NUMBER 13-19-00395-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

DONNA INDEPENDENT SCHOOL DISTRICT, Appellant,

v.

CYNTHIA CASTILLO, Appellee.

On appeal from the 275th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Chief Justice Contreras

Appellant Donna Independent School District (DISD) challenges the trial court's denial of its plea to the jurisdiction in this employment discrimination case filed by appellee Cynthia Castillo. By one issue, DISD argues that Castillo failed to exhaust her administrative remedies prior to filing suit. We affirm in part and reverse and render in part.

I. BACKGROUND

Castillo was employed as a police officer by DISD until her termination on February 13, 2017.[1] On November 10, 2016, Castillo filed a formal charge of discrimination with the Texas Workforce Commission (TWC). The discrimination charge form required Castillo to check boxes next to all bases of discrimination against her. Castillo checked the boxes next to sex, age, and retaliation. The form also prompted Castillo to fill in the earliest and latest dates of discrimination. Castillo filled in "11-12-2015" for the earliest, "5-9-2016" for the latest, and checked the box that indicated the discrimination was a "continuing action." In a field requesting the narrative of the "Particulars," Castillo provided:

> I am a 45 year old Hispanic female who is employed as a police officer at Donna ISD with eight years previous experience working at Hidalgo County Sheriff's Department. At all times I have been a loyal hardworking and dedicated employee. On or about November 12, 2015, while working at the Donna ISD North High School campus, Sergeant Francisco A. Limon was standing in the hallway by the nurse's station when he came up to me and with his right hand shook my hand while at the same time tickling the palm of my hand with his fingers which I felt was inappropriate touching and offensive. I immediately reported the incident to the Donna ISD police department, complained to Officer Gabriel Avendano as Officer Don Crist and Officer Adrian Riman when they walked in and also suggested to file a report [sic]. I reported it to Sgt. Daniel Walden regarding same. Additional offensive behavior continued until February 22, 2016.[2]
>
> I felt uncomfortable working around him while still on the same campus and filed a Level I complaint/grievance form with human resources on February 22, 2016. I conferenced with Javier J. Villanueva, Assistant Superintendent for Human Resources until May 26, 2016 which I received a response to complaint until June 9, 2016 stating that relief would not be granted and proceeded to file a Level II complaint. I received a correspondence from DISD on June 27, 2016, also stating remedy is denied.[3] A Level III Appeal

[1] It is unclear from the record how long Castillo worked for DISD.

[2] The record indicates that Castillo complained that Limon would call her to his office often for reasons unrelated to work and that he commented on her weight one time in his office.

[3] Castillo's grievance was actually granted in part and denied in part.

> Notice on June 28, 2016 which complaint was heard during a board meeting on July 6, 2016 [sic]. On August 19, 2016, I received correspondence from DISD informing me that I would be transferred to their Alternative Education Program for the 2016–2017 school year effective immediately.
>
> I believe that I was discriminated against and/or retaliated because of my age, in the manner described above, in violation of Title VII of the Civil Rights Act of 1964, as amended; the age Discrimination in Employer Act, as amended; and in violation of the Texas Commission on Human Rights Act.

On December 13, 2016, DISD placed Castillo on administrative leave to investigate possible violations by Castillo of DISD District Policy, DISD Police Department policies, and Texas Occupation Code § 1701.655. On February 14, 2017, DISD notified Castillo that the Board had approved her immediate termination at the meeting held on February 13, 2017. On June 5, 2017 the TWC issued Castillo a right-to-sue letter and explained it was dismissing her charge because she requested a notice of right to file civil action "over 180 days after filing her complaint."

Castillo filed suit against DISD alleging discrimination and retaliation under the labor code and family code. DISD filed a general denial and, later, a plea to the jurisdiction. DISD attached to its plea copies of Castillo's charge with TWC, Castillo's level 1 grievance, an excerpt from Castillo's deposition, and an email from Castillo to the Chief of Police for DISD, Roy Padilla. Castillo submitted copies and logs of communications by email, text, letter, and police radio between various parties, detailing the development of issues involving Castillo and her employment with DISD. Castillo then amended her petition, retaining only her causes of action under the labor code and filed a response to DISD's plea.

