Reversed and Rendered and Memorandum Opinion filed November 30, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00861-CV

THE UNIVERSITY OF HOUSTON, Appellant

V.

KATE KINGSBURY, Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 2021-78359

MEMORANDUM OPINION

Appellee Kate Kingsbury filed suit against appellant The University of Houston (UH), alleging: (1) discrimination; (2) retaliation; and (3) intentional infliction of emotional distress. UH filed a plea to the jurisdiction, which the trial court denied. In three issues, UH argues that the trial court erred in failing to grant its plea to the jurisdiction because: (1) Kingsbury cannot make a valid discrimination claim; (2) Kingsbury cannot make a valid retaliation claim; and (3) Kingsbury's claim for intentional infliction of emotional distress is barred by

governmental immunity. We reverse and render judgment dismissing the case for want of jurisdiction.

I. BACKGROUND

Kingsbury and Luca Oliva both applied for an open, tenure-track position in the Department of Comparative Culture Studies at UH in Fall 2020. Of the more than 200 applicants, UH narrowed it down to four finalists. Oliva was one of the 4 finalists, but not Kingsbury. While interviewing was still underway, one of the other finalists withdrew their application having accepted a different job so UH decided to offer Kingsbury an interview as a late alternative finalist.

Like the other finalists before her, Kingsbury was invited to meet with department faculty, present a lecture, and then undergo an interview with the selection committee. During her lecture, Kingsbury made a comment that deeply offended Dr. Elizabeth Farfán-Santos, a member of the selection committee. The next day, during Kingsbury's interview with the selection committee, Farfán-Santos asked Kingsbury, "What makes you think as a white person that you could ever understand such a powerful tradition?", referring to Kingsbury's study of Santa Muerte.

Dr. Christian Eberhart—another member of the UH selection committee—found Farfán-Santos's behavior inappropriate and sent an e-mail to the department chair—Dr. Nicholas De Genova—during the interview, requesting an urgent phone call. In the phone call, Eberhart triggered the complaint process with UH's Office of Equal Opportunity Services (EOS). Kingsbury e-mailed De Genova, who responded by assuring her that "we are taking this unfortunate experience very seriously" and "will be investigating the matter thoroughly."

De Genova's e-mail to Kingsbury offended Farfán-Santos, who accused De

Genova of libel and asked that he be removed from his position on the Special Committee on Race and Social Justice. Farfán-Santos then filed her own EOS complaint, creating two parallel EOS investigations: one of Farfán-Santos's treatment of Kingsbury, and another for Kingsbury's and De Genova's treatment of Farfán-Santos.

Farfán-Santos also voiced her complaints on Twitter, upset that UH staff did not more fully support her. In response, Kingsbury e-mailed De Genova again, complaining for the first time that Farfán-Santos was discriminating against her because she was not of Mexican origin.

Meanwhile, UH completed its hiring process for the tenure position. According to UH, final academic hiring decisions are made based on numerical evaluations submitted by the members of the selection committee. Typically, each member ranks each of the interviewed candidates on a scale of 1 to 10. However, UH prohibited Farfán-Santos from submitting an assessment of Kingsbury. UH then compiled the ratings of each candidate, both with and without the evaluations by Farfán-Santos. In both scenarios, Oliva was the highest ranked candidate, receiving a perfect 10 from every selection committee member, except from Farfán-Santos, who gave him a 9. Kingsbury received a score of 9 from every member of the selection committee, excluding Farfán-Santos.

Afterwards, EOS completed both of its investigations, observing that Kingsbury did not file a formal complaint against Farfán-Santos and concluding that De Genova did not engage in any mistreatment of Farfán-Santos based on national origin or race.

In December 2021, Kingsbury filed suit against UH alleging discrimination and retaliation in violation of Labor Code chapter 21. *See* Tex. Lab. Code Ann. §§ 21.001–.556. Kingsbury alleged that UH hired a "person of color" instead of

her, even though Oliva is a white, Italian male. UH filed a plea to the jurisdiction, alleging that Kingsbury failed to plead sufficient jurisdictional facts to establish a waiver of governmental immunity.

On November 1, 2022, the trial court signed an order denying UH's plea to the jurisdiction. UH filed a timely notice of appeal challenging the trial court's denial of its plea to the jurisdiction. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (permitting interlocutory appeal of orders granting or denying plea to jurisdiction filed by governmental units).

II. Analysis

A. Standard of review and applicable law

We review a trial court's ruling on a plea to the jurisdiction de novo. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. *Id.* We construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff should be afforded the opportunity to amend. *Id.* at 226–27. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.* at 227.

