to exhaust her administrative remedies under the Labor Code and to support her claims for retaliation and free speech, affirmatively waiving KIPP’s governmental immunity.

C. Exhaustion of administrative remedies

KIPP alleges that Salman was jurisdictionally barred from bringing her retaliation claim before the trial court because she did not raise the claim in her charge, and thus she failed to exhaust her administrative remedies. KIPP also argues

that Salman did not allege any retaliation claims about third parties in her discrimination charge. Finally, KIPP argues that Salman did not allege any factual support for her conclusions that (1) KIPP terminated Blanco based on her race, and (2) KIPP failed to hire Ardoin based on her race.

Salman responds that her retaliation claim is not jurisdictionally barred because her retaliation claim is reasonably related to the grounds in her charge. She checked the box for retaliation on her charge and stated that she opposed the firing of Blanco because Salman was a Hispanic woman who opposed the termination of another Hispanic woman, that she opposed KIPP's bilingual funding decisions, and that KIPP fired her for pretextual reasons. She also argues that KIPP retaliated against her for opposing KIPP's refusal to hire Ardoin, an African American woman.

“[E]xhaustion of administrative remedies is a mandatory prerequisite to filing a civil action alleging violations of the [T]CHRA.” *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 446 (Tex. 2004). An employee must file a charge with the TWC, allege an unlawful employment practice, state the facts on which the complaint is based, and identify the respondent. TEX. LAB. CODE § 21.201(c); *see Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 (Tex. 2010). A lawsuit under Chapter 21 of the Labor Code is limited “to claims that were included in the administrative charge and to factually related claims that could reasonably be expected to grow out of the agency’s investigation of the claims stated in the charge.”

Yeh v. Chesloff, 483 S.W.3d 108, 118 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). We liberally construe the administrative charge to determine whether it contains an adequate factual basis to put the employer on notice of the nature of the charges. *Id.* “We may not construe the charge to include facts that the employee initially omitted.” *Id.*

Salman marked several boxes, including the box for retaliation, on her charge of discrimination filed with the EEOC. In the description section, Salman stated that Blanco “reported financial and non-compliance issues and improprieties.” Salman alleged that KIPP fired Blanco and that she opposed Blanco’s termination for “reporting the fraud and discriminatory financial mismanagement.” She also alleged that she “openly opposed” KIPP for “allocating bilingual funds to non-bilingual students.” Salman stated that KIPP terminated her for “pretextual reasons.” She did not allege any facts related to KIPP’s failure or refusal to hire Ardoin. Nor did she specify Blanco’s race.

An employer participates in an unlawful employment practice if the employer retaliates or discriminates against a person who, among other things, opposes a discriminatory practice, makes or files a charge, or files a complaint. TEX. LAB. CODE § 21.055; *Anderson v. Hous. Cmty. Coll. Sys.*, 458 S.W.3d 633, 647 (Tex. App.—Houston [1st Dist.] 2015, no pet.). In liberally construing Salman’s charge for her retaliation claim, Salman provided an adequate factual basis to put KIPP on

notice that she was complaining of discrimination based on retaliation. She alleged details of two times when she complained about KIPP's decisions that could have possibly led to her termination.² *See, e.g., Santi v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 312 S.W.3d 800, 806 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (concluding that employee's charge adequately alleged facts to put former employer on notice of her gender discrimination claim); *see also* 29 C.F.R. § 1601.12(b) (a charge is adequate if it “describe[s] generally the action or practices complained of”). Although Salman did not allege Blanco's race, the factual allegations in her charge could have reasonably prompted an investigation of her retaliation claim. *Yeh*, 483 S.W.3d at 118. We hold that Salman exhausted the administrative remedies under the Labor Code.

D. Retaliation under the Labor Code, Chapter 21

Salman argues that she established a prima facie case of retaliation by alleging two relevant employment practices in her petition: (1) firing a Hispanic employee for advocating for bilingual Hispanic students (Blanco), and (2) not hiring an African American candidate (Ardoin). Salman also asserts that she can rebut the alleged legitimate, nondiscriminatory reasons because (1) she was an exemplary employee;

² We cannot consider Salman's allegations concerning Ardoin because our review is limited to her factual allegations in the charge. *See Yeh*, 483 S.W.3d at 118.

(2) she never received any low performance reviews during her 10-year tenure at KIPP, and (3) KIPP's allegations for her termination were unfounded.