In her live petition, Castillo brings claims for "age and sex discrimination, sexual harassment/hostile work environment, and retaliation." Castillo claims that, after she was

transferred to the Alternative Education Program, “the discrimination and retaliation continued” because:

(a) DISD took away her police vehicle and gave her a security officer vehicle which did not have the necessary equipment for her to do her job;

(b) DISD took away her master key and would not let her use the normal DISD police department parking lot;

(c) she was harassed by her supervisor and other male police officers when she took off time from work for approved personal and/or sick days;

(d) her new direct supervisor, Sgt. Daniel Walden, began to harass and belittle her, and even told her that she would be supervised directly by the principal of the Alternative Education Program campus, even though he was not in her department and not a certified police officer;

(e) board members bragged about her reassignment being a way to get rid of her and force her to quit;

(f) she was generally ridiculed, harassed, and chastised for simply doing her job, like recording incidents that were in violation of the law or Donna ISD policy;

(g) she was ordered by Sgt. Walden not to report incidents of student abuse by other officers and district employees;

(h) she was harassed for “congregating” with other police officers; and

(i) DISD failed and/or refused to give her doctor-ordered light duty work after undergoing a serious medical procedure, where other male officers were afforded light duty.

Castillo also alleged that she was retaliated against when she was placed on suspension pending an investigation and when she was terminated.

After a hearing, the trial court denied DISD's plea. This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (providing for interlocutory appeal from a trial court's order on a plea to the jurisdiction).

II. DISCUSSION

By its sole issue, DISD argues that Castillo failed to exhaust her administrative remedies and, therefore, the trial court lacked jurisdiction over her claims.

A. Standard of Review

A plea to the jurisdiction is a dilatory plea used to defeat a cause of action without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea challenges the trial court's subject matter jurisdiction. *Id.* Whether a trial court has subject matter jurisdiction and whether the pleader has alleged facts that affirmatively demonstrate the trial court's subject matter jurisdiction are questions of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

The plaintiff has the initial burden to plead facts affirmatively showing that the trial court has jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *see Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). If the plaintiff pleaded facts making out a prima facie case and the governmental unit instead challenges the existence of jurisdictional facts, we consider the relevant evidence submitted. *Metro. Transit Auth. of Harris Cty. v. Douglas*, 544 S.W.3d 486, 492 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *see Garcia*, 372 S.W.3d at 635. When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence has been submitted to support the plea that implicates the merits of the case, we take as true all evidence favorable to the plaintiff. *Douglas*, 544 S.W.3d at 492;

see Garcia, 372 S.W.3d at 635. We indulge every reasonable inference and resolve any doubts in the plaintiff's favor. *Douglas*, 544 S.W.3d at 492; *see Miranda*, 133 S.W.3d at 226. If the relevant evidence is undisputed or if the plaintiff fails to raise a fact question on the jurisdictional issue, then0020the trial court rules on the plea as a matter of law. *Garcia*, 372 S.W.3d at 635; *see Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 798–99 (Tex. 2016) (op. on reh'g).