When a plea to the jurisdiction challenges jurisdictional facts, we consider the facts alleged by the plaintiff and, "to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties" to determine whether

the plaintiff has affirmatively demonstrated the court's jurisdiction to hear the case. *See Texas Nat. Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001). The process of deciding whether jurisdictional facts have been affirmatively pleaded is similar to a summary judgment: if the evidence does not raise a genuine issue of fact regarding the jurisdictional issue, then the plea to the jurisdiction should be granted. *See Miranda*, 133 S.W.3d at 228.

"UH is a governmental unit generally immune from tort liability, except when the legislature has specifically waived that immunity." *De Miño v. Sheridan*, 176 S.W.3d 359, 366 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *see* Tex. Educ. Code Ann. §§ 111.01–.02; Tex. Civ. Prac. & Rem. Code Ann. § 101.001(3)(D). One such waiver is found under the employment discrimination provisions of Labor Code chapter 21, which states that an employer commits an unlawful employment practice if, because of an employee's race or national origin, 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."[1] Tex. Labor Code Ann. § 21.051(1); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008) (holding that chapter 21 of the Labor Code clearly and unambiguously waives immunity) ("*Garcia I*").

Labor Code chapter 21's waiver of immunity only applies in those suits in which the plaintiff alleges a violation within the scope of the statute. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 636 (Tex. 2012) ("*Garcia*

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[1] The Texas Legislature patterned Labor Code chapter 21 after federal law for the express purpose of carrying out 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, 474 (Tex. 2001); *see* 42 U.S.C. §§ 2000e–2000e-17. When analyzing a claim brought under Labor Code chapter 21, we therefore look to state cases as well as to the analogous federal statutes and the cases interpreting those statutes. *Id.* at 476.

II"). If the plaintiff does not sufficiently plead facts that state a claim under Labor Code chapter 21, the governmental unit may challenge the pleadings with a plea to the jurisdiction. *Id.* at 635. Using the same procedural device, the governmental unit may also challenge the very existence of those jurisdictional facts. *Id.*

"In a suit against a governmental employer, the prima facie case implicates both the merits of the claim *and* the court's jurisdiction because of the doctrine of sovereign immunity." *Garcia II*, 372 S.W.3d at 635–36. If the suit involves claims of disparate treatment, the prima facie case requires proof that the discrimination claimant was treated less favorably than a similarly situated comparator from the opposing class. *See University of Tex. Med. Branch at Galveston v. Petteway,* 373 S.W.3d 785, 788–89 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

There are two alternative methods by which a plaintiff can establish discrimination or retaliation under Labor Code chapter 21. *See Garcia II*, 372 S.W.3d at 634. First, a plaintiff can offer direct evidence of the employer's discriminatory actions or words. *Id.* "Direct evidence of discrimination is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." *College of the Mainland v. Glover*, 436 S.W.3d 384, 392 (Tex. App.–Houston [14th Dist.] 2014, pet. denied) (quoting *Jespersen v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 653 (Tex. App.—Dallas 2012, no pet.)). "Courts have tended to find that insults or slurs against a protected group constitute direct evidence of discrimination." *Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 643 (Tex. App.—Houston [1st Dist.] 2015, no pet.). For workplace comments to provide sufficient evidence of direct discrimination, the comments must be: (1) related to the employee's protected class; (2) proximate in time to an adverse employment decision; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue.

Id. at 644. "If an inference is required for the evidence to be probative as to the employer's discriminatory animus, the evidence is circumstantial, not direct." *Id.* at 643. As our state's high court has observed, direct evidence of discrimination is a rarity in employment cases. *See Garcia II*, 372 S.W.3d at 634.

In the alternative to presenting direct evidence, a plaintiff can proceed with indirect or circumstantial evidence of discrimination or retaliation. *See Russo v. Smith Int'l, Inc.*, 93 S.W.3d 428, 434 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). Under this second method, the employee must make a prima facie case of discrimination under the *McDonnell–Douglas* burden-shifting analysis. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–05 (1973).

To establish a prima facie case of discrimination with indirect evidence, the plaintiff must show that: (1) she was a member of a protected class, (2) she was qualified for the position she applied for; (3) she suffered an adverse employment action, such as termination or rejection; and (4) nonprotected class employees were not treated similarly. See *id.* at 802. Once the plaintiff establishes a prima facie case, the burden of production shifts to the defendant-employer to articulate legitimate nondiscriminatory reasons for any allegedly unequal treatment. *Id.* After the employer articulates a nondiscriminatory reason, the burden shifts back to the employee to prove that the articulated reason is a mere pretext for unlawful discrimination. *Id.* at 807. Although the burden of production shifts between the parties, the burden of persuasion "remains continuously with the plaintiff." *Greathouse v. Alvin Indep. Sch. Dist.*, 17 S.W.3d 419, 423 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

B. Discrimination claim

We first address UH's first issue by determining if there was any direct evidence of race or national-origin discrimination.

