IN THE SUPREME COURT OF TEXAS

═══════════
NO. 10-0802
═══════════

MISSION CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

GLORIA GARCIA, RESPONDENT

══
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS
══

CHIEF JUSTICE JEFFERSON, joined by JUSTICE MEDINA and JUSTICE LEHRMANN, dissenting.

We must decide whether a school district has conclusively negated a trial court's jurisdiction, not simply whether a claimant replaced by an older individual "is ever entitled to a presumption of age discrimination under the *McDonnell Douglas* burden-shifting framework." ___ S.W.3d ___. The answer to the former inquiry does not depend on the latter. The *McDonnell Douglas* framework is a useful mechanism for determining whether discrimination occurred, but it does not apply in every employment discrimination case. That Garcia did not establish the elements of a prima facie case means only that a court will not *presume* discrimination—it does not mean Garcia cannot possibly prevail. By equating the two inquiries, the Court dismisses Garcia's claims prematurely and forces her to prove her case to establish jurisdiction. I respectfully dissent.

I. The District has not met the summary judgment standard of proof for its assertion that the trial court lacks jurisdiction.

Because it presented undisputed evidence that Garcia was replaced by an older worker, the

District contends that her prima facie case fails as a matter of law.[1] If the elements of a prima facie case were essential to proving discrimination, this argument might have merit. But the District's position misconstrues the nature of the prima facie case in employment discrimination cases.

The phrase "prima facie case" has two different meanings. It may denote "[t]he establishment of a legally required rebuttable presumption," BLACK'S LAW DICTIONARY 1310 (9th ed. 2009), or "[i]t may mean evidence that is simply sufficient to get to the jury," 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 342, at 496 n.4 (6th ed. 2006). The Supreme Court has made clear that it uses "prima facie case" in the former sense in the employment discrimination context. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981) ("The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. . . . *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." (citations omitted)). Properly understood, this prima facie framework is a device for allocating the burden of production. *Id.* at 255 n.8. Once the presumption is established, the burden shifts to the defendant to produce evidence of some nondiscriminatory reason for the employment action. *Id.* at 253. "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, *and the factual inquiry proceeds to a new level of specificity*." *Id.* at 255 (emphasis added). Thus, a prima facie showing is not "the equivalent of a factual finding of discrimination," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978), nor is it a necessary component to establish that finding. It is

[1] Because Garcia does not challenge the court of appeals' dismissal of her race, national origin, and gender discrimination claims, this discussion refers specifically to Garcia's age discrimination claim. But the reasoning is equally applicable to any type of discrimination claim.

simply a mechanism "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n.8.

If the plaintiff produces direct evidence of discrimination, the need for a presumption disappears. The Supreme Court made this clear in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). There, the employee alleged "that he had been terminated on account of his national origin . . . and on account of his age." *Id.* at 509. The trial court dismissed his claim because he did not "adequately allege[] a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination." *Id.* The Second Circuit affirmed. The Supreme Court reversed, noting that the prima facie case under *McDonnell Douglas* "is an evidentiary standard, not a pleading requirement." *Id.* at 510. The Court explained,

> [U]nder a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. *For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case*. . . . Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. *It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.*

Id. at 511–12 (emphasis added) (citation omitted). Thus, because the employee's complaint gave his employer fair notice of his claims and the grounds upon which they rested, the Supreme Court concluded it was sufficient even though the prima facie elements were not present. The standards for Title VII mirror those for the TCHRA. *See* ___ S.W.3d at ___ ("Because one of the purposes of the TCHRA is to 'provide for the execution of the policies of Title VII of the Civil Rights Act of 1964,' we have consistently held that those analogous federal statutes and the cases interpreting them

guide our reading of the TCHRA." (quoting TEX. LAB. CODE § 21.001(1))). Why then is the outcome different in this case?

