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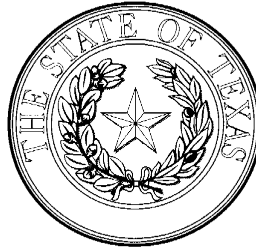

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00497-CV

TEXAS SOUTHERN UNIVERSITY, Appellant

V.

GAUTAM NAYER, Appellee

On Appeal from the 234th Judicial District Court
Harris County, Texas
Trial Court Case No. 2019-42312

MEMORANDUM OPINION

Gautam Nayer sued his former employer, Texas Southern University (TSU), alleging that it discriminated and retaliated against him in violation of the Texas Commission on Human Rights Act (TCHRA). The trial court denied TSU summary judgment on Nayer's claims. TSU appeals, contending that the trial court lacks

subject matter jurisdiction because Nayer did not exhaust his administrative remedies and the doctrine of sovereign immunity applies. We reverse and render judgment for TSU.

Background

In August 2009, Dr. Gautam Nayer was hired by TSU as an Assistant Professor for the Administration of Justice Department in the Barbara Jordan-Mickey Leland School of Public Affairs. In 2016, he was promoted to Associate Professor and received tenure. That fall he was appointed as Interim Department Chair, which came with additional financial compensation.

In September 2018, Nayer complained to the Equal Employment Opportunity Commission (EEOC) that TSU had discriminated against him based on his race (non-African American) and national origin (Indian), retaliated against him for opposing the discrimination, and placed him in a hostile work environment.

In December 2016, in response to an email from Nayer about overtime pay, Dr. Ihekwoaba Onwudiwe wrote, "Why are you people insistent on weakening the [Administration of Justice Department] all the time." Nayer believed the term "you people" was a racial epithet. In April 2017, Onwudiwe emailed Nayer and accused him of using "Indian primeval tactics of damage and control against more qualified colleagues in academe." Nayer complained to Human Resources, which led to a finding that Onwudiwe's statements were inappropriate. In 2017, Nayer claimed

faculty members harassed him by accusing him of calling TSU students "black monkeys" and "stupid ass bitches" via email.

Nayer also complained of hostile and aggressive meetings during his time as Interim Department Chair. In October 2017, the faculty held a vote of no confidence in Nayer as Interim Department Chair. The vote passed with four faculty members voting for the referendum and two abstaining. That month, Nayer resigned as Interim Department Chair, but he continued to serve through January 2018. He claims that previous department chairs were not treated this way and that the treatment he received caused him stress, anxiety, mental anguish, and ultimately reduced his compensation.

In February 2018, the new Interim Department Chair, Dr. Anita Kalunta-Crumpton, appointed Nayer as the Administration of Justice Department's Graduate Program Director. Two months later, the faculty held a vote of no confidence in Nayer as Graduate Program Director. Because the motion received insufficient votes, TSU did not remove Nayer from the position. Later that month, however, Nayer resigned after a conversation with Kalunta-Crumpton. In May 2018, Nayer tried to rescind his resignation, but TSU refused because it had processed the personnel change.

In September 2018, Dr. David Baker asked the faculty to contact him if they wanted a graduate assistant. Nayer requested his previous graduate assistant. The

next day, Nayer's requested graduate assistant emailed a complaint to Dr. Howard Henderson about verbal confrontations between her and Nayer. Henderson forwarded the email to Baker. As a result, Baker informed Nayer that the graduate assistant was unavailable. The next day, Nayer emailed his EEOC complaint to Dean Theophilus Herrington and Baker.

In April 2019, the Texas Workforce Commission (TWC) sent a Notice of Complainant's Right to File Civil Action to Nayer informing him of his right to sue TSU in state court. In June 2019, Nayer sued TSU, alleging that it discriminated and retaliated against him in violation of the TCHRA. TSU filed a hybrid no-evidence and traditional motion for summary judgment. TSU argued that it retained sovereign immunity because Nayer's claims were untimely, he failed to administratively exhaust some claims, he failed to present direct evidence for his claims, and he failed to establish a prima facie case for his claims. The trial court denied TSU's motion. TSU appealed.

Plea to the Jurisdiction – Time

In its first issue, TSU contends the trial court erred by denying its hybrid motion for summary judgment because Nayer did not exhaust his administrative remedies and thus his lawsuit was not properly before the court.[1]

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[1] TSU construes this portion of its hybrid motion for summary judgment as a plea to the jurisdiction.

