TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00588-CV

Texas Alcoholic Beverage Commission, Appellant

v.

Salvador Moralez, Jr., Appellee

FROM THE 53RD DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-14-004320, THE HONORABLE DON R. BURGESS, JUDGE PRESIDING

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

Salvador Moralez, Jr. sued the Texas Alcoholic Beverage Commission (TABC), his former employer, pursuant to the Texas Commission on Human Rights Act (TCHRA),[1] alleging age discrimination and retaliation. *See* Tex. Lab. Code §§ 21.051, .055. In this interlocutory appeal, TABC appeals from the trial court's order denying its second plea to the jurisdiction. Because we conclude that the jurisdictional evidence creates fact issues to support the trial court's jurisdiction over Moralez's claims of discrimination and retaliation, we affirm the trial court's order.

[1] In 2004, the Texas Commission on Human Rights was replaced with the Texas Workforce Commission civil rights division. *See* Tex. Lab. Code § 21.0015. Consistent with other courts, we refer to chapter 21 as the Texas Commission on Human Rights Act or TCHRA. *See Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 502 n.1 (Tex. 2012).

BACKGROUND[2]

TABC employed Moralez as a peace officer in 1985 until it terminated his employment November 14, 2016, by which time Moralez had obtained lieutenant rank and supervised TABC's El Paso office. During his 31-year TABC career, Moralez was nominated to be supervisor of the year in 2010; was awarded this honor in 2011; was "[h]eld in high regards, especially in the area of arrest and control tactics"; and was an "excellent employee" and "trainer." Moralez was a member of the field training unit and, in 2013, "had been training [at] the TABC for the last fifteen years." He was TABC's "subject matter expert for witness testimony, undercover work, arrest control tactics" and cowrote the arrest and control tactics procedures that TABC utilized. Employees that he supervised considered his work to be "[t]op notch" and him "to be an honorable and trustworthy person" and a "good supervisor" who was "loyal" to TABC.[3]

Relevant to Moralez's initial charge of discrimination, Moralez and others in the El Paso office in 2012 addressed the Legislative Budget Board (LBB) about their efforts in El Paso "to address organized crime, drug trafficking, and crimes along the border." Following this presentation, the LBB increased TABC's budget to create a new unit, the Special Investigations Unit (SIU), to implement TABC's plan to address organized crime statewide. Around this time, TABC's Chief of the Enforcement Division, Robert Saenz, said that he had a "problem" with Moralez's "tenure," "which is relating to the age and time that [he] had with the

[2] The facts are taken from the jurisdictional evidence that the parties presented concerning TABC's second plea to the jurisdiction.

[3] For example, Scott Worley, who works as an enforcement agent in TABC's El Paso office, testified in his deposition that Moralez was "professional," had earned Worley's respect, and was "held in high regards, especially in the area of arrest and control tactics."

agency," because Moralez "could walk off anytime [he] wanted to because of [his] time and [his] tenure with the agency."[4]

Moralez, who was 55 years old, applied for the newly created position of captain of the SIU. Although Moralez was interviewed, TABC selected Ron Swenson for the position in May 2013. Swenson was 38 years old and had worked for TABC for eight years as an agent without supervisory authority. There was evidence that Swenson did not qualify based on the position's initial posting and that the position was reposted so that he would qualify. In his deposition, TABC's Assistant Chief of Field Operations Dexter Jones, who was on the three-person interview panel and the hiring manager of the posted position, denied that the position was reposted or the qualifications changed. But Jones's assistant at that time, Lieutenant Darryl Darnell testified in his deposition that the position was reposted and that it was "common operating procedure over there" to "either repost because the candidate that they wanted didn't qualify or they make their selection before they have the interviews." According to Darnell, after the panel interviewed Moralez but before a candidate was selected, Jones told Darnell that he "wasn't going to select Sal Moralez because he wanted somebody that was, quote, 'going to be around a while.'" Darnell further testified that Moralez "was passed up for [the] position because of his age" and that Jones "wanted somebody that was younger and had less time at the Agency."

In his May 2016 deposition, Moralez similarly testified about a phone call from Jones in which Jones told him that he was not selected for the captain position because "they

[4] In its briefing, TABC explains that, prior to the captain position opening, Moralez had notified TABC by letter of his intention to retire but that he rescinded this letter after being contacted by the upper chain of command requesting that he stay onboard to help move the agency forward.

wanted somebody that was going to be around to see it through." Right after the call ended, Moralez relayed what Jones told him to several TABC employees. Based on what Jones said, they believed that Moralez's age was the reason behind Jones's decision. Many of these employees wrote statements to that effect. Later, Jones asked Moralez to "use [his] experience" "to help train" Swenson for the captain position.

On June 17, 2013, Moralez filed with the Equal Employment Opportunity Commission (EEOC) a charge of age discrimination concerning the SIU captain position. On November 5, 2013, he filed with the EEOC a second charge of discrimination alleging "continuing" retaliation for filing his charge of discrimination by denying him "travel, training and conducting training." After he filed his charge of discrimination, TABC did not allow Moralez to travel to train or be trained as he had done for the preceding 12 years, except one 8-hour block in January 2014, and Darnell observed Jones, Saenz, and others in the chain of command express negative attitudes toward Moralez. According to Darnell, Moralez became the "black sheep" and "fell from grace" because he filed a claim of discrimination and lawsuit.[5]

In February 2014, Moralez received a negative employment evaluation, although it eventually was amended to show that his job performance met expectations, and, in May 2014, he received a performance improvement plan, although it also was rescinded and not implemented against him. Around May 2014, Saenz sent Darnell, whose job duties included inspecting offices for their compliance with TABC policies and procedures, to El Paso to inspect the office. Darnell reported that he did not find any wrongdoing in the El Paso office; that

[5] When asked about his perception of Jones's negative attitude toward Moralez after Moralez filed his charge of age discrimination, Darnell testified: "The whole demeanor kind of changed and [Moralez] wasn't allowed to come to Headquarters and teach anymore or he wasn't allowed to teach the undercover school that he had taught, that he had wrote. He wasn't allowed to teach the defensive tactics book that he helped author."

