

Reversed and Rendered and Memorandum Opinion filed August 31, 2023.



In The

Fourteenth Court of Appeals

NO. 14-22-00453-CV

UNIVERSITY OF HOUSTON, Appellant

V.

MONIQUE SHEPPARD, Appellee

**On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2020-76967**

MEMORANDUM OPINION

Appellant, University of Houston (the “University”), appeals the trial court’s order denying its plea to the jurisdiction. The University contends Appellee Monique Sheppard’s claims are barred by sovereign immunity because she failed to provide evidence showing that the University’s legitimate, non-retaliatory reasons for terminating her were a mere pretext for retaliation and that her protected activity was the but-for cause of her termination. We reverse and render.

BACKGROUND

Monique Sheppard started working as a business administrator in the University's College of Medicine in September 2018. Sheppard filed a formal internal complaint with the University on June 20, 2019, alleging that, among other things, her supervisor Paule Anne Lewis disrespected her, made racist comments about Black women, and created a hostile work environment. Sheppard is African American and Lewis is Caucasian. Lewis, who is the Associate Vice President of Business Operations for the University's College of Medicine, learned about Sheppard's grievance from Associate Vice Chancellor and Vice President of Human Services Gaston Reinoso.

On September 13, 2019, Lewis sent Sheppard a detailed email “[a]s a follow up to some of our conversations and emails this week . . . to explicitly outline my expectations for your work product and performance.” In sum, Lewis (1) stated that Sheppard did not behave professionally because she declined meetings and refused to help others; (2) instructed Sheppard to be on time and prepared for meetings; (3) instructed Sheppard to improve her response time as well as “[c]ommunicate effectively and professionally in a respectful, non-condescending manner”; (4) informed Sheppard that she expects Sheppard to “perform [her] job duties timely and with accuracy” in several enumerated areas; and (5) warned Sheppard that “failure to adhere to the expectations outlined in this email will result in formal disciplinary action.” Lewis subsequently memorialized her perceptions and opinions in an internal memorandum.

On September 19, 2019, the University issued Sheppard a written reprimand for unprofessional behavior toward Lewis and Sheppard's colleague Laura John. On October 4, 2019, the University issued a final reprimand to Sheppard. Due to a medical condition, Sheppard was granted Family Medical Leave from October 7,

2019 to December 31, 2019. While on leave on October 25, 2019, Sheppard filed a Charge of Discrimination with the Texas Workforce Commission Civil Rights Division and the Equal Employment Opportunity Commission alleging discrimination based on race and retaliation. The University filed a position statement in response to Sheppard's charge in November 2019.

Sheppard returned to work in January 2020. She had a meeting on January 6, 2020, with Lewis and Devi Bala, who is the University's Assistant Vice President of Business Services. Sheppard recorded the lengthy meeting during which, among other things, she was informed about her unfinished work as well as several errors and deficiencies in her work that Bala's team discovered while Sheppard was on leave. She was told that Bala's team had trained the administrators she previously had worked with so that she could transition and implement the work product expectations. At one point, Sheppard expressly refused to speak with Lewis.

Two days later, the University issued Sheppard a final reprimand and a five-day suspension without pay for her behavior during the meeting. On January 29, 2020, the University terminated Sheppard for failure to adhere to expectations repeatedly outlined by her supervisor.

On December 1, 2020, Sheppard sued the University under the Texas Commission on Human Rights Act codified in Chapter 21 of the Texas Labor Code, alleging that (as relevant to this appeal) the University had terminated her employment in retaliation for her internal formal complaint and EEOC charge. The University filed its plea to the jurisdiction in April 2022, contending that Sheppard's retaliation claim is jurisdictionally barred because she cannot (1) establish that her protected activity caused her suspension or termination; and (2) show that the University's stated reasons for its conduct are a pretext for retaliation. In June, Sheppard filed a response and supplemental response to the University's plea to the

jurisdiction. The trial court signed an order denying the University's plea as to Sheppard's retaliation claim.¹ The University filed a timely appeal.²

ANALYSIS

The University maintains that the trial court improperly denied its plea to the jurisdiction because Sheppard cannot make a valid claim of retaliation to overcome the University's sovereign immunity. In that regard, the University contends that she cannot show causation and that the University's reasons for the adverse employment action were pretextual. As the supreme court has instructed, "[a]n employer is not forbidden from addressing performance issues involving employees who have engaged in protected activity, including following through on known pre-existing issues and addressing existing issues that come to light only during subsequent investigation." *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 791-92 (Tex. 2018).

