Affirmed and Memorandum Opinion filed February 18, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00363-CV

WILFRIDO MATA, Appellant

V.

HARRIS COUNTY, TEXAS, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2010-44692

M E M O R A N D U M O P I N I O N

Wilfrido Mata sued Harris County under the Texas Whistleblower Act. The Act waives governmental immunity if a governmental entity takes adverse personnel action against a public employee who in good faith reports a violation of law by another public employee to an appropriate law enforcement authority. *See* Tex. Gov't Code Ann. §§ 554.002, 554.0035 (West 2012).

Harris County filed a plea to the jurisdiction asserting suit was barred because Mata failed to comply with administrative prerequisites before filing suit.[1] The trial court granted Harris County's plea and dismissed the case. On appeal, Mata argues that the trial court erred because (1) no grievance procedure applied to his termination; and (2) alternatively, he raised a fact question on the availability of a grievance procedure. We affirm.

BACKGROUND

Mata's original petition alleges that he was employed by the Harris County Sheriff's Office as the Director of Infrastructure Technology, an "unclassified" at-will position.

In September 2009, Chief Administrative Officer John Dyess informed Mata that the Sheriff's Office would undergo a security audit of its computer systems. Sheriff Adrian Garcia convened a meeting attended by Dyess, Mata, and Robert Erwin, who was not a Harris County employee at that time. According to Mata, Erwin began to discuss "getting a view" of the computer system; Mata told the meeting attendees that the "Harris County Infrastructure Technology Office" and its director, Bruce High, should be involved in the security audit. Dyess objected to informing High, saying that High would not be informed of what the Sheriff's Office was intending to do. Erwin told the meeting attendees that he did not need High's participation because Erwin could use "packet sniffing" to obtain

[1] Harris County filed a prior plea to the jurisdiction arguing that Mata's petition negated jurisdiction under the Texas Whistleblower Act. The trial court granted the plea to the jurisdiction on April 21, 2011, and Mata timely appealed. We reversed and remanded because Mata demonstrated a reasonable basis for a belief that he was reporting a violation of law. *Mata v. Harris County*, No. 14-11-00446-CV, 2012 WL 2312707 (Tex. App.—Houston [14th Dist.] June 19, 2012, no pet.) (mem. op.).

information about the routers and passwords for the network without the knowledge of anyone at "Harris County ITC," including High.[2]

Mata contends he objected to this "unlawful intrusion into the Harris County computer system," but Sheriff Garcia and Dyess ordered him to cooperate. Mata was "[d]isturbed by the plan to 'hack' into Harris County's computer system at the order of the Sheriff," so he contacted the Federal Bureau of Investigation. He alleges that the FBI met with him on several occasions and asked him to wear a recording device to a meeting with Erwin and others. In a meeting with Dyess in October 2009, Mata informed Dyess about his cooperation with the FBI and his belief the project with Erwin was unlawful.

Mata received "documented counseling" in November 2009 and an "average" performance review in February 2010. He was fired in May 2010. Mata did not initiate an administrative appeal or a grievance contesting his termination with Harris County, the Sheriff's Office, or any other governmental entity before filing this suit.

ANALYSIS

In two related issues, Mata contends that the trial court erred in granting Harris County's plea to the jurisdiction because no procedures were available for him to appeal or grieve his termination. He first asserts that as an "unclassified" at-will employee, no Harris County Sheriff's Office or Harris County grievance or appeal procedures applied to him in connection with his termination. In his second

[2] Mata describes "packet sniffing" as a process that occurs "when a person plugs a device into a computer network and captures the mode of transmissions, the binary code, that computers use to 'talk' to each other on a network." He claims that " '[p]acket sniffing' is a favorite technique employed by computer 'hackers'—persons who are unauthorized users of a computer network."

issue, Mata argues that he presented evidence raising a fact issue concerning the availability to him of a grievance or appeal procedure.

Harris County argues that the Sheriff's Office did provide an available procedure through which Mata could have grieved or appealed his termination. Because he did not do so, Harris County maintains that the trial court lacked subject matter jurisdiction. Harris County argues that no fact issue regarding jurisdiction was raised. We address each contention in turn.

