NUMBER 13-19-00222-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

SOUTH TEXAS COLLEGE, **Appellant,**

v.

CYNTHIA V. ARRIOLA, **Appellee.**

On appeal from the 370th District Court of Hidalgo County, Texas.

OPINION

Before Chief Justice Contreras and Justices Hinojosa and Silva
Opinion by Justice Hinojosa

Appellee Cynthia V. Arriola filed an employment discrimination claim pursuant to the Texas Commission on Human Rights Act (TCHRA)[1] against appellant South Texas

[1] The Texas Commission on Human Rights has been replaced with the Texas Workforce Commission Civil Rights Division. *See* TEX. LAB. CODE ANN. § 21.0015. However, Texas courts continue to refer to Chapter 21 of the labor code as the Texas Commission on Human Rights Act. *See, e.g., Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 798 n.1 (Tex. 2010).

College (STC). *See* TEX. LAB. CODE ANN. §§ 21.001–.556. STC appeals the trial court's interlocutory order denying its plea to the jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8). In one issue, STC argues that the trial court lacked subject matter jurisdiction because Arriola failed to plead a claim under the TCHRA as necessary to waive STC's governmental immunity. We affirm.

I. BACKGROUND

Arriola filed an employment discrimination complaint with the Texas Workforce Commission (TWC) claiming that she was unfairly disciplined and ultimately terminated by STC. *See* TEX. LAB. CODE ANN. § 21.201. The TWC sent Arriola a notice stating that it was dismissing her claim and would not be drafting a charge of discrimination on her behalf. *See id*. § 21.208. Arriola timely sued STC under the TCHRA.[2] *See id*. § 21.254. According to her petition, STC hired Arriola as an accounting group manager on March 2, 2009. Arriola informed her coworkers and supervisors that she was attempting to get pregnant following her marriage in July of 2017. Arriola claimed that her supervisors reacted negatively to this news and she was disciplined and harassed as a result. Arriola stated that she complained of her treatment to one of her supervisors on September 18, 2017. STC terminated Arriola's employment on October 30, 2017. Arriola alleged that STC discriminated against her due to her gender and that she suffered retaliation for engaging in a protected workplace activity. Arriola stated that she was treated less favorably than similarly situated employees—"none of whom are female or whom are female and in child-bearing age or attempting to get pregnant."

[2] Arriola also sued the TWC. However, the TWC is not a party to this appeal.

STC filed a plea to the jurisdiction, arguing that Arriola "failed to allege a cause of action for which there is a waiver of [STC's] sovereign immunity." STC acknowledged that the TCHRA prohibits employment discrimination on the basis of pregnancy, but it argued that there was no such protection for one who is "attempting to get pregnant." Arriola filed a response to the plea to the jurisdiction, arguing that she adequately pleaded a claim for gender discrimination based on her intended pregnancy. Following a non-evidentiary hearing, the trial court denied STC's plea to the jurisdiction. STC now appeals.

II. DISCUSSION

A. Standard of Review

A plea to the jurisdiction is a dilatory plea; its purpose is "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 over a pleaded cause of action. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Subject matter jurisdiction is a question of law; therefore, when the determinative facts are undisputed, we review the trial court's ruling on a plea to the jurisdiction de novo. *Id*. Governmental immunity[3] deprives a trial court of jurisdiction over lawsuits in which the State's political subdivisions have been sued unless immunity is waived by the Legislature. *Id*.; *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d

[3] Governmental immunity is a common law doctrine protecting governmental entities from suit, similar to sovereign immunity. *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 57–58 (Tex. 2011). While sovereign immunity protects the State and its various agencies from suit, governmental immunity protects the State's political subdivisions, such as cities, counties, school districts, and university systems, from suit. *See id*. As a political subdivision, STC is generally protected from suit by governmental immunity. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(B); TEX. EDUC. CODE ANN. § 130.199; *see also S. Tex. Coll. v. Roberson*, No. 13-10-00561-CV, 2012 WL 506324, at *1 (Tex. App.—Corpus Christi–Edinburg Feb. 16, 2012, no pet.) (mem. op.).

629, 636 (Tex. 2012). Therefore, governmental immunity is properly asserted in a plea to the jurisdiction. *Miranda*, 133 S.W.3d at 225–26.