This is not to say that prima facie elements are irrelevant. They create a presumption precisely because they may establish the presumed fact of discrimination. But "relevant" does not mean "necessary." Federal circuit courts appreciate this distinction. For example, in *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419 (5th Cir. 2000), the Fifth Circuit addressed the weight to be given a plaintiff's inability to establish the elements of a prima facie case at summary judgment. There, a white male sued his employer, alleging race discrimination. *Byers*, 209 F.3d at 423. The court determined that the employee established the first three elements of the prima facie case—(1) that he was a member of a protected group, (2) that he was qualified for the position held, and (3) that he was discharged from the position—but failed to establish the fourth element because he was replaced by someone of the same race. *Id.* at 426–27. The court ultimately upheld summary judgment for the employer but not on the sole basis that the plaintiff failed to establish the fourth element. *Id.* The court noted that it had previously cautioned "district courts against applying the four-part, *prima facie* case test too mechanically," explaining that "'[w]hile the fact that one's replacement is of another national origin "may help to raise an inference of discrimination, it is neither a sufficient nor a necessary condition."'" *Id.* at 427 (quoting *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996)). The court explained that a plaintiff could still prove a case of racial discrimination "even where an employee has been replaced by someone of the same race." *Id.* But the plaintiff must then establish it was probable that his race "was a motivating factor in his employer's decision to terminate him." *Id.* Because the employee did not present such evidence, summary judgment was appropriate. *Id.* I do not understand the basis on which the Court rejects

this first-rate analysis.

Thus, a plaintiff can establish a claim without the use of a presumption by presenting other evidence of discrimination. The question here is whether Garcia was required to do so at the earliest stage of the litigation. We emphasized in *Miranda* that a plaintiff is required to raise a fact issue only after the governmental entity has met its burden:

> By requiring the state to meet the summary judgment standard of proof in cases like this one, we protect the plaintiffs from having to 'put on their case simply to establish jurisdiction.' . . . Instead, after the state asserts and supports with evidence that the trial court lacks subject matter jurisdiction, we simply require the plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue.

Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 228 (Tex. 2004) (citations omitted). The Court holds that the District is entitled to dismissal because (1) the elements of a prima facie case of discrimination are "jurisdictional facts" under the TCHRA, and (2) Garcia failed to offer any direct evidence of discriminatory intent or any other evidence of discrimination in response to the District's evidence negating an essential element of her statutory cause of action. ___ S.W.3d at ___. This implies, however, that a plaintiff *must* establish the prima facie elements to prove discrimination, a proposition rejected by federal courts and not to be found in the TCHRA's text. The Court acknowledges that "[t]here is no prima facie requirement in the text of the TCHRA; the statute simply proscribes discrimination 'because of race, color, disability, religion, sex, national origin, or age.'" ___ S.W.3d at ___. Yet the Court sidesteps the issue by restricting its holding to plaintiffs who rely on a presumption to establish liability: "*For a plaintiff who proceeds along the* McDonnell Douglas *burden-shifting framework*, the prima facie case is the necessary first step to bringing a discrimination claim under the TCHRA. Failure to demonstrate those elements means

the plaintiff never gets the presumption of discrimination and never proves his claim." ___ S.W.3d at ___ (emphasis added). But we do not know at the outset whether Garcia, or any other plaintiff, will rely solely on a presumption or present other evidence of discrimination, and nothing in Garcia's original petition confined her pleading to the prima facie framework. How a plaintiff proves her claim will vary with the available evidence in each case. And whether Garcia is entitled to a presumption has no bearing on whether the trial court has jurisdiction to consider this other evidence.

