# NUMBER 13-21-00136-CV

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI – EDINBURG

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**MONTE ALTO INDEPENDENT SCHOOL DISTRICT,** **Appellant,**

**v.**

**PATRICIA OROZCO,** **Appellee.**

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**On appeal from the County Court at Law No. 4 of Hidalgo County, Texas.**

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# MEMORANDUM OPINION

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

Appellant Monte Alto Independent School District (MAISD) challenges the trial court's denial of its plea to the jurisdiction in this employment discrimination case filed by appellee Patricia Orozco. By one issue, MAISD argues that the trial court lacks jurisdiction over the suit because Orozco failed to exhaust her administrative remedies prior to filing

suit. We reverse and render.

## I. BACKGROUND

Orozco was employed by MAISD, first as a paraprofessional and then as an educator, from October 2004 through early 2018. Orozco alleges that at some point "before the end of the [2017–2018] school year," she "was called in by [school principal,] [Alma Delia] Cerda to tell [Orozco] that [Orozco] would not be renewed."[1] On May 1, 2018, Orozco was hand-delivered a letter drafted by MAISD superintendent Richard Rivera. The letter stated that "[o]n April 24th, 2018, the [MAISD] Board of Trustees voted to propose[] nonrenewal of your employment contract for" ten specified reasons. The letter concluded:

> Attached is a copy of the District's DFBB (Local) policy regarding nonrenewal of term contracts.
>
> To request a hearing on the Board's proposed nonrenewal of your employment contract, you must submit a written request to the Board not later than the 15th day after the date you received this notice. The hearing will be conducted by the Board.
>
> If you do not request a hearing within 15 days of receiving this notice, the Board will vote to nonrenew your contract.
>
> Please direct questions regarding the proposed nonrenewal of your contract to the Superintendent.

On May 14, 2018, Orozco requested a hearing before MAISD's Board of Trustees (the Board) to reconsider the Board's April 24, 2018 vote. At the ensuing August 29, 2018 hearing, after considering the arguments of Orozco's counsel, the Board voted to "non-renew the employment contract of Patricia Orozco at the end of [the] 2017–2018 school

[1] Orozco documented principal Cerda's comments in her complaint to the Texas Workforce Commission.

year, as proposed on April 24, 2018."

On February 25, 2019, Orozco filed a formal charge of discrimination with the Texas Workforce Commission—Civil Rights Division (TWC). The discrimination charge form required Orozco to check the boxes next to all bases of discrimination she was alleging. Orozco checked the boxes next to age, disability, and retaliation. The form also prompted Orozco to fill in the earliest and latest dates of discrimination. Orozco filled in "08/2016" for the earliest and "08/29/18" for the latest, and she did not check the box indicating the discrimination was a "continuing action." In a field requesting the narrative of "Particulars," Orozco provided a lengthy depiction of myriad alleged discriminatory events. The events, which Orozco believes stem in part from her 2012 systemic lupus erythematosus (SLE) diagnosis, include, among other things: instances of belittlement and ridicule; being asked to perform tasks detrimental to her health; being denied the ability to tutor new students; being denied access to a handicap parking spot; being chastised for using a restroom closest to her classroom; being reassigned to teach a different age group and moved to a different building; having her school supplies and belongings scattered across the building; being retaliated against for filing grievances against various MAISD employees; and having her contract nonrenewed.

On December 10, 2019, Orozco received a "Notice of Dismissal and Right to File Civil Action" letter from TWC. On February 10, 2020, Orozco filed suit alleging causes of action for age discrimination, disability discrimination, and retaliation. On March 6, 2020, MAISD filed its original answer, generally denying Orozco's claims and asserting affirmative defenses. On August 3, 2020, MAISD filed its plea to the jurisdiction arguing

that "[Orozco] did not file her charge of discrimination within 180 days as required by the Texas Labor Code and therefore [the trial court] is without jurisdiction because plaintiff failed to trigger a waiver of defendant's sovereign immunity." *See* TEX. LAB. CODE ANN. § 21.202(a). MAISD argued that the 180-day clock to file a charge with TWC began on May 1, 2018, when Orozco received notice of the Board's proposed nonrenewal of her contract. On January 8, 2021, Orozco filed her response to MAISD's plea to the jurisdiction, arguing that her claim is not barred as it is subject to the "continuing violation doctrine." Unstated but implied in her response, and clarified in her brief on appeal, Orozco contends that the relevant date from which to count 180 days for purposes of filing a claim with TWC was August 29, 2018—the date the Board finalized its earlier April 24, 2018 nonrenewal decision.