B. Unlawful Employment Practices

The Texas Commission on Human Rights Act (TCHRA) prohibits sex and age discrimination and retaliation by employers. *See* TEX. LAB. CODE ANN. §§ 21.001, 21.051, 21.055; *see, e.g.*, *Garcia*, 372 S.W.3d at 640–42 (age discrimination); *County of El Paso v. Aguilar*, 600 S.W.3d 62, 90–92 (Tex. App.—El Paso, 2020, no pet.) (retaliation); *Santi v. Univ. of Tex. Health & Sci. Ctr. at Hous.*, 312 S.W.3d 800, 805–06 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (sex discrimination). In particular, § 21.051 of the labor code states, "An employer commits an unlawful employment practice if because of sex [or] age the employer . . . discriminates in any . . . manner against an individual in connection with compensation or the terms, conditions, or privileges of employment." TEX. LAB. CODE ANN. § 21.051(1); *Cox v. Waste Mgmt. of Tex., Inc.*, 300 S.W.3d 424, 432 (Tex. App.—Fort Worth 2009, pet. denied). Section 21.055 provides that an employer commits an unlawful employment practice if the employer retaliates or discriminates against a person who, under chapter 21 of the labor code, "(1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding or hearing." TEX. LAB. CODE ANN. § 21.055.

An "employer" includes a county, municipality, state agency, or state instrumentality, regardless of the number of individuals employed. *Id.* § 21.002(8)(D).

Because the TCHRA is modeled after federal civil rights law, we may look to analogous federal precedent for our guidance. *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 446 (Tex. 2004); *Brownsville Indep. Sch. Dist. v. Alex*, 408 S.W.3d 670, 674 n.6 (Tex. App.—Corpus Christi–Edinburg 2013, no pet.); *see* TEX. LAB. CODE ANN. § 21.001.

C. Exhaustion of Administrative Remedies

Governmental units, including school districts, are immune from suit unless the State consents. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 763 (Tex. 2018). "The TCHRA waives immunity, but only when the plaintiff states a claim for conduct that actually violates the statute." *Id.* Courts consider TCHRA claims only after the plaintiff has exhausted his or her administrative remedies. *Hoffman-La Roche, Inc.*, 144 S.W.3d at 446; *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 485 (Tex. 1991), *overruled on other grounds by In re United Servs. Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010) (orig. proceeding).

To meet the exhaustion requirement, a plaintiff must file a charge of discrimination with the federal Equal Employment Opportunity Commission (EEOC) or the TWC within 180 days of the alleged discriminatory employment action. *See* TEX. LAB. CODE ANN. §§ 21.201(a), (g), 21.202; *Czerwinski v. Univ. of Tex. Health Sci. Ctr.*, 116 S.W.3d 119, 121 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). The plaintiff's administrative remedies are exhausted when the plaintiff is entitled to a right-to-sue letter. *City of El Paso v. Marquez*, 380 S.W.3d 335, 341–42 (Tex. App.—El Paso 2012, no pet.); *see* TEX. LAB. CODE ANN. §§ 21.208, 21.252; *Rice v. Russell-Stanley, L.P.*, 131 S.W.3d 510, 341–42 (Tex. App.—El Paso 2012, no pet.).

The Texas Legislature has mandated that all statutory prerequisites to suit are jurisdictional requirements in suits against governmental entities. TEX. GOV'T CODE ANN.

§ 311.034; *see Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 510–11 (Tex. 2012); *Douglas*, 544 S.W.3d at 492; *see also Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 544 (Tex. 2016). Accordingly, filing a timely charge with the TWC is a jurisdictional prerequisite to filing suit for unlawful employment practices against a school district. *See Chatha*, 381 S.W.3d at 511–12; *Douglas*, 544 S.W.3d at 492; *Czerwinski*, 116 S.W.3d at 121–22.