The ultimate inquiry in an employment discrimination case is whether the employer "intentionally discriminated against the plaintiff." *Burdine*, 450 U.S. at 253; *see also* TEX. LAB. CODE § 21.051 ("An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer: . . . discharges an individual . . . ."). Thus, to negate jurisdiction the District must negate discrimination. The only evidence offered by the District to do so is that Garcia was replaced by an older worker. Evidence of an older replacement alone does not disprove discrimination as a matter of law. Garcia can still prove her case if discovery reveals other evidence of discrimination. Assume, for example, that a plaintiff establishes conclusively that the decision to fire her was motivated by age discrimination—a smoking-gun e-mail confirms that motivation unequivocally. It cannot logically follow that the employer's later decision to hire an older worker absolves it of its original sin. Recognizing this possibility, federal courts have refused to confine plaintiffs to the prima facie framework of proof. *See, e.g.*, *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 559 (10th Cir. 1996) (refusing to hold that the "*prima facie* case approach 'is the only way'" a plaintiff who is replaced by an older worker can establish his claim). Doing so denies the victim of invidious discrimination any hope that a court will set things right.

I do not understand why the Court is unpersuaded by the logic of this writing:

> There are numerous reasons why the replacement of Wright by an older individual does not rule out the possibility that Southland fired Wright because of his age. For instance, the replacement may simply have been an *ex post* attempt to avoid liability for age discrimination . . . . Alternatively, . . . the firing of Wright served to reduce Southland's total number of older store managers and thus could have been part of a systematic attempt by Southland to reduce its number of older store managers. Another theory would be that Southland has higher standards for older store managers than for younger ones; Wright's replacement happened to be one of the few individuals who could attain the higher standards. These are only a few of the possibilities; the point is that the fact that Wright was replaced by an older individual does not necessarily lead to the conclusion that Wright was not a victim of age discrimination.

Wright v. Southland Corp., 187 F.3d 1287, 1305 n.23 (11th Cir. 1999); *see also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979) ("Replacement by someone older would suggest no age discrimination but would not disprove it conclusively. The older replacement could have been hired, for example, to ward off a threatened discrimination suit.").

Thus, in federal court, this case would survive a motion to dismiss and, if discovery revealed other evidence of discrimination, summary judgment. The Court seems to agree on that. *See* ___ S.W.3d at ___ (recognizing "the possibility, however rare, that a plaintiff who is replaced by an older worker can still prove age discrimination via direct evidence"). So why must Garcia's claim be dismissed? Why does the trial court have no power to consider direct evidence of discrimination? Only because she did not prove a prima facie case. That is wrong. *See State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009) (explaining that plaintiffs are not required to "prove [a] claim in order to satisfy the jurisdictional hurdle" and that "the burden of proof with respect to . . . jurisdictional facts 'does not involve a significant inquiry into the substance of the claims'" (citation omitted)). The Court is today establishing a new and oppressive burden in the employment setting: a litigant must prove

her case to establish jurisdiction. *See Miranda*, 133 S.W.3d at 228 ("By requiring the state to meet the summary judgment standard of proof in cases like this one, we protect the plaintiffs from having to 'put on their case simply to establish jurisdiction.'" (citation omitted)); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("[T]he proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction. Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion.").

The consequence of this approach cannot be overstated. Government employees must now present direct evidence of discrimination "on painfully short notice and before evidence has been developed," *Miranda*, 133 S.W.3d at 235 (Jefferson, J., dissenting), if they are replaced by someone of the same protected class. "There will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), but that is the type of evidence that will be required for some plaintiffs to demonstrate a court's jurisdiction. The Court reaches this result based on a single affidavit that speaks to nothing more than the availability of a presumption. A factual question this "sensitive and difficult," *id.*, should not be decided this early in a case on such scant evidence.

The Court has given governmental entities a winning blueprint: First, hire a worker of the same protected class. Second, when litigation ensues, tell the court that, because a prima facie case is hopeless, it has no power to proceed. But the TCHRA is meant to eliminate unlawful discrimination. Unnecessary procedural hurdles thwart that purpose.

