

**Reversed and Rendered and Memorandum Opinion filed November 2, 2017.**



**In The**  
**Fourteenth Court of Appeals**

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**NO. 14-17-00107-CV**

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**THE UNIVERSITY OF TEXAS - MD ANDERSON CANCER CENTER,  
Appellant**

**V.**

**APRIL PORTER, Appellee**

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**On Appeal from the 295th District Court  
Harris County, Texas  
Trial Court Cause No. 2016-68806**

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

This appeal arises from the trial court's denial of a motion to dismiss filed by appellant The University of Texas – MD Anderson Cancer Center pursuant to Rule 91a of the Texas Rules of Civil Procedure. Tex. R. Civ. P. 91a. On appeal, appellant contends the trial court erred because appellee April Porter failed to invoke the trial court's jurisdiction by filing her suit within the applicable two-year statute of

limitations. *See Tex. Lab. Code § 21.256*. For the reasons set forth below, we reverse and render a judgment of dismissal.

## **BACKGROUND**

Appellee filed suit against appellant for race and gender discrimination and for retaliation. Appellant filed a motion to dismiss under Rule 91a on the basis that its immunity was not waived because appellee failed to file suit within the two-year statute of limitations and the trial court therefore lacked subject matter jurisdiction over the case. *See Tex. Lab. Code § 21.256*. Following a hearing, the trial court denied appellant’s motion. Appellant then brought this interlocutory appeal. *See Tex. Civ. Prac. & Rem. Code § 51.014(a)(8); see also Texas Dep’t of Crim. Justice v. Simons*, 140 S.W.3d 38, 349 (Tex. 2004) (“The reference to a ‘plea to the jurisdiction’ [in section 51.014(a)(8)] is not to a particular procedural vehicle but to the substance of the issue raised. Thus, an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle . . .”); *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 821 (Tex. App.—Austin 2014, no pet.).

## **STANDARD OF REVIEW**

We review a trial court’s ruling on a Rule 91a motion to dismiss de novo. *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Rule 91a allows a party to move to dismiss a cause of action on the ground that it has no basis in law or in fact. *See Tex. R. Civ. P. 91a*. To decide whether a pleading has a basis in law, we determine whether the evidence at trial would enable reasonable people to reach the verdict under review. *Wooley*, 447 S.W.3d at 76 (citing *Tex. R. Civ. P. 91a*). To decide whether a pleading has a basis in fact, we determine whether a “reasonable person could believe the facts pleaded.” *Tex. R. Civ. P. 91a*. Our determinations of whether a cause of action has any basis in law

and in fact is based on the allegations of the live petition and any attachments thereto.

*Id.* Rule 91a states:

A motion to dismiss must identify each cause of action to which it is addressed and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

We view Rule 91a motions to dismiss as analogous to pleas to the jurisdiction, because both require the court to determine whether the pleader has alleged facts demonstrating jurisdiction. *Wooley*, 447 S.W.3d at 75. To determine if the pleader has alleged facts that affirmatively demonstrate the trial court's jurisdiction over a claim, we construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings. *Id.*

## **APPLICABLE LAW**

The University of Texas–MD Anderson Cancer Center is a governmental unit generally immune from tort liability. *See Hampton v. Univ. of Texas–M.D. Anderson Cancer Ctr.*, 6 S.W.3d 627, 628 (Tex. App.—Houston [1st Dist.] 1999, no pet.). The timely filing of a lawsuit under the Texas Commission on Human Rights Act (“TCHRA”) is a statutory prerequisite to filing suit and as such is jurisdictional when the defendant is a governmental entity. *See Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 514 (Tex. 2012) (citing Tex. Civ. Prac. & Rem. Code § 311.034). This is so because the TCHRA's waiver of sovereign immunity is limited and a claimant can bring suit under the TCHRA against a governmental entity only after a claimant strictly satisfies the procedural requirements outlined in the TCHRA. *Prairie View A & M Univ.*, 381 S.W.3d at 513–14 (quoting *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008), “[T]he Legislature . . . has consented to suits brought under the TCHRA, provided the

procedures outlined in the statute have been met.”). Otherwise, the suit is jurisdictionally barred. *Id.*

The time frame within which an action for employment discrimination must be brought is set forth in section 21.256 of the Texas Labor Code. Tex. Lab. Code § 21.256. It provides that “[a] civil action may not be brought under this subchapter later than the second anniversary of the date the complaint relating to the action is filed.” *Id.* Courts have held that compliance with this specific deadline is a statutory prerequisite to suit and therefore a jurisdictional requirement in a suit against a governmental entity. *Goss v. City of Houston*, 391 S.W.3d 168, 172 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

Rule 91a motions to dismiss are analogous to pleas to the jurisdiction, requiring a court to determine whether the pleader has alleged facts demonstrating jurisdiction. *Wooley*, 447 S.W.3d at 75 (citing *See Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004)). “In that context, we construe the pleadings liberally in favor of the plaintiff, look to the pleader’s intent, and accept as true the factual allegations in the pleadings to determine if the pleader has alleged facts that affirmatively demonstrate the trial court’s jurisdiction over a claim. *Miranda*, 133 S.W.3d at 226.

## ANALYSIS

Appellee’s pleadings fail to state the date the complaint relating to the action was filed. Although she alleges that a charge of discrimination was filed within 180 days of discovering the discriminatory conduct, neither the date of said conduct nor the date of filing are provided. Appellee further asserts her suit is filed within sixty days of receiving a Notice of Right to File a Civil Action but does not state the date that notice was received. Thus appellee’s original petition wholly fails to allege facts

that affirmatively demonstrate the trial court's jurisdiction.