A. Standard of Review

A plea to the jurisdiction challenges the trial court's subject matter jurisdiction. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Whether the plaintiff has alleged facts showing subject matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Although we are not to reach the merits of the plaintiff's case, when the plea to the jurisdiction challenges the existence of jurisdictional facts, we consider the relevant evidence submitted by the parties necessary to resolve the jurisdictional issue. *Id.* at 227. This procedure generally mirrors that of a summary judgment. *Id.* at 228; *see* TEX. R. CIV. P. 166a(c).

The plaintiff has the initial burden to plead facts showing the trial court's subject matter jurisdiction. *See Miranda*, 133 S.W.3d at 226. The burden then shifts to the governmental unit to show that the trial court lacks subject matter jurisdiction. *Id.* at 228. If the governmental unit does so, the plaintiff must raise a material fact issue to overcome the plea to the jurisdiction. *Id.* If the evidence creates a fact issue on jurisdiction, the trial court should deny the plea to the jurisdiction. *Id.* If the evidence is undisputed or fails to raise a fact issue about the jurisdictional issue, the trial court should grant the plea to the jurisdiction. *Id.*

B. Law

An employer commits an unlawful employment action if because of "race, color, disability, religion, sex, national origin, or age" 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 § 21.051(1). It is also an unlawful employment practice to retaliate or discriminate against a person who, under the TCHRA, opposes a discriminatory practice, makes or files a charge, or files a complaint. TEX. LAB. CODE § 21.055. We consider federal law when interpreting the TCHRA's provisions because, "[b]y adopting the Act, the Legislature 'intended to correlate state law with federal law in employment discrimination cases.'" *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008) (quoting *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005)).

The exhaustion of administrative remedies is a jurisdictional prerequisite to suing for unlawful employment practices. *See Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996) (per curiam); *Santi v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 312 S.W.3d 800, 804 (Tex. App.—Houston [1st Dist.] 2009, no pet.). To exhaust administrative remedies under the TCHRA, a plaintiff must (1) file a complaint with the TWC or the EEOC within 180 days of the alleged discriminatory act; (2) allow the agency 180 days to dismiss or resolve the

complaint; and (3) sue in district court within 60 days of receiving a right-to-sue letter from the agency and no later than two years after filing the complaint. TEX. LAB. CODE §§ 21.202, .208, .254, .256.

"The purposes underlying the administrative-complaint requirement include giving the charged party notice of the claim, narrowing the issues for speedier and more effective adjudication and decision, and giving the administrative agency and the employer an opportunity to resolve the dispute." *Lopez v. Tex. State Univ.*, 368 S.W.3d 695, 700–01 (Tex. App.—Austin 2012, pet. denied) (citing *Pacheco v. Mineta*, 448 F.3d 783, 789 (5th Cir. 2006); *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 87879 (5th Cir. 2003)). Failing to timely file an administrative complaint deprives the court of subject matter jurisdiction. *Czerwinski v. Univ. of Tex. Health Sci. Ctr. at Hous. Sch. of Nursing*, 116 S.W.3d 119, 122 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

An exception to application of the 180-day limitations period for the discriminatory act is the continuing violation doctrine. *Santi*, 312 S.W.3d at 804. The doctrine applies when an unlawful employment practice manifests over time, rather than as discrete acts. *Id.* at 804–05. The plaintiff must show an organized scheme leading to and including a present violation, because it is the cumulative effect of the discriminatory practice, not any discrete occurrence, that gives rise to the cause of action. *Id.* at 805.

Under the continuing violation doctrine, a plaintiff need not establish that all the alleged discriminatory conduct occurred within 180 days if the plaintiff can show a series of related acts, including one or more that are within the limitations period. *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 279 (5th Cir. 2004). "A charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002). So a hostile work environment claim is considered a continuing violation. *Santi*, 312 S.W.3d at 805. But "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Morgan*, 536 U.S. at 113.

A lawsuit under the TCHRA is limited to claims made in the charge or complaint filed with the EEOC or the TWC and factually related claims that can reasonably be expected to grow out of the investigation. *Santi*, 312 S.W.3d at 805 (citing *Bartosh v. Sam Hous. State Univ.*, 259 S.W.3d 317, 321 (Tex. App.—Texarkana 2008, pet. denied)). When reviewing a charge of discrimination before the EEOC, we construe it with the utmost liberality, but the charge must contain an adequate factual basis to put the employer on notice of the charges. *Id.* "The crucial element of a charge of discrimination is the factual statement contained [within the

administrative complaint].” *Preston v. Tex. Dep’t of Fam. & Prot. Servs.*, 222 F. App’x 353, 357 (5th Cir. 2007).