Moralez's supervisor at the time, Major Richard Jauregui, "was not telling [Moralez] how Austin wanted things done"; and that it appeared that Jauregui was "intentionally" trying to set Moralez up for failure by instructing him "to do almost 180-degree opposite of what Headquarters was having the other majors do." Shortly after he reported that his inspection did not find wrongdoing in the El Paso office, Darnell's inspector position was eliminated, and he was transferred to a different division. Darnell testified that TABC's Executive Director Sherry Cook made the decision to change his job duties because "[s]he didn't like what [he] reported from El Paso."[6]

Moralez similarly testified in his May 2019 deposition that he was "under fire" because of his discrimination charges against TABC, "knew [he] was being targeted," and needed to file a lawsuit to protect himself. Moralez filed suit against TABC in July 2014 alleging age discrimination and retaliation. The suit remained pending, and on August 11, 2016, Moralez filed a third charge of discrimination with the EEOC based on retaliation. In this charge, Moralez alleged that TABC retaliated against him after November 2015, including suspending him August 5, 2016, based on his filing of charges with the EEOC and his complaints, "most recently on August 3, 2016, about violations as well as being subjected to a hostile work environment by [his] supervisor, Major Mark Menn." Menn, who was in the North Texas TABC office, became Moralez's supervisor shortly after Moralez filed suit against TABC in July 2014, and evidence showed that Menn excluded Moralez from regional meetings, failed to provide him with necessary information to perform his job duties, and gave him directives that

[6] Darnell testified that he "was transferred to the Training Division in retaliation for reporting what they were doing to Sal Moralez" and that, when he e-mailed Earl Pearson, who was the assistant chief of enforcement, about his report, Pearson was "not happy" and told him to "stay out of it, that he was going to take care of it."

were "illegal, immoral, unethical," and violative of TABC policy, negatively impacting Moralez's and the El Paso office's work environment.[7] Moralez orally complained about Menn's actions to Earl Pearson, who was assistant chief of enforcement, on August 3, 2016, and before that, and on August 5, 2016, Pearson informed Moralez that he was being suspended for "insubordination" and provided him with an inter-office communication about the suspension and a pending internal investigation. The investigation concerned an internal meeting at the El Paso office on November 18, 2015.

In March 2017, Moralez filed his fourth charge of discrimination alleging age discrimination and continuing retaliation, "including discharging [him] from employment on January 12, 2017, for engaging in protected activity." On November 14, 2016, Pearson had notified Moralez by inter-office communication that he was terminated based on allegations concerning the November 2015 internal meeting. Pearson sustained the allegations that during the meeting, Moralez "was insubordinate in his comments directed at and regarding Major Menn's Region 1 Standard Operation Procedures directive," "failed to provide supervisory leadership when he witnessed and allowed insubordinate conduct by enforcement agents under his control," and "failed to address comments made by agents regarding acts that violate TABC policy." Moralez internally appealed his termination, but Cook upheld the decision in January 2017.

Moralez's allegations in his fourth charge of discrimination recount his prior charges of discrimination and provide additional factual allegations, including:

[7] In his May 2019 deposition, Moralez testified that he believed that Menn "was singling [him] out"; that the directives that Menn was giving him were "setting [him] up to fail"; and that "by attacking" the El Paso office and its performance, it "was all a pretext effort to—to get rid of [Moralez]." Moralez believed it "was a conspiracy to run [him] off."

> Since November 18, 2015, including on November 24, 2015, I opposed discrimination against others and myself in the workplace and the hostile work environment we suffered. On August 3, 2016, I reported to Assistant Chief Earl Pearson that my Supervisor, Mark Menn was creating further retaliation and hostile work environment because of an ongoing litigation matter and/or current lawsuit against the agency. . . . As a result of the filings of the charges and lawsuit and my opposing discrimination and retaliation, I was further subjected to a hostile work environment, threatened, ridiculed, humiliated, suspended on August 5, 2016, unfairly scrutinized and disciplined untruthfully, investigated, and then discharged on January 12, 2017. Before I complained and opposed discrimination and retaliation, I was not negatively disciplined.

Sergeant David Ianni, who also was terminated around the same time as Moralez, led the November 2015 internal meeting. The employees during the meeting used profanity and complained about directives from Menn. Moralez, who was present for part of the meeting, referred to Menn using the Spanish phrase "este cabrón." Several TABC agents testified that the type of language that was used during the meeting, which they referred to as "cop talk," was commonly used internally at TABC, and that other employees, including lieutenants, continued to use this type of language without being disciplined. Robert Wiest, who was an agent in the El Paso office at the time, surreptitiously had recorded the meeting and turned over the recording to TABC around April 2016 when TABC terminated Wiest's employment. Wiest was later rehired and promoted to sergeant rank.

Moralez filed an amended petition in July 2017 that added allegations of retaliation against him based on TABC subjecting him to a hostile work environment, suspending him, and then terminating his employment. Pursuant to a February 2019 scheduling order, the case was set for trial on September 9, 2019.

TABC filed its second plea to the jurisdiction on August 2, 2019, asserting that Moralez's claims should be dismissed based on sovereign immunity.[8] TABC denied that Moralez's age was a factor in its 2013 decision to promote Swenson, and not Moralez, to the captain position. TABC contended that Moralez was not chosen because he performed poorly during his interview. TABC also denied that it had retaliated against him or subjected him to a hostile work environment and contended that TABC's decision to limit his travel and training opportunities was for budgetary reasons and that its termination of his employment was justified because he violated agency policy during the November 2015 meeting.

TABC attached 58 exhibits to its plea that included: (i) Moralez's charges of discrimination that he filed with the EEOC, (ii) TABC's responsive position statement that it filed with the EEOC, (iii) Pearson's November 2016 inter-office communication to Moralez informing him that his employment was terminated, (iv) affidavits from TABC employees, (v) transcripts of Moralez's depositions May 11, 2016, and May 30, 2019, (vi) an audio recording of the November 2015 meeting, (vii) a chart identifying the speakers at the meeting by line item, (viii) transcripts of internal investigatory interviews of Moralez August 5 and 16, 2016, and (ix) an expert report. The expert opined that TABC was justified in terminating Moralez's employment. TABC employees who provided affidavits were Jones; Saenz; Pearson; Jo Ann Joseph, who was on the interview panel in 2013 for the captain position; and Albert Rodriguez, who was the director of training. In his affidavit, Jones denied that he considered age as a factor in scoring the candidates for the captain position and averred that what

[8] TABC filed a plea to the jurisdiction in May 2015 regarding punitive damages. *See* Tex. Lab. Code § 21.2585(b) (allowing recovery of punitive damages against respondent, "other than respondent that is a governmental entity"). In response, Moralez amended his petition and removed his request for punitive damages.

he said to Moralez on the phone was that "the ideal candidate selected was someone that best articulated how to develop an operational plan for the unit that would ensure the unit to be immediately successful in the short term and establish the unit for the long haul and lay the foundation to enable the unit to be a viable component of TABC well after I and/or the incoming Captain was long gone from the Agency."