I. Governing Law and Standard of Review

A. Governmental Immunity and Plea to the Jurisdiction

Governmental units like the University are typically immune from suits except for claims for which their immunity has been waived by the legislature. *See id.* at 770; *Univ. of Tex. Health Sci. Ctr. at Houston v. Rios*, 542 S.W.3d 530, 532 n.4 (Tex. 2017). Absent a waiver, a governmental unit's immunity deprives a trial court of subject-matter jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). The legislature created a limited waiver of

¹ Although not relevant to this appeal, the trial court in its order granted the University's plea to the jurisdiction as to Sheppard's race discrimination and hostile work environment claims.

² *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (allowing interlocutory appeal from trial court's grant or denial of a plea to the jurisdiction by a governmental unit); *Metro. Transit Auth. of Harris Cnty. v. Douglas*, 544 S.W.3d 486, 490 n.1 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

immunity in the Texas Commission on Human Rights Act (“TCHRA”), but only when a plaintiff states a claim that actually violates the statute. *See Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 770; *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 639 (Tex. 2012).

Immunity from suit may be asserted through a plea to the jurisdiction. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 770; *Tex. Dep’t of Parks & Wildlife*, 133 S.W.3d at 225-26. A jurisdictional plea may challenge the face of the pleading, the existence of jurisdictional facts, or both. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 770; *see also Mission Consol. Indep. Sch. Dist.*, 372 S.W.3d. at 635. When, as here, a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider all the relevant evidence submitted by the parties. *Tex. Dep’t of Parks & Wildlife*, 133 S.W.3d at 226-27. Our review of the trial court’s decision mirrors that of our review of traditional summary judgments, which we review *de novo*. *Id.*; *see also Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 771.

If a plaintiff’s factual allegations are challenged with supporting evidence necessary to consideration of the plea to the jurisdiction, to avoid dismissal a plaintiff must raise at least a genuine issue of material fact to overcome the challenge to the trial court’s subject-matter jurisdiction. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 771; *Tex. Dep’t of Parks & Wildlife*, 133 S.W.3d at 221. In assessing whether a material fact issue exists, we must take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubt in the plaintiff’s favor. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 771; *Tex. Dep’t of Parks & Wildlife*, 133 S.W.3d at 228. However, we may not disregard evidence necessary to show context, and we may not disregard evidence and inferences unfavorable to the plaintiff if reasonable jurors could not. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 771 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 811-

12, 822-23, 827 (Tex. 2005)).

B. Elements of a Retaliation Claim under the TCHRA

The TCHRA³ prohibits an employer from retaliating or discriminating against a person who opposes a discriminatory practice, makes or files a charge, or files a complaint. Tex. Lab. Code Ann. § 21.055. “A retaliation claim is related to, but distinct from, a discrimination claim, and one may be viable even when the other is not.” *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 763-64, 781. As opposed to a discrimination claim, a retaliation claim focuses on an employer’s response to an employee’s protected activity, such as making a discrimination complaint, rather than on the validity of the underlying discrimination complaint. *Id.*

When determining whether a plaintiff has a valid claim under the TCHRA for unlawful retaliation, Texas courts recognize two alternative methods of proof. *Kaplan v. City of Sugar Land*, 525 S.W.3d 297, 302 (Tex. App.—Houston [14th Dist.] 2017, no pet.). A plaintiff may prove unlawful retaliatory intent by direct evidence. *Id.* However, because retaliatory intent is rarely overt, Texas courts have developed a second method of establishing a claim under the TCHRA, which follows the tripartite burden-shifting mechanism outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). That paradigm allows a plaintiff to establish her case through circumstantial evidence. *See Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 764 (applying *McDonnell Douglas* framework to unlawful retaliation cases).

Recognizing that Sheppard has no direct evidence that there was a retaliatory

³ “One of TCHRA’s purposes is to ‘provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.’” *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001) (citing Tex. Lab. Code Ann. § 21.001(1)). Accordingly, analogous federal statutes and the cases interpreting them guide our reading of the TCHRA. *Id.*

motive for her termination, the parties agree that we must apply the *McDonnell Douglas* burden-shifting framework to determine if she has a valid claim of retaliation under the TCHRA that waives the University's immunity.