On January 28, 2021, the trial court heard arguments on MAISD's plea to the jurisdiction. On April 20, 2021, the trial court issued an order denying MAISD's plea to the jurisdiction. This interlocutory appeal by MAISD 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, MAISD argues that Orozco 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 considering 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. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016) (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004)).

If the plea to the jurisdiction challenges the pleadings, we liberally construe the pleadings to determine if the plaintiff has "alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Miranda*, 133 S.W.3d at 226. If the plea to the jurisdiction challenges the existence of jurisdictional facts, "we consider relevant evidence submitted by the parties to determine if a fact issue exists." *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632–33 (Tex. 2015). "We take as true all evidence favorable to the nonmovant, indulge every reasonable inference, and resolve any doubts in the nonmovant's favor." *Id.* "If the evidence creates a fact question regarding jurisdiction, the plea must be denied pending resolution of the fact issue by the fact finder." *Id.* "If the evidence fails to raise a question of fact, however, the plea to the jurisdiction must be granted as a matter of law." *Id.*

**B. Applicable Law**

The Texas Commission on Human Rights Act (TCHRA) prohibits, *inter alia*, age and disability discrimination and retaliation by employers. *See* TEX. LAB. CODE ANN. §§ 21.001, 21.051, 21.055. In particular, § 21.051 of the labor code states, "An employer commits an unlawful employment practice if because of . . . disability . . . or age the

employer . . . discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions, or privileges of employment[.]" *Id.* § 21.051(1). 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." *Id.* § 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).

"Governmental units, including school districts, are immune from suit unless the [S]tate consents." *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). "The TCHRA waives immunity from suit only for statutory violations, which means the trial court lacks subject-matter jurisdiction over the dispute absent" a claim for conduct that actually violates the TCHRA. *Id.* at 763. Moreover, the waiver of immunity applies only after the plaintiff has exhausted his or her administrative remedies. *See City of Waco v. Lopez*, 259 S.W.3d 147, 149, 154 (Tex. 2008); *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 446 (Tex. 2004). 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(a); *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.); *Rice v. Russell–Stanley, L.P.*, 131 S.W.3d 510, 513 (Tex. App.—Waco 2004, pet. denied); *see* TEX. LAB. CODE ANN. §§ 21.208, 21.252. The right-to-sue letter, simultaneously, ends TWC's exclusive jurisdiction over the matter. *Marquez*, 380 S.W.3d at 341–42; *Rice*, 131 S.W.3d at 513.

Because the TCHRA is modeled after federal civil rights law, we may look to analogous federal precedent for our guidance. *Tex. Dep't of Transp. v. Lara*, 625 S.W.3d 46, 58 (2021) (citing *Clark*, 544 S.W.3d at 782); *see also 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.

The Texas Legislature has mandated that all statutory prerequisites to suit are jurisdictional requirements in suits against governmental entities. TEX. LAB. CODE ANN. § 311.034; *see Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 510–11 (Tex. 2012); *Metro. Transit Auth. of Harris Cnty. v. Douglas*, 544 S.W.3d 486, 492 (Tex. App.—Houston [14th Dist.] 2018, pet. denied). 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 form, 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 applies to hostile work environment claims. *See Morgan*, 536 U.S. at 122; *Bartosh*, 259 S.W.3d at 324; *see also Pharr–San Juan–Alamo Indep. Sch. Dist. v. Lozano*, No. 13–16–00408–CV, 2018 WL 655527, at *4 (Tex. App.—Corpus Christi–Edinburg Jan. 31, 2018, pet. filed) (mem. op.) ("[A] claim of hostile work environment would be the type of indiscrete employment practice that constitutes a continuing violation."). That is because "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify." *Morgan*, 536 U.S. at 114. But "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." *Id.* at 115. In the context of hostile work environment claims, "[t]he 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* The continuing violation doctrine, therefore, 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 Prince-Rivers v. Fed. Express Ground*, 731 F. App'x 298, 300 (5th Cir. 2018). "When such 'continuing violation' discrimination occurs, the 180-day filing clock does not begin to run 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 (quoting *Wal-Mart Stores, Inc.*, 979 S.W.2d at 42); *see Univ. of Tex.–Pan Am. v. De Los Santos*, 997 S.W.2d 817, 820 (Tex. App.—Corpus Christi–Edinburg 1999, no pet.).