The audio recording of the November 2015 meeting is around 2 hours long and supports that Moralez was present only for parts of the meeting.[9] The attendees discussed the reason for the new directives concerning operating procedures for the El Paso office, office dynamics, and Menn's attempts to go around Moralez. Attendees used profanity and expressed concern and frustration about the new directives, Menn, and how their office was being treated. Ianni, who led the meeting, at one point explained that Menn is "setting up—he's setting the office up to fail" "[a]nd in doing that, he can say the leadership from [Moralez] on down has

[9] According to TABC's chart that identifies the speakers on the audio recording, the attendees were Moralez, Ianni, and agents Robert Wiest, Jazmin Martinez, Scott Worley, Oscar Menchaca, and Robert Chavez. Moralez is designated as the speaker around 75 of the 1161 line item entries.

Consistent with the audio recording, Moralez testified in his May 2019 deposition that he was present for "[v]ery small parts" of the meeting:

> Because a lot of that meeting, after I had reviewed the tape, and it came to light to me that I wasn't in the meeting a lot of the times when these comments were being made. I was helping the front office, and I was preparing a response, I believe, to Chief Pearson, I believe, because that's what—you can hear me in the background, that I'm clearly not in the meeting. I'm talking to the girls up front.
>
> So I'm coming in and out. This meeting was held by Sergeant Ianni, and I would come in to monitor, bits and pieces, and then I had other things to do.

Moralez testified that the El Paso office has meetings every week so it was hard for him to recall this November 2015 meeting when he first was asked about it in August 2016.

failed to get this office up to par." Moralez also stated that management was "threatening to fire [him] anyway" and "going to say bad things about [him]" and asked the attendees to "hold tight and—you guys stay—get together because [Moralez thought] this wedge thing is—is part of the attack." At the end of the recording, it appears that Wiest was talking with another person after the meeting has ended. The other person asked him what was Moralez's "big thing, that he's going to get fired?" Wiest responded, "Yeah, they'll try to fire [Moralez], force him out."

In his response to TABC's second plea to the jurisdiction, Moralez argued that the "evidence easily raises fact issues as to whether Moralez was a victim of discrimination and retaliation." Concerning TABC's decision to select Swenson, Moralez cited the decisionmaker Jones's statements that they wanted someone who was "going to be around," and Swenson's age, experience, and qualifications for the position as compared with Moralez's. Swenson was 38 years old or 17 years younger than Moralez, two rankings below Moralez's, and a "rookie" without supervisory experience. Concerning TABC's alleged course of retaliatory conduct after he complained of discrimination, Moralez cited "false and unwarranted performance evaluations and improvement plans (which had to be withdrawn)," denied opportunities to participate in travel and training, ostracizing and excluding him from regional meetings, attempting to set him up for failure, and ultimately suspending and then terminating him "for blatantly pretextual reasons."

Moralez also presented evidence in response to the plea, including statements and deposition transcripts of current and former TABC employees. In addition to his own depositions with exhibits, Moralez attached the transcripts of the following depositions: (i) Jones; (ii) Darnell; (iii) Joseph; (iv) Jazmin Martinez; (v) Scott Worley; (vi) Oscar Menchaca, and (v) Robert Chavez. The statements were from the following TABC employees with the

statement's date: Wiest (not dated); Wesley Rappe (April 17, 2013); Martinez (October 16, 2013); Glenn-Anthony Canonizado (October 9, 2013); Chavez (August 28, 2016); and Menchaca (August 25, 2016).

According to their statements, Wiest, Rappe, Martinez, and Canonizado were with Moralez in the break room at the El Paso office when he received the phone call from Jones. Moralez took the phone call in his office and then returned to the break room and relayed what Jones told him about why he was not selected for the captain position. In his statement, Rappe quoted Jones's stated reason that "the agency not only 'needs someone that was not only going to be here to get the program started, but someone who would be around long enough to see it (the program) through.'" Rappe "immediately informed Lt. Moralez that he can't be denied a promotion due to his age" because "[t]hat was the only thought that crossed [his] mind. The implication is that he (Sal Moralez) doesn't have time remaining with the agency, and a position of this importance deserves a captain who can't retire any time in the near future, or has less potential of 'keeling over dead' within the next few years." Rappe also described Moralez and the El Paso office's involvement in SIU's creation and the selection of Swenson, who "came nowhere close to Lt. Moralez in terms of experience and tenure."

The statements from Wiest, Martinez, and Canonizado consistently recounted Moralez's receiving the phone call and Jones's stated reason for Moralez's non-selection. Wiest stated that he was in the El Paso office with Moralez, Rappe, Martinez, and Canonizado when Jones called, that Moralez went into his office to receive the call, and a short time later, Moralez "walked out with a shocked expression," announced that Swenson had been selected, and further stated that Jones "needed someone that would be here long enough to see the SIU program through." Wiest "immediately believed that Lt. Moralez was not selected because of his age."

Wiest also stated that he was surprised that an agent "with less time and less experience" than Moralez had been selected. Canonizado quoted Jones's stated reasons to be that "they needed someone that was not only going to start the SIU program but to also be around long enough to see the program through." Martinez similarly quoted Jones's stated reason and then stated that Jones's "statement as such to say or insinuate 'that [Moralez] would not be around to see the program thru' gave [Martinez] the impression that it was due to [their] lieutenant's age . . . [and] not based on qualifications."

In his August 2016 written statement and consistent with his deposition testimony, Menchaca explained that the El Paso office, which had been an "exemplary" office, seemed to change when it "came under the command of Major Mark Menn." According to Menchaca, "[s]ince then, the office has gravitated towards an 'unhealthy work environment,'" the "[a]gents' wellbeing and morale has suffered," and Moralez "appears to be repressed and stressed out." Menchaca attributed the changes to Menn's lack of communication and direction, provided specific examples and then stated his "strong belief that the foregoing is in 'retaliation' for Lt. Moralez's pending litigation against the agency" and that Menn's "'actions or lack of actions' are a deliberate attempt to set up the El Paso District Office for 'failure.'" Consistent with his deposition testimony, Chavez's August 2016 statement also addressed and specifically identified TABC's "questionable actions" against Moralez over "the past two years" "which [led] him to believe [TABC] may be forcing [Moralez] to resign or retire from [TABC]" and which had "created an unhealthy and stressful environment which has transcended into the El Paso Area office."