C. Analysis

TSU asserts that because Nayer filed his charge of discrimination with the EEOC on September 16, 2018, any discrimination or retaliation claim based on events that occurred more than 180 days before that date are time barred, meaning Nayer failed to exhaust his administrative remedies as required. TSU identifies Nayer’s claims for removal as Interim Department Chair and harassment related to Onwudiwe’s emails as time-barred claims. Nayer responds that because his EEOC charge included a hostile work environment claim none of the claims are time barred. We agree that Nayer’s claim about his resignation as Interim Department Chair is time barred, but his remaining claims are not.

In the EEOC Charge of Discrimination, Nayer checked the boxes asserting that the discrimination was based on race, national origin, and retaliation. Nayer identified the latest date of discrimination as September 11, 2018, and checked the “continuing action” box. Nayer alleged that he was (1) removed from his position as Interim Department Chair and lost compensation; (2) constantly harassed, bullied, intimidated; (3) forced to resign as Graduate Program Director; (4) discriminated and retaliated against because of his national origin, race, and opposition to the discrimination he faced; and (5) placed in a hostile work environment.

Nayer contends that all his claims survive under the continuing violation doctrine. *See Santi*, 312 S.W.3d at 805 (explaining that continuing violation doctrine is exception to 180-day limitations period). Nayer's notice of removal as Interim Department Chair occurred more than 180 days from the date Nayer filed his EEOC charge. *See Clark v. Resistoflex Co.*, 854 F.2d 762, 765 (5th Cir. 1988) (limitations period begins to run from date of notice of adverse action, not its effective date). Therefore, unless Nayer can show a continuing violation, the claim based on his removal as Interim Department Chair is time barred. The difference is whether Nayer's removal as Interim Department Chair was a discrete act or part of a hostile work environment claim. Nayer's involuntary reassignment with an accompanying loss in title and pay is considered a discrete act, so the continuing violation doctrine does not apply. *See City of Hous. v. Smith*, No. 01-13-00241-CV, 2014 WL 768330, *4 (Tex. App.—Houston [1st Dist.] Feb. 25, 2014, no pet.) (mem. op.); *Santi*, 312 S.W.3d at 805 (citing *Morgan*, 536 U.S. at 114). Although a discrete act may relate to acts alleged in timely filed charges, that does not make them actionable. *Morgan*, 536 U.S. at 113. We conclude this claim is time barred.

Hostile work environment claims are different from discrete acts because they involve repeated conduct. *Id.* at 115. The unlawful employment practice occurs over several days or years, and one act of harassment alone may not be actionable. *Id.* A hostile work environment claim is based on the cumulative effect of the individual

acts. *Id.* When determining whether a hostile work environment claim exists, we consider all the circumstances, including the frequency of the conduct, its severity, whether it is threatening or humiliating, and whether it unreasonably interferes with an employee's ability to work. *Id.* at 116.

TSU claims that two emails sent by Onwudiwe, one in December 2016 and one in April 2017, are time barred because they fall outside the actionable period and the scope of the continuing violation doctrine. In these two separate emails, Onwudiwe used the term "you people" and accused Nayer of using "Indian primeval tactics of damage and control against more qualified colleagues in academe."

After Nayer filed his initial EEOC charge, he amended the complaint to include acts that fall within the 180-day limitations period. The amendment alleged "additional facts that constitute unlawful employment practices relating to or arising from the subject matter of the original complaint," so it "relates back to the date the complaint was first received by the [EEOC]." TEX. LAB. CODE § 21.201(f). The amended discrimination, disparate treatment, and retaliation claims included a denial of a request to use a previous graduate assistant in October 2018, a formal warning issued in August 2018 against Nayer about a previously closed HR complaint, and a HR complaint closed in August 2018 without a full investigation.