1. No direct evidence of race or national-origin discrimination

Kingsbury argues that Farfán-Santos's comments and actions constituted direct evidence of discrimination because they proved her discriminatory animus. Regardless of whether Farfán-Santos's comments and actions portrayed discriminatory animus, ultimately this is not direct evidence of discrimination because Farfán-Santos was not a decisionmaker and her alleged bias did not impact the outcome of the hiring decision.

We find *Davis v. Chevron U.S.A., Inc.*, to be insightful. 14 F.3d 1082, 1086 (5th Cir. 1994). Davis filed suit against Chevron for discrimination, alleging she was not hired because she was a woman. *Id*. at 1083. Specifically, Davis argued that the allegedly discriminatory comments and questions from one member of the selection committee constituted direct evidence of discrimination. *Id*. at 1083–84. However, the Fifth Circuit concluded that the alleged direct evidence was too weak:

> [A]ll of Davis'[s] allegations are directed at one person: Jelercic. Yet Jelercic was but one of seven persons involved in the decision not to hire Davis, and Davis does not explain how Jelercic's alleged gender bias could have produced the unanimous decision not to hire her; she simply points to the fact of her rejection.

Id. at 1086.

In the present case, the record reflects that even though UH considered Farfán-Santos's evaluations of the other candidates, UH did not consider her evaluation of Kingsbury. And even if Farfán-Santos's opinion was considered, she was but one of four persons involved in the decision to hire Oliva instead of Kingsbury. The other decisionmakers all issued a condemnation of Farfán-Santos's behavior. Kingsbury does not explain how Farfán-Santos's alleged bias could have produced the unanimous decision not to hire her, especially because Oliva was

rated as the top candidate amongst the other decisionmakers. *See id.*

Having concluded that Kingsbury failed to show direct evidence of discrimination, we next determine if she showed any indirect evidence.

2. No indirect evidence of race discrimination

Oliva, like Kingsbury, is White. Therefore, Kingsbury cannot show she was treated less favorably than other similarly situated employees outside of her protected class because Oliva and Kingsbury were of the same protected class. *See Garcia II*, 372 S.W.3d at 634 (concluding that plaintiff cannot show prima facie case of age discrimination when plaintiff is replaced by someone older).

3. No indirect evidence of national-origin discrimination

When Kingsbury e-mailed De Genova, she complained that Farfán-Santos discriminated against her because she was “not of Mexican origin.” In her petition, she alleged she was discriminated against because she is Canadian. In her response to UH’s plea to the jurisdiction, she claimed to be British and asserted she was discriminated against for being of “Northern European extraction.”

Assuming without deciding that Kingsbury was able to establish a prima facie case of national-origin discrimination, Kingsbury is ultimately unable to overcome UH’s rebuttal evidence that it had legitimate nondiscriminatory reasons for hiring Oliva. *See McDonnell,* 411 U.S. at 802.

Oliva has the equivalent of doctorate and bachelor of science degrees from the University of Milan. His areas of concentration include the philosophy of religion and philosophical anthropology. He has authored two books (and edited a third), in addition to numerous academic articles. He became an adjunct professor at UH in 2012. UH promoted him to assistant professor in 2014. In 2019, he became the Program Director of Liberal Studies at UH. And, as discussed above,

Oliva received a perfect 10 from all three of the other selection committee members, whereas Kingsbury received 9s from all 3. Thus, UH asserts that it simply selected the top-rated candidate that had the additional bonus of having a longstanding employment history with UH already. Kingsbury argues that she was better qualified than Oliva for the position in certain regards, but "[m]erely disputing [the employer's] assessment of [the employee's] qualifications [does] not create an issue of fact." *McCoy v. Texas Instruments, Inc.*, 183 S.W.3d 548, 555 (Tex. App.—Dallas 2006, no pet.).

Kingsbury claims that UH's reasons for hiring Oliva are merely pretextual, but she has not raised a fact issue that UH's reasons for hiring Oliva instead of her were false or that the true reason for refusing to hire her was based on her race and/or national origin. Kingsbury suggests that UH's reasons were pretextual because the selection process was clearly unfair. According to Kingsbury, she was unfairly disadvantaged in the selection process because she was only rated by 3 of the committee members whereas Oliva was rated by all 4. Thus, UH's deviation from its normal selection process was pretextual and "denied [her] the benefit of having her qualifications graded in the same manner." However, Oliva was the top-rated candidate regardless of whether the scores were added or averaged, both with and without Farfán-Santos's scores.