A plaintiff has the burden to affirmatively demonstrate the trial court's jurisdiction, which encompasses the burden of establishing a waiver of a governmental entity's immunity from suit. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). "When a defendant challenges jurisdiction, a court 'is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised.'" *Id*. (quoting *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555). This is true even when the jurisdictional issue intertwines with the merits of the case. *Id*. When, as here, a jurisdictional plea challenges the pleadings, we determine if the plaintiff has alleged facts affirmatively demonstrating subject-matter jurisdiction. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). In doing so, "[w]e construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent." *Miranda*, 133 S.W.3d at 226.

B. Applicable Law

The TCHRA prohibits discrimination in employment based on "race, color, disability, religion, sex, national origin, or age." TEX. LAB. CODE ANN. § 21.051. Sex discrimination, as defined by the TCHRA, includes "discrimination because of or on the basis of pregnancy, childbirth, or a related medical condition." *Id*. § 21.106(a). One express purpose of the TCHRA is to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments." *Id*. § 21.001(1); *NME Hospitals, Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999). Therefore, when analyzing

a claim brought under the TCHRA, we may look to cases interpreting the federal statute. *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 446 (Tex. 2004); *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001); *Anderson v. Houston Cmty. Coll. Sys.*, 458 S.W.3d 633, 643 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

The TCHRA waives immunity from suit when the plaintiff states a claim for conduct that would violate the TCHRA. *Garcia*, 372 S.W.3d at 637. Where only circumstantial evidence is available, courts examine a discrimination claim by utilizing the burden-shifting paradigm established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973). *Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 433 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). Under this framework, the plaintiff must first establish a prima facie case of discrimination, which requires that a plaintiff show the following: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the job she held; and (4) she was replaced by someone not within her protected class. *Id*. at 434.

If the plaintiff establishes a prima facie case, then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* If the employer does that, the burden then shifts back to the plaintiff to show that the employer's reason was a pretext for discrimination. *Id*. at 435. "All elements of a TCHRA circumstantial-evidence claim are jurisdictional" and may be challenged in a plea to the jurisdiction. *Clark*, 544 S.W.3d at 783. When "jurisdictional evidence rebuts the prima facie case, the entire *McDonnell Douglas* framework is fully implicated, and sufficient evidence of pretext and causation must exist to survive the jurisdictional plea." *Id*.

C. Analysis

STC's jurisdictional challenge is limited solely to whether Arriola has pleaded a prima facie claim of discrimination by demonstrating that she is a member of a protected class. STC argues that women "only *attempting* to get pregnant" are not a protected class under the TCHRA. Arriola responds by citing federal cases holding that women who have expressed an intent to get pregnant are protected from discrimination under the analogous Title VII provision. STC has cited no contrary authority.

The issue presented in this case is one of first impression for Texas courts. The parties have cited no controlling authority, nor have we found any, addressing whether employees who have expressed an intent to become pregnant are protected from discrimination under the TCHRA.[4] Therefore, we look to the analogous Title VII provision and corresponding case law for guidance. *See Zeltwanger*, 144 S.W.3d at 446.

The Pregnancy Discrimination Act (PDA) amended Title VII to explicitly provide that discrimination on the basis of pregnancy constitutes sex discrimination. *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 286 n. 19 (1987); *see* 42 U.S.C.A § 2000e(k). Like the TCHRA, Title VII prohibits discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions[.]" 42 U.S.C.A. § 2000e(k). The United States Supreme Court interpreted the PDA as prohibiting an employer from discriminating against a woman "because of her capacity to become pregnant." *Int'l Union, United Auto.,*

[4] At least one Texas court has interpreted the TCHRA to prohibit discrimination against women who have had a recent pregnancy. *See KIPP, Inc. v. Whitehead*, 446 S.W.3d 99, 108 (Tex. App.—Houston [1st Dist.] 2014, pet. denied), *disapproved of on other grounds by Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Tex. 2018) ("Women who were pregnant at, or very near the time of, an adverse employment action are members of the protected class, as are women who were on maternity leave, or who had recently returned to work at the time of the adverse action.").

Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187, 206 (1991); *see Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 469–70 (6th Cir. 2005). In *Johnson Controls*, the Supreme Court concluded that an employer's policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure violated the PDA. 499 U.S. at 200.