I. Standard of Review

Absent waiver of immunity, a trial court lacks subject-matter jurisdiction over a suit against a governmental unit enjoying immunity from suit. *City of Houston v. Ranjel*, 407 S.W.3d 880, 887 (Tex. App.—Houston [14th Dist.] 2013, no pet.). A challenge to a trial court's subject-matter jurisdiction may be asserted by a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). We review a trial court's decision on a plea to the jurisdiction *de novo*. *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010); *State Dep't of Highways & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002).

A plaintiff has the burden to allege facts demonstrating jurisdiction, and we construe the pleadings liberally in the plaintiff's favor. *Miranda*, 133 S.W.3d at 226. When the governmental unit challenges the existence of jurisdictional facts, and the parties submit evidence relevant to the jurisdictional challenge, we must consider that evidence when necessary to resolve the jurisdictional issues raised. *Ranjel*, 407 S.W.3d at 887. The court must take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Miranda*, 133 S.W.3d at 228. If the evidence raises a fact question on jurisdiction, the trial court cannot grant the plea, and the issue must be

resolved by the trier of fact. *Id*. at 227–28. On the other hand, if the evidence is undisputed or fails to raise a fact question, the trial court must rule on the plea as a matter of law. *Id*. at 228. This standard generally mirrors that of a summary judgment. *Id*.

II. Texas Whistleblower Act

The Whistleblower Act prohibits governmental entities on the state and local level from terminating public employees who, in good faith, report illegal activities committed by other public employees to appropriate law enforcement authorities. Tex. Gov't Code Ann. § 554.002 (West 2012). Employees who suffer retaliatory action for their good faith reporting can assert legal actions under the Act for various forms of relief. *Id*. § 554.003. Such relief is available because of the state's clear and unambiguous statutory waiver of sovereign immunity. *Id*. § 554.0035.

A claimant first must "initiate action under the grievance or appeal procedures" of his governmental employer before suing under the Whistleblower Act. Tex. Gov't Code Ann. § 554.006(a) (West 2012). After the claimant has initiated the grievance or appeal, the employer has 60 days to address the dispute through its administrative process. *Id*. § 554.006(d). If a final decision is not rendered within this period, then the employee may elect either to exhaust his administrative remedies or terminate the appeal process and file suit. *Id*. § 554.006(d)(1) – (2). The grievance process under section 554.006 is "intended to afford the governmental entity an opportunity to correct its errors by resolving disputes before facing litigation, as the expense of litigation is borne ultimately by the public." *Fort Bend Indep. Sch. Dist. v. Rivera*, 93 S.W.3d 315, 318 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

Compliance with section 554.006(a)'s initiation requirement is a jurisdictional prerequisite. *See Tarrant County v. McQuary*, 310 S.W.3d 170, 174 (Tex. App.—Fort Worth 2010, pet. denied); *see also* Tex. Gov't Code Ann. § 311.034 (West 2013) ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity."); *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 510–11 (Tex. 2012) (section 311.034, as amended, "evinces the Legislature's intent that all statutory prerequisites are now jurisdictional requirements as to governmental entities and are properly asserted in a plea to the jurisdiction"); *Fort Bend Indep. Sch. Dist. v. Gayle*, 371 S.W.3d 391, 394–95 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *Jordan v. Ector County*, 290 S.W.3d 404, 406 (Tex. App.—Eastland 2009, no pet.).

In deciding whether the trial court had jurisdiction over Mata's claim, we must determine if the Act's grievance-initiation requirement is applicable here. *See Midland Indep. Sch. Dist. v. Watley*, 216 S.W.3d 374, 379 (Tex. App.—Eastland 2006, no writ) (plaintiff's failure to institute a grievance was a jurisdictional defect precluding her from bringing her Whistleblower claim); *Gregg County v. Farrar*, 933 S.W.2d 769, 777 (Tex. App.—Austin 1996, writ denied) (party who brings suit based entirely on a statutory cause of action must comply with the statutory prerequisites; failure to comply deprives the court of jurisdiction); *see also Breaux v. City of Garland*, 205 F.3d 150, 162 (5th Cir. 2000) ("The exhaustion requirement of the Texas Whistleblower Act is jurisdictional and, therefore, mandatory and exclusive.").