Discrete acts, however, "are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Morgan*, 536 U.S. at 113. A plaintiff cannot "use a termination that [falls] within the limitations period to pull in the time-barred discriminatory act. Nor could a time-barred act justify filing a charge concerning a termination that was not independently discriminatory." *Id.* (citing *Del. State Coll. v. Ricks*, 449 U.S. 250, 257 (1980)).

**C. Analysis**

The record is void of evidence indicating acts of discrimination or harassment between Orozco's May 1, 2018 notice of proposed nonrenewal and the Board's August 29, 2018 final decision. Because a discrete act cannot "pull in" time-barred claims, *see Morgan*, 536 U.S. at 113, the only potential claim that falls within 180 days of her February 25, 2019 filing of a formal charge with TWC would be Orozco's discrimination claim based on the Board's August 29, 2018 decision. Thus, as the parties correctly discern, the key inquiry in this case is whether the 180-day countdown for purposes of filing a claim with TWC began on May 1, 2018, when Orozco was notified of her proposed nonrenewal, or August 29, 2018, when the Board voted to finalize its nonrenewal decision.[2] Orozco

[2] While Orozco was also on notice given Cerda's comments to Orozco "before the end of the school year" about the nonrenewal of Orozco's contract, the exact date of the duo's conversation is not revealed in the record.

argues that the Board's August 29, 2018 decision following the hearing she requested on her proposed nonrenewal constituted "a new vote," and, thus, a new discrete discriminatory act. We disagree.

In *Reyes v. San Felipe Del Rio Consol. ISD*, the San Antonio court considered the exact issue relevant in this case—whether, for purposes of filing a charge with TWC, the 180-day clock begins upon notice of the Board's proposed nonrenewal or the Board's decision following a hearing on that proposal. *Reyes v. San Felipe Del Rio Consol. ISD*, No. 04-17-00488-CV, 2018 WL 1176487, at *1 (Tex. App.—San Antonio Mar. 7, 2018, no pet.) (mem. op.). Responding to appellant's argument that the initial notification was a mere "proposal," and, thus, not a discrete discriminatory action, the court in *Reyes* stated:

> In order to place the Board's use of the term "proposal" in the August 29, 2011 letter in its appropriate context, we must consider the provisions of the Texas Education Code governing the termination of a term contract by a board of trustees. Under section 21.211 of the Texas Education Code, a board of trustees may terminate a term contract and discharge a teacher at any time for good cause as determined by the board. TEX. EDUC. CODE ANN. § 21.211(a). The teacher may request a hearing before a hearing examiner assigned by the Commissioner of Education "after receiving notice of the *proposed* decision to terminate the teacher's continuing contract." *Id.* at § 21.251(a)(1) (emphasis added). The teacher must file a written request for such a hearing with the Commissioner "not later than the 15th day after the date the teacher receives written notice of the *proposed* action." *Id.* at § 21.253 (emphasis added). The hearing examiner conducts a hearing and makes a written recommendation that the board of trustees considers and either adopts or rejects. *Id.* at §§ 21.255–21.259. The teacher may then appeal the board of trustees' decision to the Commissioner. *Id.* at § 21.301. The Commissioner may not substitute his judgment for that of the board of trustees "unless the decision was arbitrary, capricious, or unlawful or is not supported by substantial evidence." *Id.* at § 21.303(a). The teacher may then appeal the Commissioner's decision to a district court, which cannot reverse the Commissioner's decision "unless the decision was not supported by substantial evidence or unless the commissioner's conclusions of law are erroneous." *Id.* at § 21.307(a)(1), (f).

> The Board's August 29, 2011 letter [of proposed termination] served two purposes. First, it notified Reyes of the Board's decision to adopt the superintendent's proposal to terminate her. Second, it informed Reyes of her right to request a hearing by a hearings examiner. Based on the foregoing statutory provisions governing the administrative review process applicable to the Board's decision to terminate Reyes's employment, we hold the Board's use of the term "proposal" was based on the use of that term in sections 21.251(a)(1) and 21.253 of the Texas Labor Code. Therefore, we must next consider what effect Reyes's invocation of the administrative review process has on the 180–day limitations period.

*Id.* at *2–3.[3] In other words, per the education code, a "proposed nonrenewal" acts as a notification of the Board's decision of nonrenewal, which may or may not be reconsidered through the relevant hearings or administrative review process if the educator seeks such a review. *Reyes*, 2018 WL 1176487, at *1–2. We find the San Antonio court's analysis persuasive.