There is, however, an exception to the 180-day filing deadline reflected in the "Continuing Action" box included in the TWC charge, which is intended to cover unlawful discrimination that manifests itself over time, rather than as a series of discrete acts. *Univ. of Tex. v. Poindexter*, 306 S.W.3d 798, 808 (Tex. App.—Austin 2009, no pet.) (citing *Wal-Mart Stores, Inc. v. Davis*, 979 S.W.2d 30, 41–42 (Tex. App.—Austin 1998, pet. denied)); *see Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111–17 (2002); *Bartosh v. Sam Houston State Univ.*, 259 S.W.3d 317, 326–27 (Tex. App.—Texarkana 2008, pet. denied). The continuing violation doctrine relieves a plaintiff from proving that all of his or her employer's alleged acts of discrimination occurred within the actionable period if he or she can show "a series of related acts, one or more of which falls within the limitations period." *Messer v. Meno*, 130 F.3d 130, 134–35 (5th Cir. 1997); *see also McAllen Indep. Sch. Dist. v. Espinosa*, No. 13-11-00563-CV, 2012 WL 3012657, at *5 (Tex. App.—Corpus Christi–Edinburg June 15, 2012, no pet.) (mem. op.). When such "continuing violation" discrimination occurs, the 180-day deadline does not begin until one of the involved discriminatory events should, in fairness and logic, have alerted the average layperson to act to protect his or her rights. *Poindexter*, 306 S.W.3d at 808; *Univ. of Tex.–Pan Am. v. De Los Santos*, 997 S.W.2d 817, 820 (Tex. App.—Corpus Christi–Edinburg

1999, no pet.); *Wal-Mart Stores, Inc.*, 979 S.W.2d at 41–42.[4] A claim of hostile work environment is a continuing violation. *Santi*, 312 S.W.3d at 805 (citing *Morgan*, 536 U.S at 114); *see Pegram v. Honeywell, Inc.*, 361 F.3d 272, 279 (5th Cir. 2004); *Yeh v. Chesloff*, 483 S.W.3d 108, 117–18 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Davis v. AutoNation USA Corp.*, 226 S.W.3d 487, 492–93 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

D. The Discrimination Charge

A primary purpose of filing the complaint with the TWC is to trigger an agency investigation so that voluntary compliance with the law is achieved through a conciliatory process. *See Pacheco v. Mineta*, 448 F.3d 783, 788–89 (5th Cir. 2006); *Alex*, 408 S.W.3d at 674. The complaint also serves to provide the charged party with notice of the claim, narrowing the issues for speedier and more effective adjudication and decision. *Lopez v. Tex. State Univ.*, 368 S.W.3d 695, 701 (Tex. App.—Austin 2012, pet. denied); *see Pacheco*, 448 F.3d at 789; *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 878–79 (5th Cir. 2003).

The crucial element of a complaint filed with the TWC is the factual statement, which must adequately put an employer on notice of the existence and nature of the discrimination charges being made. *Alex*, 408 S.W.3d at 674; *Bartosh*, 259 S.W.3d at 321; *see Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970) ("The selection of the type of discrimination alleged, i.e., the selection of which box to check, is

[4] To exhaust administrative remedies under the TCHRA. a claimant must also: (1) allow the TWC 180 days to dismiss or resolve the complaint, and (2) file suit in district court within sixty days of receiving the right-to-sue letter from the TWC and no later than two years after the complaint. *Metro. Transit Auth. of Harris Cty. v. Douglas*, 544 S.W.3d 486, 492 n.6 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *see* TEX. LAB. CODE ANN. §§ 21.208, 21.254, 21.256; *see also Lopez v. Tex. State Univ.*, 368 S.W.3d 695, 701 (Tex. App.—Austin 2012, pet. denied).

in reality nothing more than the attachment of a legal conclusion to the facts alleged."). The scope of a subsequent lawsuit is limited to the scope of the investigation that can reasonably be expected to grow out of the discrimination charge in the complaint. *Alex*, 408 S.W.3d at 674; *see Lopez*, 368 S.W.3d at 701 ("It is well settled that the scope of . . . litigation [under the TCHRA] is limited to claims that were included in the administrative charge of discrimination and to factually related claims that could reasonably be expected to grow out of the agency's investigation of the claims stated in the charge."); *see, e.g.*, *Poindexter*, 306 S.W.3d at 810. We construe the complaint liberally to reach its substance, but we will not construe it to include facts that were initially omitted. *Alex*, 408 S.W.3d at 674; *see Santi*, 312 S.W.3d at 805 (noting that "we should construe [a charge of discrimination] with 'utmost liberality,' although the charge must contain an adequate factual basis so that it puts the employer on notice of the existence and nature of the charges").