To establish a prima facie case of unlawful retaliation, an employee must show: (1) she engaged in an activity protected by the TCHRA; (2) she experienced a material adverse employment action; and (3) a causal link exists between the protected activity and the adverse action. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 782; *Metro. Transit Auth. of Harris Cnty. v. Carter*, No. 14-19-00422-CV, 2021 WL 126687, at *7 (Tex. App.—Houston [14th Dist.] Jan. 14, 2021, no pet.) (mem. op.).

If an employee meets this requirement, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory purpose for the adverse employment action. *Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 900 (Tex. App.—Houston [14th Dist.] 2013, no pet.); see also *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 782. When the employer demonstrates a legitimate, non-discriminatory purpose for its action, “an employee lacking direct evidence cannot prove a statutory violation without evidence that the employer’s stated reason is false and a pretext for discrimination.” *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 782. “In both direct- and circumstantial-evidence cases, the burden of persuasion remains at all times with the employee.” *Id.* To carry her burden, the employee must rebut each non-discriminatory or nonretaliatory reason articulated by the employer. *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007); *Navy*, 407 S.W.3d at 900-01.

“The causation standard for the *McDonnell Douglas* prima-facie-case element is not onerous and can be satisfied merely by proving close timing between the protected activity and the adverse action.” *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 782. But when the employer proffers evidence of a legitimate reason for

the adverse action, the employee must prove the adverse action would not have occurred “but for” the protected activity. *Id.* “The but-for causation standard is significantly more difficult to prove than prima facie causation.” *Id.* The supreme court identified a series of factors when evaluating but-for causation evidence in retaliation cases: courts should examine all of the circumstances, including temporal proximity between the protected activity and the adverse action, knowledge of the protected activity, expression of a negative attitude toward the employee’s protected activity, failure to adhere to relevant established company policies, discriminatory treatment in comparison to similarly situated employees, and evidence the employer’s stated reason is false. *Id.* at 790.

II. Retaliation Claim

There is no dispute that Sheppard established the first two elements of a prima facie case of unlawful retaliation, namely, that she engaged in an activity protected by the TCHRA and experienced a material adverse employment action. However, the University contends that Sheppard cannot show that a causal link exists between her protected activity and the adverse employment action because (1) the University’s disciplinary process against Sheppard was already underway in May 2019 when Lewis instructed her to take a professional development course to improve her communication and relationships at work, which was before Sheppard filed her first complaint, thus “negating her argument that causation can be inferred because her complaint preceded her formal write-up”; and (2) there is no temporal proximity. The University also contends that Sheppard cannot establish but-for causation because she cannot show that the reasons stated for the adverse employment action were false and pretextual.

Even assuming that Sheppard established a prima facie case,⁴ we conclude that she failed to carry her burden to raise a genuine issue of material fact concerning (1) the reasons for the adverse employment action and (2) but-for causation. In evaluating but-for causation evidence, we look to the several factors the supreme court identified.

A. Knowledge of Protected Activity

We begin by examining whether the decisionmaker had knowledge of Sheppard’s protected activity because, to establish a causal connection between an employee’s protected activity and an adverse employment action, the focus is on the final decisionmakers and what knowledge, if any, they had at the time of the adverse action. *Tex. Health & Human Servs. Comm’n v. Enriquez*, 642 S.W.3d 21, 35 (Tex. App.—El Paso 2021, no pet.).

The evidence shows that Vice President of Human Services Reinoso, who signed off on Sheppard’s termination, knew of her internal complaint “in the fall of 2019”.⁵ Sheppard also testified in her deposition that her supervisor Lewis learned about the complaint on August 8, 2019, because Reinoso had told Sheppard “he was going to meet with [Lewis] and tell her directly about my grievance.”

⁴ Sheppard does not dispute that the University presented a legitimate, non-retaliatory basis for the termination and that the burden thus shifted back to her to raise a fact question as to pretext.

⁵ In his affidavit, Reinoso also averred:

I met Ms. Sheppard in the fall of 2019 to discuss the administrative complaint that she had recently filed alleging a hostile work environment based on race. Based upon my conversation with Ms. Sheppard and in accordance with UH policies, I assigned Connie Kemp, Executive Director of Human Resources Services, and Carlos Luis, Director of Human Resources Services, to investigate Ms. Sheppard’s claims.

Upon completion of their investigation, which included interviews with the individuals Ms. Sheppard listed as potential witnesses, Ms. Kemp and Mr. Luis concluded that Ms. Sheppard’s claims were unsubstantiated.