The United States Supreme Court has held that "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods." *Ricks*, 449 U.S. at 261; *see also Allen v. Cnty of Galveston, Tex.*, 352 Fed. App'x 937, 939 (5th Cir. 2009) (per curiam) (same). An unlawful

[3] We recognize and note that the hearing process in *Reyes* proceeded slightly differently. *See Reyes v. San Felipe Del Rio Consol. ISD*, No. 04-17-00488-CV, 2018 WL 1176487, at *1 (Tex. App.—San Antonio Mar. 7, 2018, no pet.) (mem. op.). Whereas, in this case, Orozco's hearing was before the Board itself, in *Reyes*, the hearing was held before a "hearing examiner" under a separate subchapter of the education code. *Id.*; *see* TEX. EDUC. CODE ANN. §§ 21.251–.261. The Board subsequently reviewed and adopted the examiner's conclusions. *Reyes*, 2018 WL 1176487, at *1. The principle, however, remains appropriate under the relevant subchapter in this case. *See* TEX. EDUC. CODE ANN. §§ 21.207–.213. Under § 21.211, "[t]he board of trustees may terminate a term contract and discharge a teacher at any time for: (1) good cause as determined by the board[.]" *Id.* § 21.211(a). "Not later than the 10th day before the last day of instruction in a school year, the [Board] shall notify in writing each teacher whose contract is about to expire whether the [B]oard proposes to renew or not renew the contract." *Id.* § 21.206. "If the teacher desires a hearing after receiving notice of the proposed nonrenewal, the teacher shall notify the board of trustees in writing not later than the 15th day after the date the teacher receives hand delivery of the notice of the proposed action[.]" *Id.* § 21.207(a). "The board shall provide for a hearing to be held not later than the 15th day after the date the board receives the request for a hearing unless the parties agree in writing to a different date." *Id.* The Board may provide a hearing by utilizing the procedures set forth under Subchapter F of the code. *Id.* § 21.207(b). Subchapter F allows for use of a hearing examiner. *Id.* §§ 21.251–.261.

employment practice "occur[s]" "when a discriminatory employment decision is made—not when the effects of that decision become manifest in later events." *Chatha*, 381 S.W.3d at 503; *see* TEX. LAB. CODE ANN. § 21.202; *see also Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 493 (Tex. 1996) (per curiam) (the 180-day limitations period in the TCHRA begins "when the employee is informed of the allegedly discriminatory employment decision, not when that decision comes to fruition."); *City of El Paso v. Granados*, 334 S.W.3d 407, 411 (Tex. App.— El Paso 2011, no pet.) (holding that the 180-day period began when employee was informed of decision to terminate not when employee exhausted Civil Service Commission appeals process); *see also Reyes*, 2018 WL 1176487, at *2 (holding that the 180-day filing clock began when public school teacher was informed of the proposed nonrenewal of her contract, not after the Board of Trustees' final decision following her subsequent appeal).

The Board made its allegedly discriminatory decision on April 24, 2018, by approving the proposed nonrenewal of Orozco's contract "as recommended by the Superintendent." Orozco was informed of that decision on May 1, 2018. While Orozco requested a hearing on the Board's decision, the pendency of the hearing and the Board's decision on reconsideration did not toll the limitations period for purposes of filing with TWC to August 29, 2018. *See Granados*, 334 S.W.3d at 411; *Ricks*, 449 U.S. at 256–57; *see also Allen*, 352 Fed. App'x at 939; *Reyes*, 2018 WL 1176487, at *1. The 180-day period began to run when Orozco was notified on May 1, 2018, of the Board's April 24, 2018 vote on the proposed nonrenewal of her contract. *See Reyes*, 2018 WL 1176487, at *2; *Chatha*, 381 S.W.3d at 503; *Ricks*, 449 U.S. at 256–57; *Granados*, 334 S.W.3d at

411. Consequently, the date by which Orozco was required to file a claim with TWC was October 28, 2018—180 days after May 1, 2018.

Because Orozco filed her charge with TWC on February 25, 2019, and not by October 28, 2018, her charge was untimely, and her claims in the underlying suit are jurisdictionally barred. *See Chatha*, 381 S.W.3d at 511–12. Accordingly, the trial court erred in denying MAISD's plea to the jurisdiction. *See Suarez*, 465 S.W.3d at 632–33. We sustain MAISD's sole issue.

## III. CONCLUSION

We reverse the trial court's denial of MAISD's plea to the jurisdiction and render judgment dismissing the suit.

DORI CONTRERAS
Chief Justice

Delivered and filed on the
4th day of November, 2021.