Finally, a complaint may be amended to cure technical defects or omissions, including a failure to verify the complaint or to clarify or amplify an allegation made in the complaint. TEX. LAB. CODE ANN. § 21.201(e). "An amendment to a complaint alleging additional facts that constitute unlawful employment practices relating to or arising from the subject matter of the original complaint relates back to the date the complaint was first received by the commission." *Id.* § 21.201(f).

D. Analysis

1. Sex Discrimination

Sexual harassment is a form of sex discrimination. *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 188 (5th Cir. 2012); *Clark*, 544 S.W.3d at 763; *see, e.g.*, *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 805 (Tex. 2010); *Twigland Fashions, Ltd. v. Miller*, 335

S.W.3d 206, 217–19 (Tex. App.—Austin 2010, no pet.); *Garcia v. Schwab*, 967 S.W.2d 883, 885 (Tex. App.—Corpus Christi–Edinburg 1998, no pet.). There are two general types of sexual harassment: quid pro quo and hostile work environment. *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276, 279 (Tex. 2017); *Waffle House, Inc.*, 313 S.W.3d at 804; *Garcia*, 967 S.W.2d at 885. Quid pro quo harassment occurs when employment benefits are conditioned on sexual favors, while a hostile work environment is the result of sexual harassment. *Hoffman-La Roche Inc.*, 144 S.W.3d at 445 n.5. Incidents giving rise to a hostile environment sexual harassment claim frequently involve the continuing violation doctrine, because the plaintiff must show that the employer's inherently offensive conduct altered the "terms, conditions, or privileges of employment" so severely or pervasively that it created an abusive working environment. *Yeh*, 483 S.W.3d at 117–18; *see* TEX. LAB. CODE ANN. § 21.051(1); *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 138 (Tex. 2015).

Here, Castillo complained in her charge that Limon sexually harassed her and she states in her petition that she is bringing claims for "sexual harassment/hostile work environment." However, at least one instance of the sex discrimination underlying a hostile work environment claim must fall within the 180 day period preceding the complainant's charge. *See Chatha*, 381 S.W.3d at 503; *Del Mar Coll. Dist. v. Vela*, 218 S.W.3d 856, 860–61 (Tex. App.—Corpus Christi–Edinburg 2007, no pet.), *overruled on other grounds by Lujan v. Navistar, Inc.*, 555 S.W.3d 79 (Tex. 2018).

In her charge, Castillo alleges only one specific instance of harassment from Limon, but she checked the box indicating that she was complaining of an ongoing violation and stated in the factual background that the "offensive behavior continued until February 22, 2016." *See Aguilar*, 600 S.W.3d at 87 ("[W]hile Aguilar does not provide

specific dates, she does state that Lucero's conduct was 'continuous and daily'"). The evidence in the record indicates that Castillo also complained of Limon calling her and asking her to come to his office at unspecified times, and Castillo provided in her charge that the last incident occurred on May 9, 2016. There is no evidence indicating that Castillo was harassed by Limon after May 9, 2016, or that she complained of any action by Limon which occurred after May 9, 2016. Because May 9, 2016 was more than 180 days before Castillo filed her charge on November 10, 2016, the charge was not timely, and the trial court therefore did not have jurisdiction over Castillo's claim of hostile work environment based on Limon's sexual harassment. *See Chatha*, 381 S.W.3d at 503.