The acts alleged in Nayer's amended EEOC charge fall within the actionable period. *See* TEX. LAB. CODE §§ 21.201(f), .202. Construing Nayer's EEOC charge

with the utmost liberality, recognizing that at least one alleged discriminatory act occurred within the actionable period and that a complaint of hostile work environment encompasses these alleged continuing violations as a single unlawful employment practice, we conclude that the claims related to Onwudiwe's emails are not time barred. *See Pegram*, 361 F.3d at 279 (continuing violation doctrine relieves plaintiff from establishing that all alleged discriminatory conduct occurred within actionable period if plaintiff can show series of related acts and that one or more of them falls within limitations period); *Santi*, 312 S.W.3d at 805 (limiting TCHRA lawsuits to claims made in EEOC charge and "factually related claims that can reasonably be expected to grow out of the commission's investigation").

Accordingly, we hold that the trial court erred by denying TSU's plea to the jurisdiction only as to Nayer's claim for removal as Interim Department Chair because that claim is time barred.

Summary Judgment – Sovereign Immunity

TSU's remaining issue is that the trial court erred by denying its hybrid motion for summary judgment because Nayer failed to establish a prima facie case for his claims of discrimination, retaliation, and hostile work environment.

A. Standard of Review

We review a trial court's ruling on a summary judgment motion de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When, as here, a

party files a hybrid motion for no-evidence and traditional summary judgment, we review the trial court's ruling under the no-evidence standard of review first. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). To prevail on a no-evidence motion for summary judgment, the movant must first allege that no evidence supports one or more essential elements of a claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each element specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524.

For a traditional summary judgment motion, the movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). We take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

B. Law

As a state university, sovereign immunity bars any suit against TSU unless the Legislature has expressly waived that immunity. *Univ. of Tex. Health Sci. Ctr.*

at Hous. v. Rios, 542 S.W.3d 530, 532 n.4 (Tex. 2017). The TCHRA waives sovereign immunity only if the plaintiff alleges facts that would establish a TCHRA violation and, when challenged with contrary evidence, provides evidence at least sufficient to create a genuine fact issue material to that allegation. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770–71 (Tex. 2018). Immunity from suit may be asserted through a motion for summary judgment. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). When determining whether a plaintiff satisfied their burden, we take all evidence supporting the plaintiff's allegations as true, and we resolve all doubts and make all reasonable inferences in the plaintiff's favor. *Clark,* 544 S.W.3d at 771.

To establish unlawful discrimination, a plaintiff may rely on direct or circumstantial evidence. *Id.* at 781–82. Direct evidence of discriminatory intent is "hard to come by." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 634 (Tex. 2012). When a plaintiff relies on circumstantial evidence to establish a discrimination claim, we follow the *McDonnell Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Clark*, 544 S.W.3d at 764, 782. Under this framework, (1) the plaintiff must first create a presumption of illegal discrimination by establishing a prima facie case, (2) the defendant must then rebut that presumption by establishing a legitimate, nondiscriminatory reason for the employment action, and (3) the plaintiff must then

overcome the rebuttal evidence by establishing that the defendant's stated reason is a mere pretext. *Clark*, 544 S.W.3d at 782. When relying on either direct or circumstantial evidence, the employee always has the burden of persuasion. *Id.* (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

C. Analysis

TSU contends that Nayer cannot establish a prima facie case of discrimination, retaliation, or a hostile work environment, so he fails to satisfy the first part of the *McDonnell Douglas* framework. We review each of Nayer's claims separately because the requirements for establishing a prima facie case "vary depending on the circumstances." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 583 (Tex. 2017).

1. Discrimination

To prevail, Nayer must first establish a prima facie case of race or national-origin discrimination by showing: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) TSU gave preferential treatment to a similarly situated employee outside the protected class. *Rincones*, 520 S.W.3d at 583 (citing *Reyes*, 272 S.W.3d at 592).

As to Nayer's discrimination claim, TSU does not dispute that Nayer established the first two elements. Instead, TSU argues that the discrimination claims fail because Nayer did not show that he suffered an adverse employment action or

was treated less favorably than a similarly situated employee outside his protected class.

An essential element of a plaintiff's employment discrimination claim is that the plaintiff suffered an adverse employment action. *Id.* An adverse employment action requires a significant change in employment status. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). "[A]dverse employment actions include decisions to hire, discharge, promote, and compensate." *Esparza v. Univ. of Tex. at El Paso*, 471 S.W.3d 903, 909 (Tex. App.—El Paso 2015, no pet.). But actions such as disciplinary filings, reprimands, poor performance reviews, negative employment evaluations, verbal threats to fire, and criticism of an employee's work do not constitute actionable adverse employment decisions. *Elgaghil v. Tarrant Cnty. Junior Coll.*, 45 S.W.3d 133, 142–43 (Tex. App.—Fort Worth 2000, pet. denied); *Winters v. Chubb & Son, Inc.*, 132 S.W.3d 568, 575 (Tex. App.—Houston [14thDist.] 2004, no pet.).