On August 26, 2019, the trial court heard TABC's second plea to the jurisdiction, and the trial court signed an order denying the plea the following day. TABC's interlocutory appeal followed.

ANALYSIS

In its sole issue on appeal, TABC argues that the trial court erred in denying its second plea to the jurisdiction on Moralez's discrimination and retaliation claims.

Standard of Review and Applicable Law

As a state agency, TABC is immune from suit unless the legislature has waived immunity. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). "The TCHRA waives immunity, but only when the plaintiff states a claim for conduct that actually violates the statute." *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018) (citing *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012)); *see Garcia*, 372 S.W.3d at 636 ("[T]he Legislature has waived immunity only for those suits where the plaintiff actually alleges a violation of the TCHRA by pleading facts that state a claim thereunder."); *see also* Tex. Lab. Code §§ 21.002(8) (defining "employer" to include state agency), .254 (authorizing complainant to bring civil action against respondent).

The TCHRA provides that an employee establishes an "unlawful employment practice" when the employee "demonstrates that race, color, sex, national origin, religion, age, or disability was a motivating factor for an employment practice, even if other factors also motivated the practice." Tex. Lab. Code § 21.125(a); *see AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008) (explaining that employee bears burden of proving that discrimination was motivating factor for challenged employment practice). Relevant here, it is an "unlawful

employment practice" if, because an individual is forty years old or older, an 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." Tex. Lab. Code § 21.051(1); *see id.* § 21.101 (stating that age discrimination provisions are available to individuals who are forty years of age or older). An employer also commits an "unlawful employment practice" if the employer "retaliates or discriminates against a person" for opposing a discriminatory practice, making or filing a charge, or filing a complaint under the TCHRA. *Id.* § 21.055(1)–(3).

"Discrimination and retaliation cases under the TCHRA can be established with either direct or circumstantial evidence." *Hartranft v. University of Tex. Health Sci. Ctr.-Hous.*, No. 01-16-01014-CV, 2018 Tex. App. LEXIS 4679, at *30 (Tex. App.—Houston [1st Dist.] June 26, 2018, no pet.) (mem. op.) (citing *Clark*, 544 S.W.3d at 781–82); *see Clark*, 544 S.W.3d at 781–82 (explaining that "[i]n discriminatory and retaliation cases under the TCHRA, Texas jurisprudence parallels federal cases construing and applying equivalent federal statutes, like Title VII" and that courts "follow the well-settled proof principle that statutory violations can be established with either direct or circumstantial evidence"); *see also Garcia*, 372 S.W.3d at 634 (noting that court had "consistently held that those analogous federal statutes and the cases interpreting them guide [court's] reading of the TCHRA").

"Direct evidence of discrimination is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." *McNeel v. Citation Oil & Gas Corp.*, 526 S.W.3d 750, 756 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citations omitted); *see Garcia*, 372 S.W.3d at 634 (explaining method of proving discriminatory intent "via direct evidence of what the defendant did and said"). Because "motives are often more covert than

overt," *Garcia*, 372 S.W.3d at 634, the United States Supreme Court also created the "three-part *McDonnell Douglas* burden-shifting framework" that enables an employee to prove discrimination with circumstantial evidence. *Clark*, 544 S.W.3d at 782 (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253–54 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973)). Under this framework, a rebuttable presumption of discrimination arises when the employee establishes a prima facie case of discrimination; the presumption disappears if the employer produces "evidence of a legitimate, nondiscriminatory reason for the disputed employment action"; and the employee must then establish "that the employer's stated reason is false and a pretext for discrimination." *Id.*; *see Texas Dep't of Transp. v. Lara*, ___ S.W.3d ___, ___, No. 19-0658, 2021 Tex. LEXIS 629, at *22 (Tex. June 25, 2021) (explaining that when presumption is rebutted, there is no presumption and thus no evidence of illegal intent). To show that an employer's stated reason is false and a pretext, an employee may prevail by showing that the employer's "reason, while true, is only one reason, and discrimination was another, 'motivating,' factor." *Navy v. College of the Mainland*, 407 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

The burden-shifting framework that applies to discrimination claims also applies to retaliation claims. S*ee Clark*, 544 S.W.3d at 782 (explaining that "three burden-shifting steps apply to retaliation claims"); *Niu v. Revcor Molded Prods. Co.*, 206 S.W.3d 723, 731 (Tex. App.—Fort Worth 2006, no pet.) (explaining that "burden-shifting analysis, similar to the wrongful-discharge burden-shifting analysis, applies to retaliation claims"). To establish a prima facie case of retaliation, a plaintiff must show that: (1) he engaged in protected activity, (2) he "experienced a material adverse employment action," and (3) a causal link existed

between the protected activity and the adverse action. *Clark*, 544 S.W.3d at 782; *see also Lara*, 2021 Tex. LEXIS 629, at *22.

The causal link element of a retaliation claim requires the plaintiff to show that, in the absence of his protected activity, the employer's prohibited conduct would not have occurred when it did. *See Chandler v. CSC Applied Techs, LLC*, 376 S.W.3d 802, 823 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (concluding that "plaintiff must establish a 'but for' causal nexus between the protected activity and the prohibited conduct"); *Herbert v. City of Forest Hill*, 189 S.W.3d 369, 377 (Tex. App.—Fort Worth 2006, no pet.) (same); *see also Clark*, 544 S.W.3d at 783 (assuming without deciding that "but for" causation standard applies to retaliation claim). "In evaluating but-for causation evidence in retaliation cases," courts 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." *Clark*, 544 S.W.3d at 790 (citing *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 69 (Tex. 2000)).

Under the burden-shifting framework for retaliation cases, the causation standard for the prima-facie-case element "is not onerous and can be satisfied merely by proving close timing between the protected activity and the adverse action." *Clark*, 544 S.W.3d at 782. "Once the plaintiff makes a prima facie case, 'the burden then shifts to the defendant to demonstrate a legitimate nondiscriminatory purpose for the employment action.'" *Pineda v. United Parcel Servs., Inc.*, 360 F.3d 483, 487 (5th Cir. 2004) (quoting *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002)). "If the defendant meets this burden, then 'the plaintiff must prove that the

employer's stated reason for the adverse action was merely a pretext for the real, discriminatory purpose.'" *Id*.