Additionally, the evidence shows that the University’s associate general counsel knew of Sheppard’s EEOC charge because he filed a position statement in response to her charge in November 2019. However, there is a lack of evidence that Reinoso or Lewis knew of the EEOC charge. The University noted in its brief that “[t]here is no evidence indicating that Paule Anne Lewis, Ms. Sheppard’s supervisor, knew that Ms. Sheppard had filed an EEOC Charge of Discrimination in October 2019.” In response, Sheppard claimed that she “was not required to present direct evidence of Ms. Lewis’ knowledge” and that she needed to “only offer circumstantial evidence that could reasonably support an inference” of knowledge. Yet, Sheppard points to no such circumstantial evidence. Thus, the evidence only shows that Lewis and Reinoso knew of Sheppard’s internal complaint.

B. Temporal Proximity

We next examine the temporal proximity between the protected activity and Sheppard’s termination. “Temporal proximity is relevant to causation when it is ‘very close.’” *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 790; *see also Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001). Sheppard’s employment was terminated on January 29, 2020, a little over four months after she filed her internal complaint and less than one month after she returned from leave during which she filed her EEOC charge.⁶ Courts have found that a timeframe of three months or less may show a causal link, but courts also have found that a three to six-month timeframe is not sufficiently close to show a causal link.⁷ Recently, the

⁶ In calculating temporal proximity in this case, we do not count the time Sheppard was on leave from October 7, 2019 to December 31, 2019 because she was not at work during that time.

⁷ *See Lyons v. Katy Indep. Sch. Dist.*, 964 F.3d 298, 305 (5th Cir. 2020) (“We have ruled, for example, that a six-and-a-half-week timeframe is sufficiently close, but that a five[-]month lapse is not close enough, without other evidence of retaliation, to establish the ‘causal connection’ element”); *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 368 (5th Cir. 2013) (concluding that three months between filing of EEOC charge and adverse

supreme court concluded that an eight-week period did not support a finding of but-for causation and that while a longer delay might support an inference that the employee’s underlying action could not have been a but-for cause of her termination, a shorter delay is not evidence that the employer would not have terminated the employee without the action where evidence of prior insubordination is undisputed. *See Apache Corp. v. Davis*, 627 S.W.3d 324, 336 (Tex. 2021).

C. Expression of Negative Attitude

An employer’s expression of a negative attitude towards an employee’s protected activity can be a factor in determining whether there is a causal link between the protected activity and an adverse employment action. *Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 789. Neither party addresses this factor in its respective briefing and Sheppard points to no evidence of a negative attitude toward her complaint or charge.

employment action in addition to gradual changes in plaintiff’s job duties was sufficient to establish causation element); *Patel v. Trevino*, No. 01-20-00445-CV, 2022 WL 3720135, at *19 (Tex. App.—Houston [1st Dist.] Aug. 30, 2022, no pet.) (mem. op.) (“three-month period between Patel’s report and her termination is sufficiently close to establish the causal connection element”); *River Oaks L-M. Inc. v. Vinton-Duarte*, 469 S.W.3d 213, 228 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding a gap of slightly over three months from initial report of sexual harassment to termination to be sufficiently close temporal proximity); *but see Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (emphasizing that temporal proximity must be “very close” and noting cases that held periods of three and four months to be too long to show causality); *Gonzales v. Dupont Powder Coatings USA, Inc.*, 546 Fed. Appx. 378, 379 (5th Cir. 2013) (“We agree that the passage of six months here is too great a delay to support a causal connection.”); *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 471-72 (5th Cir. 2002) (holding a five-month period between protected activity and adverse employment action did not establish causation); *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (holding a 3-month period insufficient to show causal link); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (holding four-month period insufficient to show causal link); *Tex. Dep’t of Aging & Disability Servs. v. Comer*, No. 04-17-00224-CV, 2018 WL 521627, at *8 (Tex. App.—San Antonio Jan. 24, 2018, no pet.) (mem. op.) (finding that six-month period is too remote to show causal link and noting that “courts have determined that, without other evidence, periods of six, five, four, and even three months between the activity and the adverse action are too long to support a causal link”).

D. Failure to Follow Relevant Established Policies

An employer's failure to follow its relevant policies in making an adverse employment decision may also be a factor in determining whether there is but-for causation between an employee's protected activity and an adverse employment decision. *See Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 789. Here, Sheppard challenges the reasons for her termination, but she does not dispute that the University followed relevant and established policies in terminating her.