When, as here, an employee submits a letter of resignation, they may still satisfy the adverse employment action element by establishing that they were constructively discharged. *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994); *Hammond v. Katy Indep. Sch. Dist.*, 821 S.W.2d 174, 177 (Tex. App.—Houston [14th Dist.] 1991, no writ). "A constructive discharge occurs when an employer makes conditions so intolerable that an employee reasonably feels

compelled to resign." *Hammond*, 821 S.W.2d at 177. The Fifth Circuit has set out these non-exhaustive factors that may be considered, alone or together, in determining whether an employee acted reasonably: "(1) demotion; (2) reduction in salary; (3) reduction in job responsibilities, (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation, or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not." *Barrow*, 10 F.3d at 297. For a race discrimination claim, federal courts have explained that the fifth factor applies when the employee was reassigned to work under a supervisor who subjected the plaintiff to discriminatory or harassing behavior. *Machado v. Goodman Mfg. Co.*, 10 F. Supp. 2d 709, 719 (S.D. Tex. 1997). Similarly, for the seventh factor, in the race-discrimination context, we characterize it as "an offer of voluntary resignation 'on terms that would make the employee worse off whether the offer was accepted or not.'" *Id.* (quoting *Barrow*, 10 F.3d at 297 (emphasis omitted)).

Nayer complains of having been forced to resign from his position as Graduate Program Director. Nayer was elevated to the position of Graduate Program Director beginning in March 2018 and was supposed to continue until August 2018. The position came with additional compensation. Nayer alleges he was harassed by other faculty members who would constantly send him emails; nitpick budget issues at

meetings; complain to the Provost, the University President, and the Dean about him; and email students to get them to complain about him.

Viewing the evidence in the light most favorable to Nayer, we conclude that Nayer has not raised a fact issue on constructive discharge. Even though Nayer testified that he was demoted when he lost his position as Graduate Program Director and consequently experienced a reduction in his salary and job responsibilities, these adverse employment outcomes were the result, not the cause, of Nayer's resignation. *Cf. Stephens v. C.I.T. Grp./Equip. Fin., Inc.*, 955 F.2d 1023, 1027–28 (5th Cir. 1992) (employee was demoted, had salary and responsibilities reduced, and was repeatedly asked whether he would quit before finally doing so). The badgering that Nayer complains of was like the harassment he claims he received as Interim Department Chair. The alleged badgering was from other faculty members, not from someone with the power to fire Nayer, like Kalunta-Crumpton or the Dean. *See Chandler v. CSC Applied Techs., LLC*, 376 S.W.3d 802, 816 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (comments must be made by individuals with authority over employment decision at issue).

Lastly, Nayer's resignation as Graduate Program Director did not result from an offer to voluntarily resign on terms that would make him worse off whether he resigned or not. *See Barrow*, 10 F.3d at 297. Nayer testified that Kalunta-Crumpton did not pressure him to resign. Nayer believed that she was either going to have to

fire him, resign from her job, or be fired by the Dean for keeping him as Graduate Program Director. But once he expressed a desire to remain as Graduate Program Director, Kalunta-Crumpton tried several times to help him rescind his resignation. *See Bodnar v. Synpol, Inc.*, 843 F.2d 190, 193 (5th Cir. 1988) (employer's "offer" may create prima facie case of constructive discharge when it sufficiently alters the status quo such that each choice facing employee makes him worse off). And Nayer testified that he sought to rescind his resignation because he changed his mind and believed he could continue to serve in his position. *See Barrow*, 10 F.3d at 297 (employer must have made employee's working conditions so intolerable that reasonable employee would feel compelled to resign).

Altogether, Nayer has failed to present evidence of constructive discharge, so Nayer has not carried his burden to establish his prima facie case. Accordingly, we hold the trial court erred by denying TSU summary judgment on Nayer's discrimination claim for the position of Graduate Program Director.