TABC has asserted immunity from Moralez's suit through a plea to the jurisdiction. *Clark*, 544 S.W.3d at 770 (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000)). When a plea to the jurisdiction challenges the existence of jurisdictional facts, as is the case here, "we must move beyond the pleadings and consider evidence when necessary to resolve the jurisdictional issues, even if the evidence implicates both subject-matter-jurisdiction and the merits of a claim." *Id.* at 770–71 (citing *Garcia*, 372 S.W.3d at 635; *Bland*, 34 S.W.3d at 555); *see Lara*, 2021 Tex. LEXIS 629, at *10. In this situation, "the standard of review mirrors that of a traditional summary judgment." *Clark*, 544 S.W.3d at 771 (citing *Miranda*, 133 S.W.3d at 225–26); *see* Tex. R. Civ. P. 166a(c). "[I]f the plaintiffs' factual allegations are challenged with supporting evidence necessary to consideration of the plea to the jurisdiction, to avoid dismissal plaintiffs must raise at least a genuine issue of material fact to overcome the challenge to the trial court's subject matter jurisdiction." *Miranda*, 133 S.W.3d at 221. When determining whether a material fact issue exists, we take evidence favorable to the plaintiff as true and indulge every reasonable inference and resolve any doubts in the plaintiff's favor. *Clark*, 544 S.W.3d at 771 (citing *Miranda*, 133 S.W.3d at 228); *see Lara*, 2021 Tex. LEXIS 629, at *11.

Informed by these principles and standards, we turn to TABC's jurisdictional challenge to Moralez's claims of age discrimination and retaliation.

Age Discrimination

TABC does not challenge Moralez's prima facie case of age discrimination. *See* Tex. Lab. Code §§ 21.051(1), .101; *Garcia*, 372 S.W.3d at 638 (discussing elements of prima facie case of discrimination); *see also Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001) (listing elements of claim of discrimination based on failure to promote). The jurisdictional evidence established that Moralez was within a protected class based on his age and qualified for the position of captain but that TABC selected Swenson, who was outside the protected class, for the position. *See Blow*, 236 F.3d at 296.

TABC's challenge to the trial court's jurisdiction over Moralez's claim of age discrimination is based on the second and third parts of the *McDonnell Douglas* framework. TABC argues that it "established a legitimate, non-discriminatory reason for the non-selection"—"a more qualified candidate"—and that Moralez did not "establish pretext or motive for discrimination." *See Clark*, 544 S.W.3d at 782. TABC argues that Moralez's only evidence is his "subjective belief of discrimination" and that he "blatantly mischaracterizes the phone conversation with the hiring manager Dexter Jones after Moralez's poor job interview performance, which he improperly interpreted as age-based comments." As support, TABC cites its own evidence concerning the interview process and Swenson's selection based on his "superior job interview," including the "records of the job description, panel questions, the master score sheet, interviewee score sheets, comments/observations from the panelists and affidavits." *See Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 142 (2000) (explaining that employer's burden to establish "legitimate, nondiscriminatory reason" is "one of production, not persuasion"). TABC's evidence included affidavits from the members of the

interview panel—Joseph, Saenz, and Jones; a copy of the questions that the panel asked each candidate; and other evidence to support that the panel scored Swenson higher than Moralez.

In his affidavit, Jones denied that in the interview he considered age as a factor in his "scores for any of the candidates." He denied that he told Moralez that "he did not get the job because he would not be around to see it through," explained why Swenson's interview performance was superior to Moralez's, and then recited what he told Moralez in their phone conversation as to why he did not select Moralez. Jones averred that he told Moralez that "the ideal candidate had a vision to build the proper framework to ensure that the unit was developed for the long haul with an end goal to make the unit a viable permanent part of TABC when [he] and the successful candidate were long gone from the Agency." In his deposition, Jones further explained that what he meant by "long haul" in his conversation with Moralez was that he did not want "a fly-by-night kind of operation" and that they "wanted someone to come in to help build that foundation to ensure that the unit was here for the long haul."

At this stage of the parties' dispute, however, we must take evidence that is favorable to Moralez as true and indulge every reasonable inference and resolve any doubts in his favor. *See Clark*, 544 S.W.3d at 771; *Miranda*, 133 S.W.3d at 228. Under this standard of review, we must credit Darnell's testimony that Jones told him shortly after the interviews but before a decision was made that he "wasn't going to select Sal Moralez because he wanted somebody that was, quote, 'going to be around a while'" and the similar testimony from Moralez and others about Jones's stated reason during his phone conversation with Moralez. This evidence is direct evidence of discriminatory animus—that Jones decided not to select Moralez for the captain position because of Moralez's age. *See Garcia*, 372 S.W.3d at 634 (explaining method of proving discriminatory intent "via direct evidence of what the defendant did and

said"); *McNeel*, 526 S.W.3d at 756 (describing direct evidence of discrimination). Thus, there is direct evidence to overcome TABC's challenge to the trial court's subject matter jurisdiction over Moralez's claim of age discrimination. *See Clark*, 544 S.W.3d at 781–82 (explaining that "statutory violations can be established with either direct or circumstantial evidence").

Further, even if we consider Moralez's evidence of Jones's stated reason for not selecting Moralez to be circumstantial and apply the *McDonnell Douglas* framework, we reach the same conclusion that a fact issue was raised. *See id*. at 782. Evidence supporting that Jones's stated reason was false and a pretext for discrimination includes: (i) the testimony of Moralez and Darnell about Jones's statements to Moralez as to why Moralez was not chosen; (ii) the testimony of Worley and others as well as documentary evidence that showed that Moralez was significantly more experienced and qualified than Swenson and "held in high regards" by TABC; (iii) the testimony and other evidence that Moralez was instrumental in SIU's creation and asked to "use [his] experience" "to help train" Swenson for the captain position; and (iv) Darnell's testimony that the position of sergeant was reposted after Swenson did not qualify and that it was "common operating procedure over there" to "either repost because the candidate that they wanted didn't qualify or they make their selection before they have the interviews."