E. Discriminatory Treatment of Similarly Situated Employees

A comparison to similarly situated employees also does not favor Sheppard in the causation analysis. "Employees are similarly situated if their circumstances are comparable in all material respects, including similar standards, supervisors, and conduct." *Id.* at 791 (quoting *Ysleta Indep. Sch. Dist. v. Monarrez*, 177 S.W.3d 915, 917 (Tex. 2005) (per curiam)); *see also Apache Corp.*, 627 S.W.3d at 339. Sheppard does not contend that there was any similarly situated employee who was treated differently than she was.

F. Evidence that Stated Reason for Termination is False

Finally, we consider whether the reasons the University stated for Sheppard's termination were false. Sheppard must rebut each non-discriminatory or non-retaliatory reason articulated. *McCoy*, 492 F.3d at 557; *Navy*, 407 S.W.3d at 900-01. Therefore, simply disputing the underlying facts of an employer's decision is insufficient to create an issue of pretext. *Kaplan*, 525 S.W.3d at 309.

The University posits that (1) its reasons for terminating Sheppard were her inability to adequately perform her job duties, her unprofessional behavior, and her disregard for her supervisor's authority, and (2) Sheppard cannot show that the stated reasons were false or unworthy of credence. Sheppard counters that the evidence is

sufficient to establish that the reasons provided for her termination were false. She makes several arguments in that regard, which we address in turn.

1. Manufactured Performance Deficiencies prior to Complaint

Sheppard first claims that Lewis in her affidavit tried to manufacture a list of performance issues that predated Sheppard's internal complaint, which were false and undocumented and were "not cited as a ground for the termination." She claims that the University's "shifting explanations" and "new grounds to support a termination" are evidence of pretext. The record does not support Sheppard's assertion.

With regard to Sheppard's work performance before she filed her internal complaint, Lewis stated in her affidavit:

4. As Business Administrator for the College of Medicine, Ms. Sheppard's job duties and responsibilities included processing business transactions, training of faculty and staff regarding transactions and error resolution, completing month-end and year-end processes, reports, and analysis, budget journals and other fund transfers, and creating cost centers, as required.

5. As early as December 2018, I began to experience problems with Ms. Sheppard's job performance. She refused to accept any training or assistance from other members of the Business Services Center, and the quality of her work product was well below the needs of our department and my expectations.

6. On April 3, 2019, Ms. Sheppard was unable to explain the content of the financial reports that she produced. The dates and data on her reports did not reconcile and Ms. Sheppard did not know how to interpret the data or how to perform any analysis. These activities were a critical part of her job duties and responsibilities.

7. Throughout the month of April 2019, I worked with Ms. Sheppard on her financial reporting and analysis; however, she failed to grasp the concepts necessary to adequately perform her job duties.

8. On April 30, 2019, at Ms. Sheppard's request, I arranged a meeting

with Devi Bala, UH's Assistant Vice President of Business Services, to review the financial reporting done by Ms. Sheppard. During the meeting, Ms. Bala explained to Ms. Sheppard the reports available for analysis and reporting on a monthly basis to meet the reporting needs for the College of Medicine. Ms. Sheppard was not familiar with many of the reports that Ms. Bala mentioned. This was very surprising because during her interview for the position, Ms. Sheppard had represented that she was knowledgeable about such things. Ms. Bala also told Ms. Sheppard that she and her team were available to help Ms. Sheppard with the reporting and also to train Ms. Sheppard in other areas such as journal entries and month-end processes, areas that were critical in Ms. Sheppard's performance of her job duties. During this meeting, Ms. Bala told Ms. Sheppard that she needed to elevate her analytical skills and improve her accounting transactions to eliminate the errors she was making. After this meeting, Ms. Sheppard told me that she refused to work with Ms. Bala and her team.

9. Ms. Sheppard's job performance did not improve and in May 2019, Ms. Bala recommended that I seek a replacement for Ms. Sheppard's position.

10. Instead of seeking termination at that time, I suggested that allowing Ms. Sheppard to transition the human resources and faculty affairs workload to a new staff member and then evaluating Ms. Sheppard's ability with a more appropriate workload, coupled with coaching on communication, was the better approach to help Ms. Sheppard perform her job duties. Both Mr. Bartlett, Senior Vice Chancellor and Senior Vice President for Administration and Finance, and Dean Spann, Vice President of Medical Affairs for the College of Medicine, agreed with this plan.