KIPP responds that Salman failed to establish a prima facie claim of retaliation because she failed to plead that she engaged in a protected activity—i.e., complaining about an unlawful employment practice—and only complained about KIPP's misallocation of bilingual funding. KIPP contends that Salman failed to establish that she would not have been terminated but for engaging in protected activity because she only disagreed with the reasons for Blanco's termination and did not make any argument, or cite any record evidence, to prove that she would not have been terminated but for doing so.

The Labor Code waives immunity from suit and liability only when the plaintiff states a claim for conduct that would violate the Chapter 21 of the Labor Code. *Clark*, 544 S.W.3d at 783. If a defendant's jurisdictional challenge negates an element of a plaintiff's prima facie case of a TCHRA claim, the plaintiff has a duty to raise a fact issue about discriminatory intent. *Id.* If the plaintiff fails to do so, we must affirm the trial court's dismissal of the suit because the trial court lacks jurisdiction. *Id.*

Employers must not retaliate or discriminate against a person who engages in a protected activity. *See* TEX. LAB. CODE §§ 21.051, 21.055. Protected activities include (1) opposing a discriminatory practice, (2) making or filing a charge, (3)

filing a complaint, or (4) testifying, assisting, or participating in an investigation, proceeding, or hearing. *Id.* § 21.055. “Opposing a discriminatory practice includes making an internal grievance.” *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 585 (Tex. 2017). To establish opposition to a discriminatory practice, the plaintiff must show that she “held a reasonable, good faith belief that the employer engaged in an activity made unlawful by” the Labor Code. *Lee v. Harris Cnty. Hosp. Dist.*, No. 01-12-00311-CV, 2013 WL 5637049, at *5 (Tex. App.—Houston [1st Dist.] Oct. 15, 2013, pet. denied) (mem. op.). An employer commits an unlawful employment practice if due to race, color, disability, religion, sex, national origin, or age, the employer:

(1) 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; or

(2) limits, segregates, or classifies an employee or applicant for employment in a manner that would deprive or tend to deprive an individual of any employment opportunity or adversely affect in any other manner the status of an employee.

TEX. LAB. CODE § 21.051.

When, as here, there is no direct evidence of retaliation, the employee must make a prima facie case under the burden-shifting mechanism in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973). *Crutcher v. Dallas Indep. Sch. Dist.*, 410 S.W.3d 487, 493–94 (Tex. App.—Dallas 2013, no pet.). “Under this

framework, the plaintiff is entitled to a presumption of discrimination if she meets the ‘minimal’ initial burden of establishing a prima facie case of discrimination.” *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 634 (Tex. 2012).

For a prima facie case of retaliation, Salman must establish that (1) she participated in a protected activity, (2) her employer took an adverse employment action against her, and (3) a causal connection existed between her protected activity and the adverse employment action. *Rincones*, 520 S.W.3d at 585; *Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 822 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). She must establish that, “absent her protected activity, the adverse employment action would not have occurred when it did.” *Donaldson v. Tex. Dep’t of Aging & Disability Servs.*, 495 S.W.3d 421, 441 (Tex. App.—Houston [1st Dist.] 2016, pet. denied); see *Metro. Transit Auth. of Harris Cnty. v. Ridley*, 540 S.W.3d 91, 99 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (requiring a “but for” showing). If Salman establishes a prima facie case, the burden shifts to KIPP to articulate a legitimate, nondiscriminatory purpose for the adverse employment action. See *Chandler*, 376 S.W.3d at 822–23.

KIPP argues that Salman did not establish that she engaged in a protected activity when she challenged KIPP’s budget allocation practices because complaints about the misallocation of bilingual student funding is not an unlawful employment practice. KIPP relies on *Lamar Univ. v. Jenkins*, No. 09-17-00213-CV, 2018 WL

358960 (Tex. App.—Beaumont Jan. 11, 2018, no pet.) (mem. op.), to argue that complaints about how an employer chooses “to operate with respect to student-oriented matters” do not constitute unlawful employment practices.

In *Jenkins*, a college professor sued his former employer, Lamar University. *Jenkins*, 2018 WL 358960, at *1. The professor alleged that the University retaliated against him by denying him a promotion and tenure because Jenkins had opposed the admission exam the University used to make admission decisions for a graduate program, because it excluded women and minorities from teaching in the University’s doctoral program. *Id.* The University filed a plea to the jurisdiction and asserted that Jenkins’s complaint about an admission criterion for a graduate program was not about an unlawful discriminatory employment practice. *Id.*