Other gaps in the evidence raise fact issues concerning Jones, Saenz, and Joseph's statements in their affidavits about Moralez's performance during his interview and TABC's position that the reason for its decision was "a more qualified candidate." The score sheets that are in the record show only numbers next to each question without explanation. In her deposition, Joseph was unable to answer questions about what the interview questions meant, and she did not know Moralez's training or experience. Jones testified that all he knew about

Moralez "[i]n a nutshell" was that Moralez was a certified peace officer and trained in martial arts. Moralez also testified that the interview panel "seemed indifferent to anything [he] told them" based on "their mannerisms," including that they did not make eye contact with him, Saenz—the chief of the enforcement division—was rolling his eyes and "looked like he was falling asleep," and the only panel member taking notes was Jones. Moralez further testified that a few months before the interviews, Saenz stated that he had a "problem" with Moralez's "tenure" because Moralez "could walk off anytime [he] wanted to because of [his] time and [his] tenure with the agency."

Applying the *McDonnell Douglas* framework, we conclude that the above evidence creates a fact question as to whether TABC's stated reason—"a more qualified candidate"—was "false and a pretext for discrimination." *See* Tex. Lab. Code § 21.125(a), *Clark*, 544 S.W.3d at 782; *see also Navy*, 407 S.W.3d at 899 (explaining that "plaintiff can avoid summary judgment if the evidence taken as a whole creates a fact issue as to whether the employer's stated reason was not what actually motivated the employer *and* creates a reasonable inference that discriminatory intent was a determinative factor in the adverse employment action"). On these bases, we conclude that the trial court did not err when it denied TABC's second plea to the jurisdiction as to Moralez's claim of age discrimination.

Retaliation

TABC argues that the trial court erred in denying its second plea to the jurisdiction as to Moralez's claim of retaliation because Moralez failed to establish a prima facie case. *See Clark*, 544 S.W.3d at 782 (stating elements of prima facie case of retaliation to be that employee engaged in protected activity, "experienced a material adverse employment action,"

and causal link). TABC does not challenge that Moralez engaged in protected activities but argues that he "was unable to show a causal link between any of his numerous EEOC charges of discrimination and any adverse employment activity." *See id.* Moralez's retaliation claim asserts that because he opposed and complained of discrimination and retaliation, TABC retaliated against him by removing his training duties, suspending and then terminating him, and subjecting him to a hostile work environment. *See* Tex. Lab. Code § 21.055(1), (2), (3) (stating that employer commits "unlawful employment practice" if employer "retaliates or discriminates against a person" for opposing discriminatory practice, making or filing charge, or filing complaint under TCHRA). We address TABC's challenges to these alleged "adverse employment" actions in turn.

Denial of Training and Travel

In his November 2013 discrimination charge, Moralez alleged "continuing" retaliation against him for filing his charge of discrimination by denying him "travel, training and conducting training." He alleged that he was not allowed to travel for training or to train as he had done for the preceding 12 years and that, as to a particular program, "14 other people were sent to Austin," that he was informed that he would "not be used at the next covert operations school (January, 2014 at Fort Hood)," and that the reason he was given was "problems with travel expenses for travel." In his pleadings, Moralez similarly alleged that TABC had "prevented [him] from adequately performing his job, including by denying him necessary additional training and travel and by taking away job duties." The evidence showed that in the preceding 15 years before Moralez filed his discrimination charges, he was considered TABC's "subject matter expert for witness testimony, undercover work, and arrest control

tactics" and a trainer in the field training unit,[10] and that, after he filed his charge of discrimination in June 2013, TABC removed his training duties, except for one 8-hour block.

TABC does not dispute that Moralez was the "subject matter expert" and a trainer before he filed his discrimination charge and that TABC no longer used him in that way after he filed his discrimination charge, except for the one 8-hour block. TABC argues that this claim fails because the evidence established that TABC made its decision "to limit or remove" Moralez from training activities on June 1, 2013, which was approximately two weeks before Moralez filed his discrimination claim. TABC cites the affidavit of Albert Rodriguez, Director of Training, as the evidence that established June 1, 2013, as the day that TABC made this decision. Rodriguez's affidavit, however, does not support TABC's contention. Rodriguez testified that he hired an agent who was going to be a training specialist and informed that agent on June 1, 2013, that he "was going to recommend to the Enforcement Division that Lieutenant Moralez was not needed for the Agent Trainee program." Crediting Rodriguez's testimony, Rodriguez had not decided to change Moralez's training duties as of June 1, 2013, but to recommend a change in his duties as to a particular program.

Rodriguez's affidavit also addresses decisions that Pearson made after June 1, 2013, to remove Moralez from training. Rodriguez testified that Moralez was one of the instructors for the undercover school, that he e-mailed a list of instructors in October 2013 to Pearson that included Moralez for the undercover school that was scheduled in December 2013, and, in

[10] In his May 2016 deposition, Moralez testified: "I've been totally—totally taken out of training in all of its forms. I am currently the use of force expert for the agency, and I help them with when—when there's an issue of use of force and I—since I co-authored the arrest and control tactics, I used to—for the last—up until before the lawsuit was filed or the complaint was filed, I had been training the—the TABC for the last 15 years." He also testified that TABC denied his request to train for the Texas Department of Public Safety which he had been allowed to do in the past and would have done on his own time.

response, Pearson asked him to remove Moralez from the list. Pearson's stated reason to Rodriguez for doing so was that Moralez "was not up to speed with his work" and Pearson wanted him to stay in El Paso to "do his work." Rodriguez also testified that he and Pearson met later in October 2013 about training that was scheduled in Austin in January 2014. Moralez was scheduled to attend and meet the instructor candidates during this training, but Pearson made the decision at that time that Moralez would only be used "on a limited basis" for this training and "would not need to come to Austin to meet the instructor candidates."

TABC also argues that the decision to "limit Moralez's training activity was not an adverse employment action that can support a retaliation claim because it was not materially adverse." *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006). A "materially adverse" employment action is one that "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)); *see Clark*, 544 S.W.3d at 788 (explaining that "objective materiality requirement is necessary 'to separate significant from trivial harms'" (quoting *White*, 548 U.S. at 68)). Viewing the evidence under the appropriate standard of review, however, we conclude that the evidence about TABC's decision to remove Moralez's training duties—that he had had for at least 12 years as the "subject matter expert"—after he filed his charge of discrimination creates a fact issue as to whether TABC's action of doing so "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *See White*, 548 U.S. at 68; *Clark*, 544 S.W.3d at 788.