Of those that have addressed the issue, an overwhelming majority of federal courts have concluded that Title VII also prohibits discrimination against women who have expressed an intent to become pregnant. *See, e.g., Griffin v. Sisters of Saint Francis, Inc.*, 489 F.3d 838, 844 (7th Cir. 2007); *Kocak*, 400 F.3d at 470; *Walsh v. Nat'l Comput. Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003); *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996); *see also Ciocca v. Heidrick & Struggles*, No. CV 17-5222, 2020 WL 1550748, at *5 (E.D. Pa. Apr. 1, 2020); *Dantuono v. Davis Vision, Inc.*, No. 07-CV-2234 TCP ETB, 2009 WL 5196151, at *7 (E.D.N.Y. Dec. 29, 2009); *Batchelor v. Merck & Co.*, Inc., 651 F. Supp. 2d 818, 831 (N.D. Ind. 2008); *Poucher v. Automatic Data Processing, Inc.*, No. CIV. A. 3:98-CV2669P, 2000 WL 193619, at *4 (N.D. Tex. Feb. 17, 2000); *Jolley v. Phillips Educ. Grp. of Cent. Fla., Inc.*, No. 95-147-CIV-ORL-22, 1996 WL 529202, at *4 (M.D. Fla. July 3, 1996); *Cleese v. Hewlett-Packard Co.*, 911 F. Supp. 1312, 1318 (D. Or. 1995); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1401 (N.D. Ill. 1994); *but see, e.g., Panizzi v. City of Chi. Bd. of Educ.*, No. 07 C 846, 2007 WL 4233755, at *3 (N.D. Ill. Nov. 19, 2007); *Barnowe v. Kaiser Found. Health Plan of the Nw.*, No. CV 03-1672-BR, 2005 WL 1113855, at *4 (D. Or. May 4, 2005).

Pacourek is one of the first opinions adopting the majority position and has been cited often in other jurisdictions. 858 F. Supp. 1393. The *Pacourek* court held that the plaintiff stated a claim under the PDA when she alleged she was adversely treated because of her potential or intended pregnancy. *Id*. at 1402. The court explained its position as follows:

> The basic theory of the PDA may be simply stated: Only women can become pregnant; stereotypes based on pregnancy and related medical conditions have been a barrier to women's economic advancement; and classifications based on pregnancy and related medical conditions are never gender-neutral. Discrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is therefore illegal discrimination. It makes sense to conclude that the PDA was intended to cover a woman's intention or potential to become pregnant, because all that conclusion means is that discrimination against persons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law.

Id. at 1401. The court noted the following legislative history in support of its interpretation:

> Senator Harrison Williams, chief sponsor of the Senate bill leading to the PDA, stated in floor debate that "[b]ecause of their *capacity to become pregnant*, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement. . . . In some of these cases, the employer refused to consider women for particular types of jobs on the grounds that they *might become pregnant*." Senator Williams continued, "[T]he overall effect of discrimination against women because they *might become pregnant*, or do become pregnant, is to relegate women in general, and pregnant women in particular, to a second-class status. . . ." Representative Ronald Sarasin, a House bill manager, expressed a similar sentiment when he remarked that the PDA gives a woman "the right . . . to be financially and legally protected *before*, during, and after her pregnancy."

Id. (alterations in original) (citations omitted). Citing *Pacourek*, the United States District Court for the Northern District of Texas, Dallas Division, concluded that "the intent to become pregnant falls within the scope of protections afforded by Title VII." *Poucher*, 2000 WL 193619, at *4.

We find persuasive the rationale of those courts that have interpreted the PDA as prohibiting discrimination against women who have expressed an intent to become pregnant. *See Zeltwanger*, 144 S.W.3d at 446. Because the TCHRA is intended to "provide for the execution of the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments," TEX. LAB. CODE ANN. § 21.001(1), we conclude that the TCHRA's analogous provision affords the same protection. In the present case, Arriola alleged that her supervisors were aware that she was "attempting" to become pregnant and that she was unfairly disciplined and ultimately terminated for this reason. Therefore, Arriola has shown she is within a class of persons protected by the TCHRA. Having rejected the only jurisdictional challenge raised by STC, we conclude that the trial court did not err in denying STC's plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 226. We overrule STC's sole issue.

IV. CONCLUSION

We affirm the trial court's judgment.

LETICIA HINOJOSA
Justice

Delivered and filed on the
11th day of February, 2021.