Castillo states in her petition that she is also bringing claims for "sex discrimination" but does not specifically state what actions she is relying on for this claim. To the extent Castillo's "sex discrimination" claim is based on Limon's alleged actions, the trial court does not have jurisdiction for the reasons just stated above. To the extent Castillo's "sex discrimination" claim is based on the other instances of harassment complained of by Castillo in her petition that occurred after Castillo filed her charge, we note that these alleged acts of "harassment" do not involve Limon and are not sexual in nature, and the factual statement in her charge does not provide any notice that Castillo suffered any harassment based on sex from anyone else other than Limon. *See Clark*, 544 S.W.3d at 766; *cf. Santi*, 312 S.W.3d at 805–06; *see also Harris-Childs v. Medco Health Sols.*, 169 Fed. Appx. 913, 916 (5th Cir. 2006) (per curiam) (rejecting notion that any complaint of "harassment" encompasses either race or sex discrimination); *Martinez v. Wilson County*, No. 04-09-00233-CV, 2010 WL 114407, at *1, 3–4 (Tex. App.—San Antonio Jan. 13, 2010, no pet.) (mem. op.) (concluding plaintiff's written "Notice of Hostile Work Environment" complaining of rude and offensive behavior did not suggest any motivation

based on a protected characteristic). In other words, the "harassment" alleged in her petition at the hand of anyone other than Limon is not factually related to the sexual harassment described in her charge and is either part of Castillo's retaliation claims or of separate claims of discrimination based on gender or age. Because any subsequent "harassment" based on sex alleged in her petition, if any, is distinct and separate from any alleged sexual harassment from Limon, we conclude that Castillo was required to amend her charge or file a new charge with TWC complaining of this conduct in order to exhaust her remedies and for the trial court to have jurisdiction.[5] *See* TEX. LAB. CODE ANN. § 21.201(c)(3) (noting that a complaint must state "facts sufficient to enable the commission to identify the respondent"); *Morgan*, 536 U.S. at 111–16 ("Each discrete discriminatory act starts a new clock for filing charges alleging that act."); *Clark*, 544 S.W.3d at 766; *Yeh*, 483 S.W.3d at 118 (noting that a claimant's lawsuit "is limited to claims that were included in the administrative charge and to factually related claims that could reasonably be expected to grow out of the agency's investigation of the claims stated in the charge); *see also* TEX. LAB. CODE ANN. § 21.201(e), (f); *Espinosa*, 2012 WL 3012657, at *4. The continuing violation doctrine cannot be used to combine two groups of unrelated alleged acts of discrimination based on sex. *See Alex*, 408 S.W.3d at 674; *Lopez*, 368 S.W.3d at 701; *Santi*, 312 S.W.3d at 805.

[5] For the first time on appeal, Castillo points to DISD's local policy DGBA concerning grievances and argues that "an employer's deviation from its policies, or failure to uniformly enforce them, is evidence of a disparate treatment claim sufficient to establish pretext." Specifically, Castillo argues that DISD did not follow its policy requiring that a meeting with the appropriate administrator be scheduled with the complainant within ten days of the filing of a level 1 grievance. However, contrary to Castillo's argument, the record indicates that the appropriate administrator (Padilla) held a meeting with Castillo to investigate her complaint on February 29, 2016, which was within ten days of the filing of her level 1 grievance on February 22, 2016.

Therefore, the trial court did not have jurisdiction over Castillo's sex discrimination claims.

2. Age Discrimination

In her charge, Castillo stated in the factual background: "I believe I was discriminated against . . . because of my age[.]" Castillo's charge can reasonably be read as complaining of age discrimination by DISD when she was transferred.[6] This event occurred within 180 days of Castillo filing her charge. Accordingly, the trial court has jurisdiction over Castillo's claim that she was discriminated against based on her age when she was transferred.

We note that Castillo checked the "continuing action" box in her charge, and that she alleges she was discriminated against by other "harassment" in her petition that occurred after Castillo filed her charge.[7] However, in her petition, Castillo does not plead a cause of action for a hostile work environment created by age discrimination or any other continuing violation based on age discrimination. The other incidents of "harassment" and "discrimination" alleged in her petition, if based on age, are discrete or separate acts and, as such, required Castillo to file a new charge or amend her original charge in order to exhaust her remedies as to those actions. *See Morgan*, 536 U.S. at 111–14; *Garcia*, 372 S.W.3d at 635; *Alex*, 408 S.W.3d at 674; *Lopez*, 368 S.W.3d at 701; *Del Mar Coll. Dist.*, 218 S.W.3d at 858–61. Thus, the trial court did not have jurisdiction

[6] A prima facie case of age discrimination under the TCHRA requires proof that the plaintiff (1) is a member of a protected class; (2) was discharged; (3) was qualified for the position from which she was discharged; and (4) was either replaced by someone outside the protected class, replaced by someone younger, or was otherwise discharged because of her age. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 640–41 (Tex. 2012).

