



NUMBER 13-15-00033-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

ADAN PEREZ JR.,

Appellant,

v.

WESLACO INDEPENDENT SCHOOL DISTRICT,

Appellee.

**On appeal from the 332nd District Court
of Hidalgo County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion by Chief Justice Valdez**

Appellant, Adan Perez Jr., appeals the trial court's grant of a plea to the jurisdiction filed by appellee, Weslaco Independent School District (the "District"). By four issues, Perez contends that the trial court should have denied the District's plea to the jurisdiction on his claims. We affirm.

I. BACKGROUND

We stated the following facts in a prior decision regarding the District's plea to the jurisdiction requesting to dismiss Perez's claims against the District's superintendent, Richard Rivera.

From 2004 until June 2010, Perez was employed as the District's risk manager. In this position, Perez oversaw the District's employee benefit plans, including the school district's self-funded workers' compensation fund and health insurance program.^[1] In June 2010, Perez's employment with the District was terminated. In March 2011, Perez filed suit against [the District] and Rivera, the District's superintendent.

By his live petition, Perez alleged that in early 2009, he became aware of the District's purported desire and eventual action to withdraw funds from the District's self-funded insurance programs "for the specific purpose of beginning construction of a new 'Press Box' at [the District's] football stadium." Perez asserted in his petition that he was "rebuked" when he informed the District's chief financial officer that such withdrawal of funds was illegal. Perez further asserted that he made several attempts to meet with Rivera about the issue, but "was denied access" to him. Perez alleges that he continued to present his complaints to his supervisor, as well as "other administrators and members of [the District's] Board of Trustees." According to Perez's petition, the District and Rivera sought to "silence" him and put a plan in place to terminate his employment.

Perez's lawsuit against the District and Rivera asserted various causes of action including: (1) breach of contract; (2) breach of Perez's right of reasonable expectation to renewal of his contract; (3) violations of the Texas Whistleblower Act, see TEX. GOV'T CODE ANN. § 554.002 (West 2004), by the District and Rivera, in his individual capacity; (4) constitutional violations of due course of law rights, equal protection rights, and free speech under the Texas Constitution; and (5) common-law retaliation. Perez sought actual, exemplary, and statutory damages, attorney's fees, pre- and post-judgment interests, costs, and any other relief in law and in equity.

Weslaco Indep. Sch. Dist. v. Perez, No. 13-12-00590-CV, 2013 WL 3894970, at *1 (Tex. App.—Corpus Christi July 25, 2013, no pet.) (mem. op.); see also *Weslaco Indep. Sch.*

¹ On February 5, 2010, District employee, Dr. Ruben Alejandro, informed Perez that his contract would not be renewed and provided Perez with his evaluation, which was less than satisfactory.

Dist. v. Perez, No. 13-12-00581-CV, 2013 WL 3894951, at *1 (Tex. App.—Corpus Christi July 25, 2013, no pet.) (mem. op.).

The District “filed a plea to the jurisdiction asserting that the trial court lacked jurisdiction over Perez’s claims of (1) breach of contract; (2) breach of right of reasonable expectation to renew his contract, (3) constitutional violations for damages, and (4) retaliation.” *Weslaco Indep. Sch. Dist.*, 2013 WL 3894970, at *2. The District also filed a plea to the jurisdiction on behalf of Rivera claiming immunity. *Id.* The trial court held a hearing and denied the District’s pleas. *Id.* The District appealed the trial court’s denials of both pleas to the jurisdiction to our Court in appellate cause numbers 13-12-00581-CV and 13-12-00590-CV. *Id.*

In appellate cause number 13-12-00581-CV, we “reverse[d] the trial court’s denial of [the District’s] plea to the jurisdiction and render[ed] judgment that (1) Perez’s constitutional claims for damages and common-law retaliation claim [were] dismissed with prejudice and (2) Perez’s breach of contract claim [was] dismissed without prejudice.” *Weslaco Indep. Sch. Dist.*, 2013 WL 3894951, at *5. In that cause, we remanded “Perez’s claim for breach of his right of reasonable expectation to renew his contract because this pleading defect is one for which he should be afforded an opportunity to amend.” *Id.*

In appellate cause number 13-12-00590-CV, the District appealed from the trial court’s denial of its plea to the jurisdiction regarding Perez’s claims against Rivera. *Weslaco Indep. Sch. Dist.*, 2013 WL 3894970, at *1. In that cause, we reversed the trial court’s denial of the District’s plea to the jurisdiction and rendered judgment dismissing with prejudice Perez’s causes of actions against Rivera for common law retaliation, constitutional violations, and Texas Whistleblower Act violations. *Id.* at *4.