In response, Sheppard presented an affidavit in which she disputed some, but not all, of Lewis's assertions.⁸

⁸ Specifically, Sheppard claimed that: (1) she never refused any training or assistance from other members of the Business Services Center and had trained with two teams; (2) she was able to explain the content of financial reports and interpret the data but that instead Lewis had difficulty grasping the reports because the University used a different financial system than the one with which Lewis was accustomed; (3) Lewis did not work with her in April 2019 because she failed to grasp the necessary concepts to perform her job; (4) she met with Lewis "a number of times to teach [Lewis] the UH Peoplesoft Finance system, reports, policies, and procedures"; (5) she did

Sheppard did not, however, dispute that (1) as early as December 2018, the “quality of her work product was well below the needs of [the] department” as Lewis averred; (2) the dates and data on the reports she presented to Lewis on April 3, 2019, did not reconcile and that she did not know how to perform any analysis; (3) she was not familiar with many of the reports Bala mentioned at the April 30, 2019 meeting;⁹ and (4) she was unfamiliar with many of the reports mentioned but had represented during her interview for the position that she was familiar with these reports. Sheppard also did not refute that, during the April 30, 2019 meeting, Bala had told her “that she needed to elevate her analytical skills and improve her accounting transactions to eliminate the errors she was making,” although Sheppard stated in her affidavit that she had “no recollection of Ms. Bala telling me that I needed to elevate my analytical skills.”

In an email attached to her internal complaint, Sheppard stated that, on May 9, 2019, Lewis “told me that I have a ‘communication and relationship problem across the campus’ and that she is sending me to Professional Development to ‘fix my problems.’” Sheppard again admitted during her deposition that Lewis had instructed her to take a professional development course to improve her communication and relationships at work, although Sheppard asserted that Lewis made her take the course because Sheppard did not “tolerate” Lewis speaking to her in a disrespectful manner which Lewis perceived as “a lack of professionalism.”

not meet with Lewis and Bala on April 30, 2019, to review Sheppard’s financial reporting; and (6) the purpose of said meeting was for Bala to help Lewis understand how the University’s financial reporting system operated.

⁹ Sheppard claimed that she was unfamiliar with some reports “because they were executive-level reports to which I had no access (to my knowledge) and that I did not generate.” But Lewis asserted that it was very surprising that Sheppard was unfamiliar with many of the reports Bala mentioned during the April 30, 2019 meeting because Sheppard, during her job interview, represented she was knowledgeable about these various reports.

During her deposition, Sheppard also admitted that Lewis had complained about her work performance before Lewis found out that Sheppard had filed her internal complaint. She testified that Lewis “would complain about things if they weren’t done when she wanted them,” but, in an effort to justify her performance, Sheppard testified that Lewis did not understand “the process of how long the time took” and “how anything worked.” Sheppard also acknowledged that Lewis had talked to her about, among other things, (1) improving her work product with the expectation to accomplish tasks and duties timely and accurately; and (2) communicating effectively and professionally.

The evidence does not support Sheppard’s assertion that Lewis “tried to manufacture a list of performance issues” that predated Sheppard’s internal complaint, which were false and “not cited as a ground for the termination.” Nor does the evidence support Sheppard’s assertion that the University provided “shifting explanations” and “new grounds to support a termination.”

2. *Discipline and Suspension*

Sheppard claims that “the most damning evidence of pretext is that, after Ms. Lewis learned about the grievance, she disciplined” Sheppard twice for disrespecting her when “nothing about either incident . . . appear[ed] to justify any form of discipline.” Sheppard refers to her first written reprimand on September 19, 2019, and to her suspension on January 8, 2020; she claims this was “bogus discipline.”

For context, before receiving the written reprimand, Lewis sent Sheppard a detailed email on September 13, 2019, outlining her expectations regarding Sheppard’s work product and performance. Sheppard admitted to being late and unprepared for meetings and claimed that sometimes she did not know what Lewis wanted or had to wait for Lewis to return something. Six days after Lewis sent the September 13, 2019 email, Sheppard received the first written reprimand.

We do not agree with Sheppard that the evidence shows “Lewis was grasping at straws to discipline” her and that the circumstances of the reprimand show pretext. Sheppard did not present any evidence to rebut the facts recited in the written reprimand or the internal memorandum.