III. Harris County Sheriff's Office Grievance Procedures

The Harris County Sheriff's Office Department Manual contains procedures relating to appealing or grieving a termination.[3] Policy #232 concerning "Employee Grievance/Complaint Resolution" states as follows:

> It is the policy of the Harris County Sheriff's Office that any employee may initiate and present, for prompt and fair consideration, a grievance concerning the administration of policies, procedures, rules, regulations, and operations of the Sheriff's Office, without fear of reprisal or harassment.

Mata argues that the Policy #232 specifically denies him the right to grieve his termination because it excludes "Sheriff's Office decisions pertaining to disciplinary actions."[4]

Evidence offered by both parties shows that Mata was not terminated as part of a disciplinary action. In a letter dated May 5, 2010, Dyess notified Mata of his employment termination and its basis:

> Your employment with the Harris County Sheriff's Office is terminated effective immediately. We did not make this decision lightly. Since the Spring of 2009, you have been counseled repeatedly to demonstrate greater effort and greater commitment to your job performance. You have been afforded numerous opportunities to improve your performance and to meet the milestones and goals standard for the LAN Administrator position. Your failure to effectively manage and accomplish goals in the Infrastructure Technology Division falls short of the performance level this office expects.

[3] In its plea to the jurisdiction, Harris County argued that Mata had appeal and grievance avenues available under both the Sheriff's Office Department Manual and under the Harris County Civil Service Commission regulations. On appeal, Harris County relies solely on the Sheriff's Office Department Manual.

[4] Mata has not argued that any of the other exclusions from Policy #232 apply.

In his deposition, Dyess testified that Mata's termination was a business decision; he was fired because he could not perform his job. Dyess testified that, under Sheriff's Office Department Policy #232, Mata had an avenue to grieve or to appeal his termination of employment. He did not do so.

Based on this record, we reject Mata's contention that his termination was part of a disciplinary action for which no grievance or appeal procedures were available. Because procedures were available and Mata did not initiate the remedies prescribed by the Sheriff's Office, the trial court lacked jurisdiction to hear his whistleblower suit. *See* Tex. Gov't Code Ann. § 554.006; *Watley*, 216 S.W.3d at 379; *Farrar*, 933 S.W.2d at 777; *see also Breaux*, 205 F.3d at 162.

Mata argues alternatively that a fact question exists regarding the availability of a grievance or appeal procedure for his termination. He relies on the affidavit of a former employee of Harris County Sheriff's Office, Major Michael O'Brien, which states:

> I am of the opinion, based on my tenure as employee, major, and CALEA [Commission on Accreditation of Law Enforcement Agencies] manager, that an "unclassified" at-will employee appointed by the Sheriff has no right to appeal their [sic] termination. I am also of the opinion that an employee cannot grieve any matter which affected their [sic] pay status, such as being terminated.

On appeal, Harris County contends that O'Brien's affidavit contains legal conclusions and therefore is incompetent as proof. An objection that an affidavit states only a legal conclusion relates to a defect of substance and may be raised for the first time on appeal. *Ramirez v. Transcontinental Ins. Co.*, 881 S.W.2d 818, 829 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

We agree that O'Brien's affidavit is conclusory, contains legal conclusions, does not constitute competent evidence in a plea to the jurisdiction proceeding, and

does not raise an issue of fact regarding the availability to Mata of a grievance or appeal process. *See Wilson v. Dallas Indep. Sch. Dist*., 376 S.W.3d 319, 326 (Tex. App.—Dallas 2012, no pet.) ("Appellant's statements that he reported a [statutory] violation . . . were conclusory because the underlying facts in his testimony do not support the conclusions."); *see also Ramirez*, 881 S.W.2d at 829 (assertion in affidavit that "the insurance company had no reasonable basis for denying benefits" stated only "a legal conclusion and is incompetent summary judgment proof.").[5]

CONCLUSION

We affirm the trial court's order granting Harris County's plea to the jurisdiction.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby and Brown.

[5] Mata does not specifically identify any other portion of this record giving rise to an asserted fact issue regarding the availability to Mata of a grievance or an appeal process. His brief cites globally to more than 100 pages of the record. This court is not obligated to search the record in response to a global reference such as this. *See Casteel-Diebolt v. Diebolt*, 912 S.W.2d 302, 305 (Tex. App.—Houston [14th Dist.] 1995, no writ) ("Court has no duty to search a voluminous record without guidance from appellant to determine [this] whether an assertion of reversible error is valid."); *see also* Tex. R. App. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.").