[7] It is unclear from her petition whether Castillo is complaining that the subsequent acts of "harassment" were age discrimination or sex discrimination. *See Harris-Childs v. Medco Health Sols.*, 169 Fed. Appx. 913, 916 (5th Cir. 2006) (per curiam); *see also Martinez v. Wilson County*, No. 04-09-00233-CV, 2010 WL 114407, at *1, 3–4 (Tex. App.—San Antonio Jan. 13, 2010, no pet.) (mem. op.).

over Castillo's claims, if any, for age discrimination based on the subsequent "harassment" alleged in her petition. *See Garcia*, 372 S.W.3d at 635.

3. Retaliation

Finally, an employer also commits an unlawful employment action if the employer retaliates or discriminates against a person who opposes a discriminatory practice or who makes or files a complaint under the TCHRA. *Santi*, 312 S.W.3d at 804 (citing TEX. LAB. CODE ANN. § 21.055); *see, e.g.*, *Aguilar*, 600 S.W.3d at 92–94. "A retaliation claim is related to, but distinct from, a discrimination claim, and one may be viable even when the other is not." *Clark*, 544 S.W.3d at 763. "Unlike a discrimination claim, a retaliation claim focuses on the employer's response to an employee's protected activity, such as making a discrimination complaint." *Id.* at 763–64.

To establish a prima facie case for retaliation under chapter 21 of the labor code, a plaintiff must show that (1) he or she participated in protected activity, (2) his or her employer took an adverse employment action against him or her, and (3) a casual connection existed between his or her protected activity and the adverse employment action. *Clark*, 544 S.W.3d at 782; *Brewer v. Coll. of the Mainland*, 441 S.W.3d 723, 729–30 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see also Tex. Health & Human Servs. Comm'n v. Baldonado*, No. 13-14-00113-CV, 2015 WL 1957588, at *5 (Tex. App.—Corpus Christi–Edinburg Apr. 20, 2015, no pet.) (mem. op.). An employee engages in a protected activity, by, among other things, filing an internal complaint, opposing a discriminatory practice, or making a charge of discrimination with the EEOC or TWC. *See Clark*, 544 S.W.3d at 786. "An adverse employment action in the context of a retaliation

claim is not limited to conduct that constitutes ultimate employment decisions."[8] *Douglas*, 544 S.W.3d at 494. "In other words, such conduct includes those actions that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* (quoting *Burlington N. & Santa Fe R.R. Co. v. White*, 548 U.S. 53, 64–68 (2006)).

Here, Castillo checked the box in her charge that she was retaliated against and generally states in her petition she is bringing claims for retaliation. In her charge, the only action in the factual statement that can be considered as a possible adverse action—i.e., a retaliatory act—is Castillo's transfer after she filed grievances complaining of Limon. *See Clark*, 544 S.W.3d at 786; *Douglas*, 544 S.W.3d at 494. Accordingly, the trial court had jurisdiction over a retaliation claim based on Castillo's transfer. However, as to the other alleged retaliatory actions in Castillo's petition that occurred after her charge was filed, we note that Castillo did not plead an action for hostile work environment based on retaliation.[9]

Nevertheless, to exhaust his or her administrative prerequisites, an employee is not required to file a new charge with the TWC for acts that are allegedly in retaliation to

[8] Generally, ultimate employment decisions involve hiring, granting leave, discharging, promoting, and compensation, but not events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee—anything which might jeopardize employment in the future. *Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 900 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