Upon remand to the trial court in appellate cause number 13-12-00581-CV, the District filed another plea to the jurisdiction seeking dismissal of Perez's whistleblower claims and his reasonable expectations of renewal claim against the District. In its plea, the District claimed that (1) it was impossible for the District to have retaliated against Perez because he learned of the adverse employment action prior to reporting any alleged illegal activity to the Texas Education Agency ("TEA"); (2) Perez failed to file his grievance within the statutory ninety-day deadline; (3) Perez failed to exhaust his administrative remedies; (4) Perez failed to file his lawsuit within the required statutory timeline; (5) Perez could not have established any violation of law within the meaning of the Texas Whistleblower Act; and (6) Perez did not report his alleged violation of the law to the appropriate law enforcement agency. Perez amended his petition and responded to the District's plea to the jurisdiction challenging all grounds. The trial court granted the District's plea to the jurisdiction and dismissed Perez's whistleblower and reasonable expectation-of-contract renewal claims on December 17, 2014. This appeal followed.

II. STANDARD OF REVIEW

A plea to the jurisdiction challenges a trial court's subject matter jurisdiction. *City of Dallas v. Carbajal*, 324 S.W.3d 537, 538 (Tex. 2010) (per curiam). We determine subject matter jurisdiction as a question of law that we review de novo. *Id.*

A plea to the jurisdiction challenges a court's authority to hear a case by alleging that the factual allegations in the plaintiff's pleadings, when taken as true, fail to invoke the court's jurisdiction. The plaintiff bears the burden of alleging facts affirmatively demonstrating the trial court's jurisdiction to hear a case.

Scott v. Godwin, 147 S.W.3d 609, 620 (Tex. App.—Corpus Christi 2004, pet. dism'd) (internal citations omitted). When determining whether the plaintiff has alleged facts

affirmatively demonstrating the trial court's jurisdiction, our standard of review requires us to construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings. *Thornton v. Ne. Harris County MUD 1*, 447 S.W.3d 23, 37 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). The plaintiff's allegations in the pleadings may either affirmatively demonstrate or negate the court's jurisdiction. *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). When the pleadings do neither, the issue becomes one of pleading sufficiency, and the plaintiff should be given an opportunity to amend the pleadings. *Id.*

In its plea to the jurisdiction, a defendant may also challenge the existence of jurisdictional facts which may implicate the merits of the plaintiff's case. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In those cases, we consider relevant evidence and our standard of review "generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c)." *Id.* at 228. The burden lies with the governmental unit to present evidence to support its plea. *Id.* If the governmental unit meets its burden, the burden shifts, and the plaintiff must show that a disputed material fact exists regarding the jurisdictional issue. *Id.* "[W]e take as true all evidence that is favorable to the [plaintiff]," and "[w]e indulge every reasonable inference and resolve any doubts in the [plaintiff's] favor." *Id.* "If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact question will be resolved by the fact-finder." *Id.* at 227–28. A trial court rules on a plea to the jurisdiction as a matter of law if the evidence is undisputed or fails to raise a fact question on the jurisdictional issue. *Id.* at 228.

III. WHISTLEBLOWER CLAIM

By his third issue, Perez contends the trial court should have denied the District's plea because initiation of the grievance process is not jurisdictional.²

A. Applicable Law

The Texas Whistleblower Act waives a governmental unit's sovereign immunity when a public employee alleges a violation of chapter 554 of the Texas Government Code. See TEX. GOVT. CODE ANN. § 554.0035 (West, Westlaw through 2015 R.S.). For waiver of immunity to apply in these cases, the plaintiff must sufficiently allege that he or she was a public employee, the defendant was a state or local governmental entity, that the plaintiff reported a violation of law to the appropriate law enforcement agency in good faith, and that the plaintiff's report was the but-for cause of the defendant's adverse employment action. *Id.* § 554.002(a) (West, Westlaw through 2015 R.S.); *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 636 (Tex. 1995); *Scott*, 147 S.W.3d at 621.