TABC also argues that Moralez cannot establish a causal link between his charges of discrimination and its decision to "limit" his "training activities." But after he filed his charge of discrimination June 17, he no longer was allowed any training duties including training that

was scheduled in December, except one 8-hour block. *See Clark*, 544 S.W.3d at 780 (explaining that "[t]emporal proximity is relevant to causation when it is 'very close'"). TABC also provided differing reasons for its decision—budgetary constraints and Moralez's need to stay in El Paso because he "was not up to speed with his work"—and evidence showed that other employees were allowed to travel for the training. *See id.* (explaining that evidence that reasons for action are false is circumstantial evidence of causal link). And evidence showed a change in the chain of command's attitude toward Moralez from positive to negative after he filed his discrimination charge. *Id.* (explaining that expressions of negative attitude toward employee's protected activity is circumstantial evidence of causal link).

Viewing the evidence favorable to Moralez as true and indulging every reasonable inference and resolving any doubts in his favor, we conclude that it creates a fact issue as to whether TABC's denial of training and travel to train was in retaliation for Moralez's protected activities of opposing and filing a charge of discrimination. *See* Tex. Lab. Code § 21.055; *Clark*, 544 S.W.3d at 771; *Miranda*, 133 S.W.3d at 228.

Suspension and Termination

In his August 2016 and March 2017 discrimination charges, Moralez alleged that TABC retaliated against him for his protected activities by suspending and then terminating his employment. TABC does not dispute that Moralez's suspension August 5, 2016, and subsequent termination were adverse employment actions but argues that Moralez's first two charges, that were filed in 2013, were too remote in time to support these subsequent claims of retaliation and that there was no evidence that Moralez's oral complaint to Pearson August 3, 2016, "was causally connected" to his suspension or termination. TABC argues that the chain of command

"simply did not discover Moralez's misconduct in connection [with the November 2015 meeting] until August 5, 2016, and Moralez was immediately informed of the investigation and placed on suspension per TABC policy."

Although TABC argues that Moralez's chain of command only "discovered" Moralez's "misconduct" on August 4, 2016, the evidence showed that Wiest provided the audio recording to TABC several months earlier and was then rehired and promoted despite recording the meeting surreptitiously.[11] Further, Moralez's suit that was based in part on the 2013 discrimination charges remained pending at the time of his suspension and termination, and other evidence supported the "causal link" between his pending suit and his suspension and termination. *See Clark*, 544 S.W.3d at 780. In his 2016 statement and deposition testimony, Menchaca provided specific ongoing examples of the El Paso office being "singled out" after Moralez filed his claims of discrimination and testified that it was his "strong belief that the foregoing [was] in 'retaliation' for Lt. Moralez's pending litigation against the agency." Chavez's August 2016 statement and deposition testimony also identified TABC's "questionable actions" against Moralez over "the past two years" "which [led] him to believe [TABC] maybe forcing [Moralez] to resign or retire from [TABC]."

Worley similarly confirmed in his 2019 deposition that he observed a "negative attitude" from "headquarters personnel" toward Moralez "that was not called for, in light of his performance, in light of his leadership, and in light of his character." Worley testified that the

[11] Evidence supported that recording the meeting without the other attendees' knowledge was against TABC policy and illegal. In his deposition, Worley testified about Wiest's termination and then subsequent rehire after providing the meeting's audio recording to TABC. Worley did not believe that Wiest was disciplined for recording the meeting. Worley's impression was that he was rehired and promoted because he "gave TABC what they had been looking for for a very long time"—an avenue to get "rid" of Moralez.

"chain of command" was "digging" to find something against Moralez and that, when Moralez's name came up, he would see lieutenants and sergeants "kind of the roll of the eye or the kind of, you know, 'Whew, his time's due.'" Darnell consistently testified that TABC was trying to "find anything on [Moralez] to get rid of him" and that Moralez "had a target on his back the day he filed the EEOC complaint." Further, because Moralez directly reported his complaints to Pearson about Menn, Pearson was aware of these complaints when he advised Moralez of his suspension two days later.

Evidence also discredited TABC's stated reasons for suspending and terminating Moralez. In his inter-office communication to Moralez November 14, 2016, Pearson sustained the two allegations against Moralez concerning the November 2015 meeting: (1) "Moralez was insubordinate in his comments directed at and regarding Major Menn's Region 1 Standard Operation Procedures directives"; and (2) "Moralez failed to provide supervisory leadership when he witnessed and allowed insubordinate conduct by enforcement agents under his control" and "failed to address comments made by agents regarding acts that violate TABC policy." Evidence showed that Moralez was present only for a "small part" of the meeting in which Ianni described the new directives in detail, and agents who were present for the meeting testified that they did not believe that Moralez did anything inappropriate during the meeting.[12]

As to Moralez's use of the phrase "este cabrón" when referring to Menn in the meeting, several witnesses testified that the phrase's meaning is not derogatory and that it is

[12] For example, Chavez, who was at the meeting, answered "No" when asked if he had ever observed Moralez "be insubordinate to any members of management or headquarters" and that he did not believe Moralez did anything inappropriate during the meeting. Menchaca and Worley, who were also at the meeting, testified similarly.

commonly used in the El Paso area.[13] Further, TABC employees testified that all levels of TABC management commonly used this type of language—"cop talk"—with no consequences and that TABC had not disciplined any other employee for this type of language, including other lieutenants and the agents at the meeting with the exception of Ianni. *See Bell Helicopter Textron, Inc. v. Burnett*, 552 S.W.3d 901, 916–17 (Tex. App.—Fort Worth 2018, pet. denied) (citing testimony that younger employee who had similar deficiencies in work performance was not disciplined as support for trial court's rejection of employer's "proffered reasons" for terminating plaintiff's employment); *Kaplan v. City of Sugar Land*, 525 S.W.3d 297, 308 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (explaining that plaintiff may establish that employer's proffered reason for employment action is pretextual "by showing that the employer treated the plaintiff more harshly than other similarly situated employees for nearly identical conduct"); *see also Agoh v. Hyatt Corp.*, 992 F. Supp. 2d 722, 737 (S.D. Tex. 2014) (stating that

[13] Although TABC presented evidence that the phrase means "bastard," Moralez testified about his uses of the phrase during the meeting as follows:

> [M]y uses of the word was simply to describe that [Menn] is—he's a person that I would say is somebody that's very—very determined. This guy is just—he's very, in some ways, maybe stubborn, very committed. It's just my way of describing he's very set in his ways. And so we don't necessarily have to be friends, but if I say "este cabrón," I could be referring to—and that's what I meant—that he's just very set in his ways, and that's all I ever meant. I didn't mean it to be an insult.