[9] The Fifth Circuit has not recognized a retaliatory hostile work environment cause of action. *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 741 n.5 (5th Cir. 2017) (citing *Bryan v. Chertoff*, 217 Fed. Appx. 289, 293 (5th Cir. 2007)); *see Hamic v. Harris Cty. W.C. & I.D. No. 36*, 184 Fed. Appx. 442, 447 (5th Cir. 2006) (per curiam) ("[R]etaliation is, by definition, a discrete act, not a pattern of behavior."). The twelve other circuits have. *Gowski v. Peake*, 682 F.3d 1299, 1311 (11th Cir. 2012) (collecting cases); *Bryan*, 217 Fed. Appx. at 293 n.3 (collecting cases). We have previously stated that an employee could invoke the continuing violation doctrine to raise a fact issue as to whether the ongoing retaliation created a hostile work environment. *Tex. Youth Comm'n-Evins Regional Juvenile Ctr. v. Garza*, No. 13-08-00527-CV, 2009 WL 1238582, at *9 (Tex. App.—Corpus Christi–Edinburg May 7, 2009, no pet.) (mem. op.).

the previous filing of an administrative charge. *See Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981); *Douglas*, 544 S.W.3d at 499 ("Under *Gupta*, the plaintiff is allowed to raise a new claim of retaliation in the district court when it grows out of an administrative charge that is properly before the court."); *see, e.g.*, *Tex. Dep't of Transp. v. Esters*, 343 S.W.3d 226, 230–31 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("[U]nder both state and federal law, courts have held that a claim of retaliation for filing a charge of discrimination is sufficiently related to the charge of discrimination to exhaust remedies for the retaliation claim, even though the charge contains no reference to the alleged retaliation."). "In other words, retaliation that occurs in response to the filing of an administrative charge can be included in the lawsuit without filing a new charge alleging retaliation." *Douglas*, 544 S.W.3d at 499.[10] Therefore, the trial court also had jurisdiction over Castillo's claims that she was retaliated against, in response to her filing of an administrative charge, by the subsequent discrete adverse actions alleged in her petition.

4. Summary

We sustain DISD's issue in part and overrule it in part. The trial court had jurisdiction over Castillo's claim for age discrimination based on her transfer and her retaliation claims based on adverse actions taken in response to Castillo's administrative

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[10] The Houston Fourteenth Court of Appeals noted:

> It is the nature of retaliation claims that they arise after the filing of the EEOC charge. Requiring prior resort to the EEOC would mean that two charges would have been filed in a retaliation case[,] a double filing that would serve no purpose except create additional procedural technicalities when a single filing would comply with the intent of Title VII. We are reluctant to erect a needless procedural barrier to the private claimant under Title VII, especially since the EEOC relies largely upon the private lawsuit to obtain the goals of Title VII. Intertwined with this practical reason for our holding is a strong policy justification. Eliminating the needless procedural barrier will deter employers from attempting to discourage employees from exercising their rights under Title VII.

Metro. Transit Auth. of Harris Cty. v. Douglas, 544 S.W.3d 486, 492 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (quoting *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981)).

complaints. The trial court did not have jurisdiction over Castillo's claim for sexual harassment, hostile work environment caused by sex discrimination, and any other sex discrimination alleged in her petition that occurred after Castillo's charge was filed. Likewise, the trial court did not have jurisdiction over Castillo's claims for age discrimination, if any, based on acts alleged in her petition that occurred after she filed her charge.

III. CONCLUSION

We reverse the trial court's denial of DISD's plea to the jurisdiction over Castillo's claim for sex discrimination and "sexual harassment/hostile work environment" claim, and we render judgment dismissing those claims. We affirm the denial of DISD's plea to the jurisdiction over Castillo's claim for age discrimination when she was transferred to the Alternative Education Program and for Castillo's claims of retaliation based on her filing grievances or a charge with TWC.

DORI CONTRERAS
Chief Justice

Delivered and filed the
13th day of August, 2020.