2. Retaliation

TSU contends that Nayer cannot establish a prima facie case satisfying any of the elements for retaliation. The TCHRA prohibits an employer from retaliating against an employee for engaging in certain protected activities. TEX. LAB. CODE § 21.055. Nayer must show: (1) he engaged in an activity protected by the TCHRA, (2) he experienced a material adverse employment action, and (3) a causal link exists

between the protected activity and the adverse action. *Clark*, 544 S.W.3d at 782. Relevant here, protected activities include opposing a discriminatory practice, making or filing a charge, and filing a complaint. TEX. LAB. CODE § 21.055(1)–(3); *Chandler*, 376 S.W.3d at 822.

Additionally, in the retaliation context, the adverse employment action is not limited to conduct that constitutes "ultimate employment decisions." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006). But the retaliation provision only protects an individual from actions that a reasonable employee would have found materially adverse. *Id.* at 67–68. "Material" actions are those "that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Id.* at 68 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)). "[N]ormally, petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Id.* This objective standard is applied to a fact-specific inquiry "because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id.* at 69.

TSU contends that Nayer has not specified any protected activity other than a statement that he opposed discrimination. But Nayer points out that he filed several complaints over the years. In 2017, Nayer complained that Baker harassed him by sending "incessant emails," "sending students to complain about [Nayer] . . . to the President and Provost's office," and spreading "lies . . . claiming that" Nayer is a

racist because Nayer called students "black monkeys." That same year, Nayer also filed a complaint claiming that Henderson created a hostile work environment by meddling in Nayer's department and sending a "potentially libelous email" to the university provost and president. In 2018, Nayer submitted another complaint about Baker claiming collusion among the faculty to spread "malicious lies and rumors" about Nayer, including that he has called students "black monkeys," all in an effort for Baker to be appointed as permanent department chair. Each of these complaints involved Nayer's time as Interim Department Chair.

Nayer testified that the alleged harassment that occurred during his time as Interim Department Chair continued during his time as Graduate Program Director. Nayer testified that there was a series of complaints filed against him by the same faculty members whom he filed complaints against.

Complaining only of harassment, hostile work environment, discrimination, or bullying in general is not enough to invoke the TCHRA's anti-retaliation protection. *Clark*, 544 S.W.3d at 786–87. The alleged harassment, hostile work environment, and discrimination must be based on a protected characteristic. *Id.* Because Nayer's complaints from 2017 complain only generally of harassment and a hostile work environment they do not invoke the TCHRA's protection. At best, only one of Nayer's complaints identifies a protected characteristic, his religious identification as Hindu, about other faculty saying Nayer has called students "black

monkeys." Nayer's complaint states he finds such allegations about him insensitive and disrespectful because he is Hindu and "[worships] a monkey demi-god named Hanuman." But Nayer does not state that he believes the comments were based on his religion. Moreover, that is Nayer's only mention of religion over the course of his complaints to TSU and the EEOC and in his testimony. For complaint to constitute a protected activity, it must alert the employer of the employee's reasonable belief that unlawful discrimination is at issue. *Brown v. United Parcel Serv., Inc.*, 406 F. App'x 837, 840 (5th Cir. 2010); *Rincones*, 520 S.W.3d at 586. As a result, Nayer has failed to present evidence that he engaged in an activity protected by the TCHRA. Failing to satisfy this element precludes his ability to establish a prima facie case of retaliation on these matters.

Nayer also complained of an email sent by Onwudiwe in April 2017 to the faculty stating that Nayer was using "Indian primeval tactics of damage and control against more qualified colleagues in academe." Nayer identifies his national origin as Indian and complained that Onwudiwe had "attacked his cultural [sic]." In August 2018, HR found that Onwudiwe had violated TSU's non-discrimination policy and recommended "appropriate disciplinary" action for the violation. Nayer has done enough to identify that the alleged harassment was based on a protected characteristic. Thus, Nayer has shown he engaged in a protected activity, satisfying the first element for retaliation.

On the second element, requiring a material adverse employment action, Nayer presented no evidence. Nayer's claims about his resignation as Interim Department Chair are time barred, and his resignation as Graduate Program Director does not satisfy the requirements for an adverse employment action. Because Nayer has identified no other potentially applicable adverse material actions we cannot conclude that he raised a fact issue on the second element of a retaliation claim.