II. Garcia has adequately alleged a violation of the TCHRA.

Because Garcia is not yet required to present evidence, the only other possible basis for dismissal is if Garcia's pleadings affirmatively negate jurisdiction. For example, in *Lueck*, we held that to affirmatively demonstrate the court's jurisdiction, Lueck had to allege a violation of the Whistleblower Act, which required that he make "a good-faith report of a violation of law to an appropriate law enforcement authority." *Lueck*, 290 S.W.3d at 878. Lueck's pleadings, however, affirmatively negated jurisdiction because he alleged that he warned only of regulatory non-compliance to a supervisor who was not "an appropriate law enforcement authority." *Id.* at 885. Thus, because Lueck failed to allege a violation of the Whistleblower Act, he failed to invoke the court's jurisdiction. *Id.* at 886.

Here, Garcia alleges (1) that she worked for the District for twenty-seven years, (2) that she was wrongfully discharged for discriminatory reasons, (3) that she was discriminated against because of her age, (4) that these actions were in violation of the TCHRA, and (5) that there was no legitimate business justification for her termination because she had always performed satisfactory work. By alleging that she was discharged because of her age, Garcia has adequately alleged a violation of the TCHRA and affirmatively invoked the trial court's jurisdiction. *See* TEX. LAB. CODE § 21.051 ("An employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer . . . discharges an individual . . . ."). Additionally, these allegations satisfy our notice pleading standard because the District can ascertain "the nature, basic issues, and the type of evidence that might be relevant to the controversy." *Low v. Henry*, 221 S.W.3d 609, 612 (Tex. 2007); *cf. Swierkiewicz*, 534 U.S. at 514 (holding that the plaintiff's pleadings gave the defendant fair notice of the plaintiff's claims and the grounds upon which they rested because the plaintiff (1) alleged that he had been terminated on account of his

national origin and age, (2) detailed the events leading to his termination, (3) provided relevant dates, and (4) included the ages and nationalities of at least some of the relevant persons involved with his termination). No additional specificity is required.

III. The District's remaining arguments

The District presents two alternative arguments: First, that the TCHRA does not waive immunity for school districts, and, second, that Garcia's failure to comply with the filing and notice requirements of the TCHRA deprived the court of jurisdiction. As the Court notes, however, we have already addressed the first and held that the TCHRA waives immunity. *See* ___ S.W.3d at ___ n.33 (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659–60 (Tex. 2008)). The second misinterprets the TCHRA's filing requirements.

Labor Code section 21.254 provides that "the complainant may bring a civil action against the respondent" within sixty days of receiving a right-to-sue letter. Garcia filed suit timely on July 2, 2004, fifty-seven days into the sixty-day time period. She completed service seventeen days later. Nonetheless, the District argues that Garcia did not comply with section 21.254 because that section requires both filing and service within the sixty-day time period. Thus, because such compliance is a statutory prerequisite to suit under Government Code section 311.034, which provides that statutory prerequisites to suit "are jurisdictional requirements in all suits against a governmental entity," Garcia has failed to establish jurisdiction. We need not consider, however, the jurisdictional consequences of noncompliance because Garcia has fulfilled her statutory responsibilities.

The statute requires only that suit be filed within sixty days. *See* TEX. LAB. CODE § 21.254 ("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."). While generally, "a timely filed suit will not

interrupt the running of limitations unless the plaintiff exercises due diligence in the issuance and service of citation . . . [i]f service is diligently effected after limitations has expired, the date of service will relate back to the date of filing." *Proulx v. Wells*, 235 S.W.3d 213, 215 (Tex. 2007) (per curiam) (citations omitted).

Even assuming our diligence rule applies to TCHRA claims, the District misreads the rule as requiring both filing and service within the limitations period. All that is required is a timely suit and diligent service. Both were achieved here.

IV. Conclusion

Garcia's allegations affirmatively demonstrate the trial court's jurisdiction, and the District has not met its burden to require Garcia to raise a fact issue regarding its jurisdictional challenge. As a result, the trial court has jurisdiction over Garcia's claim, and she is entitled to proceed with discovery. Because the Court holds otherwise, I respectfully dissent.

____
Wallace B. Jefferson
Chief Justice

OPINION DELIVERED: June 29, 2012