The trial court granted the University’s plea. *Id.* Jenkins appealed, arguing that he engaged in a protected activity by opposing an unlawful employment practice. *Id.* at *4. According to Jenkins’s affidavit, some graduate students had opportunities to become paid graduate assistants at the University. *Id.* at *4. The court concluded that the TCHRA does not waive the University’s immunity from suit because Jenkins failed to plead a prima facie case of employment retaliation under the TCHRA. *Id.* Jenkins failed to show that the University’s use of the entrance exam to admit students was an unlawful employment practice. *Id.* The court

reasoned that “a speculative opportunity for employment of a prospective graduate student” does not satisfy the statutory requirement. *Id.*

In applying *Jenkins* to the facts here, Salman has not demonstrated that she engaged in protected activity by opposing a discriminatory practice based on race because her complaint solely involves student funding matters. *See* TEX. LAB. CODE §§ 21.051, 21.055. In other words, Salman failed to supply “some evidence of racial motivation” to connect her complaint about the funding issue to KIPP’s alleged discriminatory misconduct. *See Democratic Schs. Research, Inc. v. Rock*, 608 S.W.3d 290, 313 (Tex. App.—Houston [1st Dist.] 2020, no pet.). Her own deposition testimony shows that she complained solely about the student bilingual funding issue:

When I went in and talked to—when I went to talk to [Ali] about the funding, I told her that the funding was not being allocated correctly and that I was worried that this was what [Blanco] had been talking about; and she said to drop it. And I said, “But we’re—not allocating the funding correct correctly. And she said, “Again, to—to drop it.”

Salman had to show not only that she opposed a practice, but that the practice she opposed was discriminatory. *See* TEX. LAB. CODE § 21.055(1). She did not do so.

Salman contends that she established that KIPP committed a discriminatory practice because her student funding complaints were directly linked to her complaints to KIPP about its termination of Blanco for being a “Hispanic advocating for the bilingual funds.” However, the evidence fails to show that Salman articulated

to KIPP that she thought Blanco was fired for discriminatory reasons. When asked about what opposition she raised to KIPP about its grant funding for bilingual programs, Salman testified that Blanco complained about “the mislabeling of bilingual students at other schools.” Salman told Blanco to escalate her concerns and report the matter to the executive team. Although she was a member of the executive team, the record shows that Salman was not present if or when Blanco reported her bilingual student funding concerns to the executive team. She testified that the “meeting didn’t happen in front of me.”

Later, Salman discovered that Blanco no longer worked for KIPP. Salman described how she learned about Blanco’s departure from KIPP:

[Ali] mentions that [Blanco] is gone. And so I asked, “What do you mean she’s gone? You know, where did she go? And [Ali] stated that we weren’t going to talk about that and—we weren’t going to discuss it and that [Blanco]—we were not to reach out to [Blanco]. We were not to speak to [Blanco], and she was now gone. And so I, again, asked why because I wasn’t known for being quiet. So, I had pushed and I asked why, and they said it was something that was—not going to be discussed. I did try to—to find [Blanco] in the building, but [Blanco] was not in the building; and I didn’t get to talk to her again after that.

Salman’s evidence fails to establish Salman’s engagement in a protected activity. An employee’s opposition to a discriminatory practice “must, at a minimum, alert the employer to the employee’s reasonable belief that unlawful discrimination is at issue.” *Rock*, 608 S.W.3d at 312. Salman’s statements to Ali could not have reasonably placed KIPP on notice of any unlawful behavior

concerning Blanco's departure because Salman did not tell Ali that KIPP's motivation for allegedly terminating Blanco was based on her race or any other discriminatory reason. Nor did she even mention Blanco's race. In addition, she never even told Ali that she reasonably believed Blanco's termination was related to the potential meeting Blanco may have had with the executive team to report the alleged financial improprieties. In contrast, Salman's evidence shows that Salman speculated that KIPP retaliated against Blanco and terminated her position because of the temporal nexus between her conversation with Blanco and her discovery of Blanco's departure from KIPP. "[A]n employee's subjective beliefs of retaliation are merely conclusions and do not raise a fact issue . . . in a retaliatory discharge claim." *Niu v. Revcor Molded Prods. Co.*, 206 S.W.3d 723, 731 (Tex. App.—Fort Worth 2006, no pet.) (citing *Tex. Div.-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994) (per curiam)); see *Chandler*, 376 S.W.3d at 814 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) ("Subjective beliefs of discrimination alone are insufficient to establish a prima facie case."). Thus, Salman's conversation with Ali about Blanco is not sufficient to have alerted KIPP to alleged discrimination. See *Rincones*, 520 S.W.3d at 586 (employee failed to establish retaliation claim where evidence showed that employee failed to alert employer of alleged discrimination employee's statements to supervisor lacked information about race or other discrimination); see also *Harris-Childs v. Medco Health Sols., Inc.*, 169 F. App'x

913, 916 (5th Cir. 2006) (per curiam) (plaintiff’s complaint failed to “put the employer on notice” of discriminatory conduct); *Sitar v. India Dep’t of Transp.*, 344 F.3d 720, 727 (7th Cir. 2003) (“An employee can honestly believe she is the object of discrimination, but if she never mentions it, a claim of retaliation is not implicated, for an employer cannot retaliate when it is unaware of any complaints.”).