Claims brought pursuant to the whistleblower act are subject to the statute of limitations set out in section 554.005, which requires that the employee sue the employer no "later than the 90th day after the date on which the alleged violation of this chapter" either occurred or "was discovered by the employee through reasonable diligence." TEX. GOVT. CODE ANN. § 554.005 (West, Westlaw through 2015 R.S.). Section 554.006 tolls the ninety-day limitations period. *Id.* § 554.006(d) (West, Westlaw through 2015 R.S.). It states that any "[t]ime used by the employee in acting under the grievance or appeal procedures is excluded" from the limitations period as set out in section 554.005. *Id.* §§ 554.005, 554.006(d). However, an employee *may not file suit* under the whistleblower

² We address Perez's third issue first because it is dispositive of this appeal.

act *unless* the employee “initiate[d] action under the grievance or appeal procedures” of the governmental employer “not later than the 90th day after the date on which the alleged violation” either occurred or “was discovered by the employee through reasonable diligence.”³ TEX. GOV’T CODE ANN. § 554.006(a), (b) (stating that the employee *must* initiate grievance action prior to suing employer) (emphasis added).

B. Discussion

In his live pleading, Perez did not state the date when he was notified of the nonrenewal of his contract or when he claimed he became aware that the District took any adverse action against him due to his alleged whistleblower status. Moreover, Perez did not state in his pleading when he filed his grievance regarding the District’s alleged adverse actions. However, at his deposition, Perez testified that he learned that his contract would not be renewed on February 5, 2010, and the record shows that Perez filed his level one grievance with the District on July 20, 2010.

Perez argues a fact question exists regarding when the adverse act took place because the evidence shows that his contract actually expired in June of 2010. However, this Court has held that when determining when a cause of action accrues in a whistleblower case, the proper focus is on the time when the employee learned of the

³ The goal of section 554.006 is “to afford the governmental entity with the opportunity to investigate and correct its errors and to resolve disputes before incurring the expense of litigation.” *Fort Bend Indep. Sch. Dist. v. Gayle*, 371 S.W.3d 391, 395 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

Once the employee has initiated an action under the grievance or appeal procedures, the employer has sixty days to address the employee’s grievance through its administrative process. TEX. GOV’T CODE ANN. § 554.006(d) (West, Westlaw through 2015 R.S.). “If a final decision is not rendered before the 61st day after the date [grievance or appeal] procedures are initiated,” to obtain relief under chapter 554, the claimant may either exhaust the remedies available under the employer’s grievance procedure or terminate the grievance and file suit within the time remaining under section 554.005. *Id.* “Thus, section 554.006 does not require [exhaustion of] administrative remedies before filing suit.” *Gayle*, 371 S.W.3d at 394–95. Instead, all that is required is initiation of the grievance or appeal process and sixty days for the grievance authority to render a decision prior to filing suit. *Id.* at 395.

allegedly retaliatory conduct and not on the time when the consequences of that decision come to fruition. *Univ. of Tex.—Pan Am. v. De Los Santos*, 997 S.W.2d 817, 820 (Tex. App.—Corpus Christi 1999, no pet.) (concluding that the employee failed to file the whistleblower lawsuit within the statute of limitations based on the date that the employee learned that the employer intended to terminate her and not on the date that the actual termination occurred). Thus, guided by this principle, we conclude that February 5, 2010, the date when Perez learned that his contract would not be renewed is the accrual date of Perez’s whistleblower claim. See *id.*

Pursuant to section 554.005, Perez was required to file his whistleblower lawsuit no more than ninety days after February 5, 2010. See TEX. GOVT. CODE ANN. § 554.005 (providing that the employee must not file a whistleblower claim “later than the 90th day after the date on which the alleged violation of this chapter” either occurred or “was discovered by the employee through reasonable diligence.”). Here, it is undisputed that Perez filed his whistleblower lawsuit approximately one year later on March 8, 2011. Section 554.006 tolls the limitations period during the grievance period; however, Perez must have initiated the grievance procedure within ninety days prior to suing the District in order for the tolling statute to apply.⁴ See *id.* § 554.006(a), (b), (c) (providing that the