The next evidence of a complaint is Nayer's EEOC charge filed in 2018 alleging discrimination based on race, national origin, retaliation, and a hostile work environment. Nayer has done enough to identify that the alleged harassment was based on a protected characteristic because it includes Onwudiwe's comments. As a result, Nayer has shown he engaged in a protected activity, satisfying the first element for retaliation. In Nayer's amended EEOC charge, he adds that after sending a copy of the EEOC charge to Dean Herrington and Baker that he was denied the use of his previous graduate assistant, issued a formal warning for misuse of his email in another matter, and that HR was not fully investigating his complaints. Nayer contends that this also amounts to retaliation.

We now consider whether the denial of Nayer's previous graduate assistant, the formal warning issued to Nayer, and the allegation that HR failed to investigate a complaint constitute adverse employment actions. In the context of establishing retaliation, an adverse employment action must be one that would "dissuade[] a

reasonable worker from making or supporting a charge of discrimination." *White*, 548 U.S. at 68. This objective standard exists "to separate significant from trivial harms" and "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." *Id.*

The denial of Nayer's previous graduate assistant does not constitute an adverse employment action. *See Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 332–33 (5th Cir. 2009) (finding no evidence of adverse employment action where plaintiff's reassignment did not affect job title, grade, hours, salary, or benefits; plaintiff's duties were unchanged; and plaintiff did not suffer diminution in prestige or standing among co-workers). The evidence shows that Baker stated the student was unavailable and that there had been a complaint about Nayer. Nayer was not prohibited from having a different graduate assistant.

As for the formal warning issued by Dean Herrington, this stemmed from a HR investigation that ended in August 2018, before the EEOC charge was filed. HR recommended a written reprimand or a formal warning. The Dean issued a formal warning a few months later. The context surrounding the formal warning matters. *See White*, 548 U.S. at 69. Dean Herrington was merely following the recommendation of an HR investigation that concluded before Nayer's EEOC charge was filed. Receiving a single warning does not rise to the level of a materially

adverse employment action for purposes of a retaliation claim. *Gumpert v. ABF Freight Sys., Inc.*, 293 S.W.3d 256, 263 (Tex. App.—Dallas 2009, pet. denied) (citing *Grice v. FMC Techs. Inc.*, 216 F. App'x 401, 407 (5th Cir. 2007)). Therefore, this action cannot satisfy the materially adverse employment action requirement.

The final potentially adverse action is Nayer's allegation that HR failed to investigate a complaint he filed. Nayer's EEOC charge amendment notes that the improperly conducted investigation concluded over one month before he filed his EEOC charge. Even if the Court assumes that the failure to investigate internal complaints is an action meant to dissuade an employee from making or supporting a charge of discrimination, there is no causal link here. *See Clark*, 544 S.W.3d at 782. Because the complained-of action occurred before Nayer filed his EEOC charge, it cannot be that engaging in the protected activity of filing the charge resulted in the alleged adverse employment action. *See Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 441, 444 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) ("The employee must establish that absent his protected activity, the adverse employment action would not have occurred when it did.").

We conclude Nayer cannot make a prima facie case of retaliation, and we therefore hold that the trial court erred by denying TSU summary judgment on Nayer's retaliation claim.

3. Hostile Work Environment

TSU's final argument is that Nayer failed to establish all but the first element of a hostile work environment claim, so he has failed to make a prima facie case for it. The elements of a prima facie case for a hostile work environment claim are: "(1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome harassment; (3) the harassment complained of was based on the protected characteristic; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Anderson v. Hous. Cmty. Coll. Sys.*, 458 S.W.3d 633, 646 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

An employee complaining of harassment by a supervisor must only establish the first four elements. *Id.* We consider the totality of the circumstances when reviewing a hostile work environment claim, including: "the frequency of the discriminatory conduct; its severity; whether the conduct was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with the employee's work performance." *Donaldson*, 495 S.W.3d at 445.

Because it is dispositive, we address TSU's argument that the conduct Nayer complains of did not affect a term, condition, or privilege of his employment. *See City of Hous. v. Garner*, No. 14-20-00688-CV, 2022 WL 2678850, at *6 (Tex.

App.—Houston [14th Dist.] July 12, 2022, no pet.) (mem. op.). To satisfy this element, Nayer must show that the workplace was permeated with discriminatory intimidation, ridicule, and insult severe or pervasive enough to create a hostile or abusive working environment. *See Lauderdale v. Tex. Dep't of Crim. Just.*, 512 F.3d 157, 163 (5th Cir. 2007); *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 806 (Tex. 2010) (abusive environment is created "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult.'" (citation omitted)). Furthermore, "the conduct must be both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so." *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 330 (5th Cir. 2009).