Because Salman did not carry her initial burden of establishing that she engaged in a protected activity in support of her retaliation claim when she challenged KIPP’s budget allocation practices or discussed Blanco’s departure from KIPP, we conclude that Salman 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.”).

We therefore hold that the trial court did not err in granting KIPP’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.”). We overrule Salman’s first issue.³

³ We need not address Salman’s remaining arguments under her first issue because she failed to establish a prima facie case for her retaliation claim. *See* TEX. R. APP. P. 47.1.

E. Free-speech retaliation under the Texas Constitution

As for her free speech claim, Salman contends that the trial court should have analyzed her equitable claims under the Texas Constitution—the injunctions protecting a public employee’s speech—under Article I, Section 8 of the Texas Constitution, not the First Amendment of the Constitution of the United States. She argues that she was terminated for speaking on a matter of public concern because the misapplication of bilingual student funds affected mainly Hispanic students. Another example of Salman voicing a matter of public concern was about KIPP’s failure to allow her to hire an African American principal.

KIPP asserts that Salman presented no arguments showing that the trial court adjudicated her free speech claim solely under the First Amendment. KIPP also asserts that Salman failed to argue or cite record evidence supporting her claim that she was terminated for making comments protected by law.

To prevail on a free-speech retaliation claim under the Article I, Section 8 of the Texas Constitution, Salman must establish that (1) she suffered an adverse employment decision; (2) her “speech” involved a matter of public concern; (3) her interest in commenting on matters of public concern outweighed her employer’s interest in promoting efficiency; and (4) her speech motivated the adverse employment decision. *Caleb v. Carranza*, 518 S.W.3d 537, 544 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing *Beattie v. Madison Cnty. Sch. Dist.*, 254

F.3d 595, 601 (5th Cir. 2001)). Establishing that Salman spoke as a private citizen, rather than as an employee under her official duties, is another mandatory requirement to support her claim. *Id.*

Salman quoted Article I, Section 3a of the *Texas* Constitution, set out the elements for a *federal* free speech retaliation claim, and asserted that “the Texas Constitution guarantees an affirmative right to speak, rather than simply prohibition of any law that would quell that right.” Salman provides no legal argument that she alleged a facially valid free-speech claim. Instead, she set forth conclusory allegations without analyzing her claims. *Cf.* TEX. R. APP. P. 38.1(f), (i) (requiring an appellant’s brief to “state concisely all issues . . . presented for review” and “contain clear and concise argument for the contentions made”).

When a public employee makes statements in their official capacity, she is “not speaking as [a] citizen[] for free speech purposes.” *Caleb*, 518 S.W.3d at 543. Thus, the “critical inquiry is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.” *Id.* Salman’s inquiry about why Blanco no longer worked for KIPP along with Salman’s individual concerns about the budget allocation both fell within the scope of Salman’s professional duties. In her deposition, Salman testified that it was her “responsibility” to address the school’s compliance for funding issues. Thus, Salman made comments in her capacity as an employee and not as a private citizen and she

therefore failed to allege a facially valid constitutional claim. *Caleb*, 518 S.W.3d at 544–45.

As for her selection of the candidate for principal, Salman at first testified that it was her responsibility to select the principal. But then she changed her testimony and admitted that Ali, as Superintendent, had the authority to select the principal. Salman acknowledged that she only had the “right to disagree” with Ms. Ali’s decision. And Salman’s right to disagree about a candidate for a principal position is similarly within the scope of her official duties. Salman has not established that her comments to Ali about KIPP’s hiring decision involve a matter of public concern because she commented in her official capacity and not as a private citizen. *See Caleb*, 518 S.W.3d at 545.

We overrule Salman’s second issue.

Conclusion

We affirm the trial court’s order granting the KIPP’s plea to the jurisdiction and dismissing Salman’s claims with prejudice.

Sarah Beth Landau
Justice

Panel consists of Chief Justice Radack and Justices Landau and Countiss.