⁴ We note that some of our sister courts have held that failure to file a grievance within ninety days of learning of the adverse act constitutes a jurisdictional defect, which precludes the employee from bringing a whistleblower claim. See *Midland Indep. School Dist. v. Watley*, 216 S.W.3d 374, 380 (Tex. App.—Eastland 2006, no pet.) (citing *Montgomery County Hosp. Dist. v. Smith*, 181 S.W.3d 844, 850–53 (Tex. App.—Beaumont 2005, no pet.)); see also TEX. GOVT. CODE ANN. § 311.034 (West, Westlaw through 2015 R.S.) (“Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.”); *City of Lubbock v. Walck*, No. 07-15-00078-CV, 2015 WL 7231027, at *5 (Tex. App.—Amarillo Nov. 16, 2015, pet. denied) (mem. op.) (“We initially note our agreement with the City that the initiation of the grievance procedure under section 554.006(a) is a jurisdictional requirement for the filing of suit.”) (citing *Fort Worth Indep. School Dist. v. Palazzolo*, No. 02–13–00006–CV, 2014 WL 69889 at **7–8 (Tex. App.—Fort Worth, Jan. 9, 2014, no pet.) (mem. op.); *Tarrant County v. McQuary*, 310 S.W.3d 170, 174 (Tex. App.—Fort Worth 2010, pet. denied)); *Fort Bend Indep. School Dist.*, 371 S.W.3d at 395; *Jordan v. Ector County*, 290 S.W.3d 404, 406 (Tex. App.—Eastland 2009, no pet.); *Med. Arts Hosp. v. Robison*, 216 S.W.3d 38, 44 (Tex. App.—Eastland 2006, no pet.)). Neither

statute of limitations is tolled when the employee *is acting under* the grievance or appeal procedures); *County of El Paso v. Latimer*, 431 S.W.3d 844, 849 (Tex. App.—El Paso 2014, no pet.) (“[T]he terminated employee’s notice to the employer that he believes that an adverse personnel action was taken against him due to a good faith report of a violation of the law by the governmental entity, *if made within 90 days*, is sufficient to toll the limitations period of Section 554.005.”) (emphasis added).

As stated above, Perez discovered that his contract would be non-renewed on February 5, 2010, requiring him to file his grievance no later than May 3, 2010 for tolling to apply. See TEX. GOVT. CODE ANN. § 554.006(a), (b), (c). It is undisputed that Perez filed his grievance with the District on July 5, 2010, more than ninety days after the adverse employment action occurred. Thus, Perez failed to properly initiate the grievance procedure, and limitations was not tolled by section 554.005(c). See *id.* § 554.006(c). Our Court has already determined that failure to file suit within the ninety-day period is jurisdictional, and the employee is barred from bringing suit if suit is brought outside that time period. See *De Los Santos*, 997 S.W.2d at 820 (holding that the whistleblower act’s ninety-day statute of limitations is jurisdictional; thus, the trial court was required to grant the employer’s plea to the jurisdiction because the employee failed to file suit within ninety

this Court nor the Texas Supreme Court has made such a determination. See *Midland Indep. Sch. Dist.*, 216 S.W.3d at 380 n.5 (“In *Barrett*, the supreme court expressly declined to resolve whether the failure of an aggrieved public employee to initiate a grievance procedure in compliance with Section 554.006 constitutes a jurisdictional defect.”) (citing *Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631, 632–33 (Tex. 2005)). However, given our determination that because Perez failed to timely initiate the grievance procedures, the ninety-day statute of limitations for bringing his suit was not tolled, we need not address whether failure to file a grievance within ninety days is jurisdictional. *But see Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 511 (Tex. 2012) (stating that the amendment to section 311.034, adding that “[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity” “evinces the Legislature’s intent that all statutory prerequisites are now jurisdictional requirements as to governmental entities and are properly asserted in a plea to the jurisdiction”).

days). Thus, the trial court properly granted the District's plea to the jurisdiction as to Perez's whistleblower claim against the District. See *id.* We overrule Perez's third issue.

IV. BREACH OF REASONABLE EXPECTATION OF RENEWAL CLAIMS

By his fourth issue, Perez contends that the trial court has jurisdiction over his breach of reasonable expectation of renewal of his contract claim under the due process clause and due course of law clause. However, Perez has not argued or shown in the trial court or on appeal that the renewal of his contract is a protected interest either in liberty or property. See *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) ("We examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State. . . ."); *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) ("Our review of Than's due course claim requires a two-part analysis: (1) we must determine whether Than has a liberty or property interest that is entitled to procedural due process protection; and (2) if so, we must determine what process is due.").

Moreover, Perez has not provided citation to appropriate authority regarding his claim for breach of reasonable expectation of renewal of contract claim or substantive analysis regarding our standard of review. See TEX. R. APP. P. 38.1(i). In addition, Perez's claim for breach of reasonable expectation of renewal of a contract is not based on the terms of his written contract. Instead, Perez claims that the District entered into an implied contract for renewal. Perez cites no authority, and we find none, providing that the legislature has waived immunity for claims for breach of an implied contract. See *id.* We overrule Perez's fourth issue.

V. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
28th day of July, 2016.