Sheppard also contends that her suspension was “bogus” because it was “based on supposed misconduct during a meeting between” her, Lewis, and Bala when an audio recording Sheppard made of the meeting shows “the meeting was almost entirely innocuous, except for a brief exchange in which Ms. Lewis provoked Ms. Sheppard.” Sheppard contends that Lewis’s description of the meeting is demonstrably false and that Lewis arranged for a “bogus suspension” which is proof that the University’s “explanation for the termination is unworthy of credence.” The evidence does not support Sheppard’s contention.

Following the meeting, the University suspended Sheppard for her behavior during the meeting; the suspension document provided as follows:

PREVIOUS CORRECTIVE ACTION:

Prior to September 2019, you were verbally coached and counseled on multiple occasions due to your inaccuracy and untimeliness of business and financial transactions.

On September 13, 2019[,] you were provided expectations regarding professionalism, response time, communication, and performance.

On September 23, 2019. you were presented with a formal Written Reprimand regarding your lack of professionalism and disruptive working relationships with your colleague Laura John.

On October 4, 2019, you were presented with a formal Final Reprimand regarding your inaccuracy, untimeliness of business and financial transactions, and disruptive working relationships. Specifically, issues with the FY 20 budget, transfer of local travel and M&O funds, and once again your unwillingness to work with your colleague Laura John, College HR Administrator, COM, Human Resources.

FACTS:

On Monday, January 6, 2020, the Assistant VP, Business Services and your supervisor, Paule Anne Lewis met with you to discuss the key internal controls deficiencies for the College of Medicine that were identified and corrected between October 2019 and December 2019, by the Business Services team due to your inaccuracies and untimeliness. It was also discussed how you would have the opportunity to complete any pending transactions for January 2020 and Paule Anne would review at the end of the month as these deficiencies are the fundamental responsibilities of a College Business Administrator.

During the meeting, you became confrontational and visibly upset, defensive, and unwilling to take responsibility for your deficiencies. You also spoke over your supervisor and directed your conversation to the Assistant VP, Business Services. Additionally, when Paule Anne attempted to have a productive conversation regarding the issues, you stated to her, "I have already decided that I am not going to respond to you or talk to you, I am only talking to [Assistant VP, Business Services]." Despite Paule Anne's communication to you that you were displaying disrespectful and unprofessional behavior, you continued to be insubordinate towards her during the meeting.

Your willful and deliberate disregard for your supervisor's authority, including your unprofessional behavior you demonstrated, is unacceptable and will not be tolerated.

OBJECTIVES:

- You are expected to interact with your supervisor and follow all of their directives and adhere to their expectations.
- You are expected to follow all policies and procedures as established by the College of Medicine.
- You are expected to communicate properly and maintain professional behavior at all time[s].
- You are expected to perform your job duties timely and with accuracy.

SOLUTIONS:

You are expected to improve your behavior immediately.

You are expected to interact with your supervisor and all necessary personnel to timely complete your assigned work, duties, and obligations.

ACTIONS:

You are being issued a final reprimand with a 5 day suspension without pay for your insubordinate and unprofessional behavior. Failure to adhere to the expectations outlined in this reprimand will result in termination of your employment.

There is no evidence that the meeting was innocuous or that Lewis provoked her. Furthermore, the recording itself is not evidence that there was no legitimate basis for Sheppard's suspension and that the termination was therefore retaliatory. We do not agree with Sheppard that "Lewis' description of the meeting is demonstrably false, including her claim that Ms. Sheppard refused to talk to her." Nothing in the suspension document describing what occurred during the meeting is demonstrably false. The recording supports the description of Sheppard as (1) becoming "confrontational and visibly upset, defensive and unwilling to take responsibility for [her] deficiencies"; (2) speaking over Lewis; (3) directing her conversation to Bala; (4) declining to speak to Lewis; and (5) displaying unprofessional behavior.

3. *Set Up for Failure*

Again pointing to the first written reprimand issued on September 19, 2019, Sheppard asserts that the events preceding the reprimand constitute evidence that Lewis had a transparent plan to set her up to fail and, therefore, the reprimand demonstrates retaliatory motive and renders the University's explanation for the termination unworthy of credence. Sheppard claims that Lewis's plan "is shown by the incident in September 2019 when Ms. Sheppard went to Ms. Lewis' office and found her own e-mails spread across Ms. Lewis' desk. Ms. Lewis was setting her up, and when Ms. Sheppard had the audacity to say something about it, Ms. Lewis seized the opportunity to give her a written reprimand. In other words, Ms. Lewis wrote up Ms. Sheppard for pointing out the fact that Ms. Lewis (through her friend, Laura John) was retaliating against her."