Chavez similarly testified that the phrase had different meanings and could be used to refer to someone who is "stubborn or hardheaded," for example by parents referring to their children. Worley answered "No" when asked if people in El Paso consider the phrase to be a derogatory comment and testified that it was "a very common word" that TABC agents used. Menchaca testified that the use of the phrase was "[v]ery common" in law enforcement, at the TABC in El Paso, and in the "mostly Hispanic community." He also testified that he "couldn't even count the times" that he had heard the phrase used by TABC agents and that it was continuing to be used at TABC without anyone being fired for using it. According to evidence in the record, a literal translation of the phrase is "male goat."

one way to show that defendant's proffered ground for termination is not credible is through "a disparate treatment theory using comparators").

Viewing the evidence favorable to Moralez as true and indulging every reasonable inference and resolving any doubts in his favor, we conclude that the evidence creates a fact issue as to whether TABC suspended and then terminated Moralez in retaliation for his charges of discrimination and retaliation. *See* Tex. Lab. Code § 21.055; *Clark*, 544 S.W.3d at 771; *Miranda*, 133 S.W.3d at 228.

Hostile Work Environment

In his August 2016 charge of discrimination, Moralez alleged that, "[s]ince on or around November 2015, [he had] made several complaints, most recently on August 3, 2016, about violations as well as being subjected to a hostile work environment by [his] supervisor Major Mark Menn" and that "[his] complaints have been ignored." Similarly, in his March 2017 charge of discrimination, Moralez alleged that "TABC retaliated against [him] for complaining and opposing discrimination, including subjecting [him] to a hostile work environment that was severe and pervasive." He alleged:

> Since November 18, 2015, including on November 24, 2015, I opposed discrimination against others and myself in the workplace and the hostile work environment we suffered. On August 3, 2016, I reported to Assistant Chief Earl Pearson that my Supervisor, Mark Menn was creating further retaliation and hostile work environment because of an ongoing litigation matter and/or current lawsuit against the agency.

He further alleged that he attempted to report Menn's conduct to the investigators of the pending claim against him but that they would not accept the complaint in violation of TABC's policy.

TABC argues that there was "simply no evidence to show that [Moralez] was subjected to unwelcome harassment, that any harassment was because of his age or any other protected characteristic, that it affected a term, condition, or privilege of his TABC employment, or that TABC knew or should have known of the harassment but failed to take prompt remedial action" and that "no evidence exists to meet the 'sufficiently severe or pervasive' standard." *See Bartosh v. Sam Houston State Univ.*, 259 S.W.3d 317, 324 (Tex. App.—Texarkana 2008, pet. denied) (explaining that "hostile-work-environment claim entails ongoing harassment, based on the plaintiff's protected characteristic, so sufficiently severe or pervasive that it has altered the conditions of employment and created an abusive working environment"); *Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 646 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (same); *see also Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 806 (Tex. 2010) (discussing hostile work environment claim in context of sexual harassment claim). TABC further argues that this claim cannot be based on Menn's actions because he was "over 300 miles away" in TABC's Lubbock office and there was no evidence that Menn was aware of Moralez's "numerous EEOC charges, internal complaints or pending lawsuit."

Moralez, however, alleged and presented evidence of Menn's actions that created a hostile work environment to establish a "material adverse employment action" as to his prima facie case of retaliation. *See Clark*, 544 S.W.3d at 782 (requiring plaintiff to establish prima facie showing that he engaged in protected activity, he "experienced a material adverse employment action," and there was causal link between two); *see, e.g.*, *Manor Indep. Sch. Dist. v. Boson*, No. 03-16-00756-CV, 2017 Tex. App. LEXIS 2630, at n.4 (Tex. App.—Austin Mar. 29, 2017, no pet.) (mem. op.) (assuming without deciding that retaliation claim may be

based on hostile work environment); *see also Noviello v. City of Boston*, 398 F.3d 76, 92–93 (1st Cir. 2005) (describing claim of retaliation based on hostile work environment).

In this context, Moralez presented evidence about TABC's negative attitude and actions toward him after he filed his charges of discrimination, including Menn's actions subjecting Moralez to a hostile work environment and attempting to set the El Paso office up for failure and get "rid" of Moralez, and Moralez's complaints to Pearson about Menn's actions. Menn became Moralez's supervisor shortly after Moralez filed his lawsuit in 2014, and several employees provided specific examples of Menn's actions and efforts to set the El Paso office up for failure and their belief that Menn's actions were in retaliation for Moralez's pending litigation. Among this evidence, Chavez provided specific examples of "questionable actions" against Moralez over "the past two years," "which [led] him to believe [TABC] maybe forcing [Moralez] to resign or retire from [TABC]" and which had "created an unhealthy and stressful environment which has transcended into the El Paso Area office." Moralez also testified that Menn was "singling [him] out"; provided examples of Menn's directives that were "illegal, immoral, unethical" and violative of TABC policy; and testified about the negative impact of Menn's actions on Moralez's ability to perform his work duties and the El Paso office's work environment, including agent safety concerns.[14] In the audio recording of the November 2015 meeting, the agents also discuss specific concerns about Menn's directives.

Viewing the evidence favorable to Moralez as true and indulging every reasonable inference and resolving any doubts in his favor, we conclude that the evidence creates

[14] For example, Moralez testified in his May 2019 deposition that Menn told the El Paso office that they "weren't allowed to act on felonies committed in [their] presence." Moralez also described the "lack of information" that was "key in law enforcement" for "operational practices," which created danger for his agents' safety in the field.

a fact issue as to whether Menn's actions toward Moralez "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[15] *See White*, 548 U.S. at 68; *Clark*, 544 S.W.3d at 788. We also conclude that the evidence was sufficient to create a fact issue as to whether a causal link existed between Moralez's protected activities and Menn's actions. *See Clark*, 544 S.W.3d at 782. Thus, we conclude that the trial court did not err when it denied TABC's plea to the jurisdiction as to Moralez's retaliation claim to the extent it is based on Menn's adverse actions directed toward him. *See* Tex. Lab. Code § 21.055; *Clark*, 544 S.W.3d at 771; *Miranda*, 133 S.W.3d at 228.

CONCLUSION

For these reasons, we overrule TABC's issue and affirm the trial court's order denying TABC's second plea to the jurisdiction.

Melissa Goodwin, Justice

Before Justices Goodwin, Baker, and Kelly

Affirmed

Filed: July 29, 2021

[15] Chavez confirmed that he feared that TABC would retaliate against him for his testimony based on what happened to Moralez after he filed his suit against TABC. Menchaca testified similarly that fear of retaliation for testifying had "come to mind."