Therefore, Kingsbury did not present evidence from which a jury could conclude that "no reasonable person, in the exercise of impartial judgment, could have chosen [Oliva] over [Kingsbury] for the job in question." *Moss v. BMC Software, Inc.*, 610 F.3d 917, 923 (5th Cir. 2010). Accordingly, the trial court erred by failing to dismiss Kingsbury's discrimination claim. We sustain UH's first issue.

C. Retaliation claim

In its second issue, UH argues that Kingsbury cannot make a valid retaliation claim to overcome its governmental immunity. The record contains no direct evidence that UH had a retaliatory motive for refusing to hire her so we apply the same *McDonnell–Douglas* burden-shifting analysis we employed above to determine if Kingsbury established a prima facie case of retaliation. *See McDonnell,* 411 U.S. at 802. "To establish a prima facie case of retaliation, a person must show: (1) she engaged in an activity protected by [Labor Code chapter 21], (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. v. Clark*, 544 S.W.3d 755, 782 (Tex. 2018). The causal link must be established through but-for causation. *See Apache Corp. v. Davis*, 627 S.W.3d 324, 335 (Tex. 2021).

Kingsbury alleges two separate adverse employment actions: Farfán-Santos's social media posts and the "denial of the proper consideration of [her] application." But the social media posts do not constitute a material adverse employment action: "Generally adverse employment decisions involve hiring, granting leave, discharging, promoting, and compensating." *Winters v. Chubb & Son, Inc.*, 132 S.W.3d 568, 575 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

Regarding Kingsbury's second alleged adverse employment action, she cannot show that her complaints to the department chair were the but-for causation of UH's failure to properly consider and hire her. There is no evidence in the record to support Kingsbury's assertion that her application was denied the "proper consideration." If anything, the record shows that Farfán-Santos was reprimanded, and her evaluation of Kingsbury was not considered. And there is nothing in the record to suggest that UH's decision not to hire Kingsbury was related to her filing

of a complaint.

Even if Kingsbury could show a prima facie case of retaliation, she cannot overcome UH's legitimate nondiscriminatory reason for any alleged unequal treatment: Oliva was hired because he was the highest-rated candidate and had already been working with UH for several years.

Therefore, the trial court erred by failing to dismiss Kingsbury's retaliation claim. We sustain UH's second issue.

D. Intentional-infliction-of-emotional-distress claim

In her response to UH's plea to the jurisdiction and in her appellate brief, Kingsbury concedes that her claim for intentional infliction of emotional distress is barred by governmental immunity. Accordingly, the trial court erred by failing to dismiss Kingsbury's claim for intentional infliction of emotional distress.

We sustain UH's third issue.

E. Opportunity to amend petition

Because the jurisdictional evidence establishes that all of Kingsbury's claims are barred by governmental immunity, the trial court should have granted UH's plea to the jurisdiction. Having reached this conclusion, we must next decide whether Kingsbury is entitled to an opportunity to amend her petition. *See Dohlen v. City of San Antonio*, 643 S.W.3d 387, 397 (Tex. 2022) (Texas courts allow parties to replead unless their pleadings demonstrate incurable defects). Ultimately, Kingsbury cannot overcome UH's legitimate, non-discriminatory reasons for hiring Oliva. Also, Kingsbury has not suggested there is a jurisdictional defect she can cure. During the proceedings below, she did express an intent to amend her petition, but only to remove her claim for intentional infliction of emotional

distress.[2] *See Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007) (dismissing claim and concluding plaintiff was not entitled to amend petition, noting that plaintiff's "pleading defects cannot be cured, and he has made no suggestion as to how to cure the jurisdictional defect"). Remanding this case to allow Kingsbury to amend her petition would serve no legitimate purpose because she cannot overcome the defects of her pleadings. Accordingly, Kingsbury is not entitled to an opportunity to amend in this case.

III. Conclusion

We reverse the trial court's order denying UH's plea to the jurisdiction and render the judgment the trial court should have rendered: a judgment dismissing Kingsbury's suit against UH for want of jurisdiction. Tex. R. App. P. 43.2(c).

/s Charles A. Spain
Justice

Panel consists of Justices Wise, Bourliot, and Spain.

[2] We also note that despite expressing an intent to amend her petition, she never did so.