Appellant's motion to dismiss claimed its immunity was not waived because appellee failed to file her lawsuit within the two-year statute of limitations. *See Tex. Lab. Code § 21.256.* Attached to the motion to dismiss is a copy of appellee's Charge of Discrimination filed with the Texas Workforce Commission Civil Rights Division. It reflects the complaint was filed August 20, 2013. Appellee filed suit against appellant on October 10, 2016, more than two years after her complaint was filed.

Appellant argues appellee's failure to comply with the procedural requirement to file suit within the two-year statute of limitations renders it immune from suit and deprives the trial court of jurisdiction. Appellee first counters that her suit was timely pursuant to sections 21.202 and 21.254 of the Texas Labor Code. Sections 21.202 and 21.254 of the Texas Labor Code provide as follows:

§ 21.202. Statute of Limitations

- (a) A complaint under this subchapter must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred.
- (b) The commission shall dismiss an untimely complaint.

...

§ 21.254. Civil Action by Complainant

Within 60 days after the date a notice of the right to file a civil action is received, the complainant may bring a civil action against the respondent.

Tex. Lab. Code Ann. §§ 21.202, 21.254. Appellee argues that because she timely filed her complaint with the Texas Workforce Commission pursuant to section 21.202, she then had sixty days, after receiving notice from the Commission of the

right to file suit under section 21.254, to file her cause of action.<sup>1</sup> *Id.* Because her suit was filed within that sixty days, appellee contends, it was timely filed and is not barred by the two-year state of limitations. In support, appellee relies upon *Windle v. Mary Kay, Inc.*, No. 05-02-00252-CV, 2003 WL 21508782 (Tex. App.—Dallas July 1, 2003, pet. denied) (mem. op.) (citing *Davis v. Ed. Serv. Ctr.*, 62 S.W.3d 890, 893 n. 4 (Tex. App.—Texarkana 2001, no pet.)), wherein the court stated that section 21.254’s sixty-day period is in addition to, and can take precedence over, section 21.256’s two-year statute of limitations.

In *Windle*, although suit was filed within sixty days of receiving notice, the defendant was not served within that time frame. *Id.* at \*1. The court noted that “under certain circumstances, like here,” section 21.254 can take precedence over section 21.256. *Id.* The court went on to hold that the defendant’s statute of limitations defense was meritorious based on the failure to effectuate service of process. *Id.* at \*2-3. *Windle* found the suit was barred by section 21.254’s sixty-day period, notwithstanding section 21.256’s two-year statute of limitations. *Id.* at \*2.

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<sup>1</sup> Appellee attached a copy of the notice sent September 23, 2016, as an exhibit to her response to appellant’s motion to dismiss. It provides:

The above-referenced case was processed by the United States Equal Employment Opportunity Commission, The EEOC provided you with a Dismissal and Notice of Rights dated December 8, 2015, stating that “Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statute”...You requested a Notice of Right to File Civil Action from my division on August 1, 2016.

Under Tex. Lab. Code 21.254 a complainant must file a civil action against the respondent within 60 days after the date a Notice of Right to File Civil Action is received. However, Pursuant to Tex. Lab. Code Sec. 21.256 a civil action may not be brought later than the second anniversary of the date the complaint is filed. In addition, Tex. Lab. Code Sec. 21.252(d) provides that failure to issue a Notice of Right to File Civil Action does not affect the complainant’s right to bring civil action against the respondent. Since the Charge of Discrimination was filed on August 20, 2013, the second anniversary has already passed. While this division is issuing you this Notice of Right to File Civil Action, it is a decision for the court on the issue of timeliness.

Thus *Windle* stands for the proposition that these provisions operate independently, rather than appellee's position that section 21.254 controls over section 21.256. To conclude otherwise is unnecessary and would render section 21.256 meaningless. Under the plain language of section 21.256, appellee had two years from the date of filing her complaint to file her civil suit. *See Texas Dep't of Aging & Disability Svrcs. v. Lagunas*, No. 08-16-00086-CV, 2017 WL 728368, at \*5 (Tex. App.—El Paso Feb. 24, 2017, no pet.) (mem. op.) (holding trial court lacked jurisdiction to hear additional claims in amended petition filed more than two years after the charge was administratively filed). This limitation is separate from and in addition to the requirement of section 21.254 that suit must be filed within sixty days of receiving notice of the right to sue. Accordingly, the two-year statute of limitations barred appellee's TCHRA claims. *See Tex. Lab. Code § 21.256.*

Appellee further contends that even if her suit was untimely filed, the limitations period should be equitably tolled. The Supreme Court of Texas has recognized that equitable tolling of statutes is not applicable to a *jurisdictional* statutory requirement. *In re United Services Auto. Ass'n*, 307 S.W.3d 299, 311 (Tex. 2010). Because the statutory requirement that suit be filed within two years is jurisdictional when, as here, the defendant is a governmental entity, we do not apply the equitable tolling doctrine. *See id.* at 311; *Goss*, 391 S.W.3d at 174; *Guevara v. H.E. Butt Grocery Co.*, 82 S.W.3d 550, 552–53 (Tex. App.—San Antonio 2002, pet. denied) (declining to adopt the doctrine of equitable tolling); Tex. Gov't Code § 311.034.

For these reasons, the trial court erred in denying appellant's motion to dismiss. Appellant's issue is sustained.

## **CONCLUSION**

We reverse the trial court's order and render judgment dismissing the suit.

/s/      John Donovan  
Justice

Panel consists of Justices Jamison, Busby, and Donovan.