Nayer made several complaints over the years during his time first as Interim Department Chair, then as Graduate Program Director, and later as faculty. We consider those complaints together with the facts and context of these three time periods.

Nayer testified that, as Interim Department Chair, he was responsible for the budget of the department; managing an undergraduate, two graduate, one Ph.D., and three ROTC programs; teaching classes; conference travel; research publications; assigning work to faculty; appointing a Graduate Program Director; and holding faculty meetings. Some of his complaints during this time were that other faculty

attacked him by "questioning . . . why is the budget like this, where did this money go." Nayer testified that the Administration of Justice Department had a deficit of "about $300,000 in all [the] master's programs." Nayer acknowledged that previous department chairs had not raised budgetary issues. Nayer admitted that he stopped holding faculty meetings in the summer of 2017 because he found them stressful. Nayer did not recall that any other department chairs ever stopped holding meetings.

When Nayer was announced as the incoming Graduate Program Director by the new Interim Department Chair, other faculty objected to his appointment because he had just resigned as Interim Department Chair. Nayer testified that during his time as Graduate Program Director he was harassed, just like when he was Interim Department Chair.

After he resigned as Interim Department Chair and Graduate Program Director, Nayer complained that he was denied the graduate assistant he requested. The reasoning provided was that the graduate assistant had filed a complaint against Nayer and the faculty member in charge of assigning graduate assistants wanted to meet with Nayer about the complaint. Nayer admitted that he had once been reprimanded for calling a student's presentation "fucking idiotic."

As to the emails and questions Nayer received from faculty members, excluding Onwudiwe, during his time as Interim Department Chair and Graduate Program Director, Nayer has not shown that they were based on his race, national

origin, or opposition to discrimination. Instead, the emails and questions received were about matters that the Interim Department Chair and Graduate Program Director were responsible for, such as meetings, the budget, and work-related assignments. That he received emails and comments about his duties is not enough to create an abusive working environment. *See Williams*, 313 S.W.3d at 806; *Garner*, 2022 WL 2678850, at *6 (conduct must be objectively offensive, such that reasonable person would find it hostile and abusive, and subjectively offensive, meaning that victim found it offensive).

While there are statements by Onwudiwe that potentially implicate race and national origin, these offensive utterances are not severe or pervasive enough to establish a hostile work environment. *See Clark*, 544 S.W.3d at 772 (TCHRA is not "a general civility code" protecting against "all verbal or physical harassment in the workplace"). An offensive utterance that gives rise to offensive feelings in an employee is not enough to create an abusive work environment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (describing abusiveness standard as requiring extreme conduct); *Frazier v. Sabine River Auth.*, 509 F. App'x 370, 374 (5th Cir. 2013) (concluding use of N-word, the word "Negreet," and a noose gesture "were isolated and not severe or pervasive enough" to create hostile work environment).

As for the faculty conduct that occurred after Nayer filed his EEOC charge, those claims are not severe or pervasive enough to create a hostile or abusive working environment. *See Harris*, 510 U.S. at 21. Nayer testified that he was informed there was a complaint against him by the graduate assistant whom he had requested and that he was asked to attend a meeting to discuss the matter. He also admitted that he had been reprimanded once for how he spoke to students. Nayer did not testify that he was denied all graduate assistance, only the assistance of the student who submitted a complaint about him. As for the Dean's formal warning, Nayer has not shown that by following through on HR's recommendation to issue the warning the Dean engaged in "discriminatory intimidation, ridicule, and insult" severe enough to create an abusive working environment. *Id.* On the alleged incomplete investigations by HR, Nayer provides little to no evidence to support his claim that he was being discriminated against by HR, only that he engaged in a dialogue with HR and other faculty members about his concerns.

Considering the totality of the circumstances, we conclude that the conduct alleged by Nayer, even if true, was not extreme and did not affect the terms and conditions of his employment. *See Garner*, 2022 WL 2678850, at *7 (citing *Jackson v. Honeywell Int'l, Inc.*, 601 F. App'x 280, 287–88 (5th Cir. 2015)). Accordingly, we hold the trial court erred by denying TSU summary judgment on Nayer's hostile work environment claim.

Conclusion

We reverse the trial court's order and render judgment granting TSU's motion for summary judgment.

Sarah Beth Landau
Justice

Panel consists of Justices Landau, Guerra, and Farris.