However, nothing in the record supports Sheppard's assertion of a set up. She does not explain what about her emails that were allegedly on Lewis's desk shows a set up and retaliatory intent. We do not know what the emails were about and what in them could have been used against Sheppard. Numerous items could have been the subject of the emails; for all we know, the emails could have contained information or data Lewis and John needed to complete a task. Without more context, Sheppard's emails on Lewis's desk are not evidence of a set up.

4. *Emails*

Finally, Sheppard contends that Lewis's failure to respond to her email requests "for a list of the specific actions that she needed to take and the specific policies she needed to follow" during the month of January 2020 establishes that Lewis did not want Sheppard to succeed and "[t]he termination was preordained."

Although Sheppard points to several pages of emails, the emails are illegible and, therefore, cannot support her contention that she sent emails asking for a list of actions and policies and that these emails went unanswered. Additionally, Sheppard has not presented any evidence controverting the facts outlined by the University in the termination document.

Sheppard presented no evidence refuting that she (1) had meetings with Lewis and Bala before and after the suspension during which she was provided clear explanations; (2) had a one-on-one meeting with Lewis during which Lewis discussed in detail what was expected from Sheppard; and (3) failed to approve transactions despite being asked by Lewis numerous times to do so, which required intervention from the central business office. And, during her deposition, Sheppard acknowledged that she essentially declined to do work without getting policies and procedures in writing via email from Lewis or Bala, although she claimed the reason was so she could follow policies accurately. Thus, we disagree that Lewis's alleged

failure to respond to Sheppard's alleged email requests establishes that Lewis did not want Sheppard to succeed and that "[t]he termination was preordained."

Based on the evidence before us, we conclude that Sheppard has not presented evidence that the University's stated reasons for her termination were false and pretextual and that she would not have been terminated but for her protected activity. As we have discussed above, Sheppard offered no evidence to counter the University's evidence that there had been various issues with Sheppard's work product, performance, and professionalism before she engaged in protected activity. The University also presented evidence of continued issues with Sheppard's work product, communication, and unprofessional conduct after she filed a complaint and charge. Regarding problems to communicate professionally and effectively, (1) Lewis required Sheppard to take a professionalism course back in May 2019; (2) after issues did not resolve, Lewis sent Sheppard a detailed email on September 13, 2019, in which Lewis outlined her expectations regarding Sheppard's work product and performance; (3) Sheppard received her first written reprimand for unprofessional behavior toward John and Lewis; and (4) Sheppard was suspended for unprofessional behavior she displayed during her meeting with Lewis and Bala on January 6, 2020.

Regarding issues with Sheppard's work product and performance, she received a written reprimand on October 4, 2019. Sheppard did not offer any evidence to negate the statements contained in the October written reprimand. During her deposition, Sheppard acknowledged that "it's a possibility" that she made the alleged errors failing to submit the correct fund code which caused a rejection from the budget office. She confirmed failing to present budget journals to Lewis "for approval prior to submission per [Lewis's] instructions in our meeting September 23, 2019." In light of the written reprimand and in-person meeting,

Sheppard's justifications are insufficient.

Sheppard denies or attempts to justify many of her performance issues, but such denials are insufficient to create a fact issue as to causation. *See Alamo Heights Indep. Sch. Dist.*, 544 S.W.3d at 792. "The issue is whether the employer's perception of the problems—accurate or not—was the real reason for termination." *Id.* The record bears no evidence that the stated reasons for Sheppard's termination were false and a mere pretext.

Having reviewed the record, we conclude there is no question of fact as to whether Sheppard would not have been terminated but for the protected activity. Therefore, immunity has not been waived as to Sheppard's retaliation claim, and the trial court should have granted the University's plea to the jurisdiction. Accordingly, we sustain the University's issue.

CONCLUSION

We reverse the trial court's order denying the University's plea to the jurisdiction and render judgment dismissing Sheppard's retaliation claim.

/s/ Meagan Hassan
Justice

Panel consists of Justices Zimmerer, Spain, and Hassan.