Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00488-CV

Denise **REYES**,
Appellant

v.

SAN FELIPE DEL RIO CONSOLIDATED ISD,
Appellee

From the 83rd Judicial District Court, Val Verde County, Texas
Trial Court No. 31173
Honorable Stephen B. Ables, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: March 7, 2018

AFFIRMED

Denise Reyes sued San Felipe Del Rio Consolidated ISD alleging violations of the Texas Commission on Human Rights Act. Specifically, Reyes alleged she was terminated from her employment based on her national origin and gender and in retaliation for complaining about sexual harassment. Reyes appeals the trial court's order granting the District's plea to the jurisdiction. We affirm.

BACKGROUND

On April 11, 2011, Reyes was placed on paid administrative leave while Dr. Patricia McNamara, the District's executive director of human resources, investigated complaints that were made about her. After a four-month investigation, the District's superintendent recommended to the District's Board of Trustees that Reyes be terminated based on McNamara's investigation and findings. The Board of Trustees accepted the superintendent's recommendation proposing the termination of Reyes's employment contract and notified Reyes in writing on August 29, 2011. The letter referred to the Board's decision as a proposal to terminate Reyes's employment and informed Reyes of her right to request an administrative hearing by filing a written request with the Commissioner of Education.

On September 13, 2011, Reyes requested an administrative hearing. After a three-day hearing in December of 2011, the hearing examiner also recommended that Reyes be terminated for good cause and supported her decision with findings of fact and conclusions of law. On January 11, 2012, the Board of Trustees met to consider the hearing examiner's recommendation and adopted her recommendation, findings, and conclusions. By letter dated January 18, 2012, Reyes was informed of the Board's decision and that her employment was terminated effective January 11, 2012.

On May 23, 2012, Reyes filed a charge of discrimination with the Texas Workforce Commission, and the Commission issued a notice of right to file suit. Thereafter, Reyes filed the underlying lawsuit, alleging she was terminated from her employment based on her national origin and gender and in retaliation for complaining about sexual harassment.

The District filed a plea to the jurisdiction and alternative motions for traditional and no evidence summary judgment. In its plea to the jurisdiction, the District asserted Reyes failed to file her charge with the Commission within 180 days of the alleged unlawful employment practice.

The trial court granted the plea to the jurisdiction and dismissed Reyes's claims for want of jurisdiction. Reyes appeals.[1]

STANDARD OF REVIEW

"Whether a court has subject matter jurisdiction is a question of law, properly asserted in a plea to the jurisdiction." *Sampson v. Univ. of Texas at Austin*, 500 S.W.3d 380, 384 (Tex. 2016). We review a trial court's ruling on a plea to the jurisdiction de novo. *Id*.

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." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). If the plea to the jurisdiction challenges the existence of jurisdictional facts, "we consider 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*.

[1] Although Reyes also briefs the grounds raised in the District's alternative motions for summary judgment, the trial court's order reads:

> Pending before the Court is Defendant San Felipe Del Rio Consolidated Independent School District's Plea to the Jurisdiction and, Alternatively, Traditional and No-Evidence Motions for Summary Judgment. The Court, having considered the Plea, and upon argument of counsel, review of the pleadings and evidence, and consideration of all matters related thereto, is of the opinion that the Plea to the Jurisdiction should be **GRANTED**.
>
> **IT IS, THEREFORE, ORDERED** that all of Plaintiff Denise Reyes's causes of action filed in this proceeding, asserting claims against Defendant San Felipe Del Rio Consolidated Independent School District under Chapter 21 of the Texas Labor Code Act, are **DISMISSED WITH PREJUDICE** for want of jurisdiction.

180-DAY LIMITATIONS PERIOD

The Texas Commission on Human Rights Act (TCHRA) requires a plaintiff to file an administrative complaint with the Texas Workforce Commission "not later than the 180th day after the date the alleged unlawful employment practice occurred." TEX. LAB. CODE ANN. § 21.202(a) (West 2015). The 180-day limitations period, "while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Del. State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980). "Th[e] time limit is mandatory and jurisdictional." *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996). If the complaint is against a governmental entity, a plaintiff's failure to adhere to the 180-day filing requirement will jurisdictionally bar a subsequent lawsuit. *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 511–14 (Tex. 2012).

ANALYSIS

Reyes contends the trial court erred in granting the District's plea to the jurisdiction because the unlawful employment practice occurred when she was notified on January 18, 2012, that she was terminated effective January 11, 2012. The District contends the unlawful employment practice occurred on August 29, 2011, when Reyes was notified that the Board accepted the superintendent's recommendation to propose the termination of her employment contract. Reyes counters the August 29, 2011 letter did not trigger the 180-day limitations period because the letter referred to a "proposal to terminate" and not her actual termination.

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) (West 2012). 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 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.

An unlawful employment practice "occurs" for purposes of section 21.202 "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. Thus, "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.'" *Id*. at 509 (quoting *Specialty Retailers, Inc.*, 933 S.W.2d at 493); *see also In re ArcelorMittal Vinton, Inc.*, 334 S.W.3d 347, 349 (Tex. App.—El Paso 2011, orig. proceeding) ("The date the allegedly discriminatory decision goes into effect, or the date on which the effect of such decision is realized by the employee, does not alter the commencement of the 180-day period."). "This is because the discriminatory employment decision is the practice made with discriminatory intent." *Chatha*, 381 S.W.3d at 509.

The United States Supreme Court has held "the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the [180-day] limitations period." *Ricks*, 449 U.S. at 261; *see also Allen v. Cty. of Galveston, Tex.*, 352 Fed. Appx. 937, 939 (5th Cir. 2009) (noting "limitation period is not tolled by the pendency of a grievance or other review process that may take place after the employee is informed of the adverse employment decision"). This court has recognized the holding in *Ricks*, asserting the 180-day period is "not stayed by the filing of an administrative appeal or grievance." *Alamo Cmty. Coll. Dist. v. Ryan*, No. 04-17-00196-CV, 2017 WL 4942858, at *3 (Tex. App.—San Antonio Nov. 1, 2017, no pet.) (mem. op.); *see also City of El Paso v. Granados*, 334 S.W.3d 407, 411 (Tex. App.—El Paso 2011, no pet.) (holding 180-day period began when employee was informed of decision to terminate not when employee exhausted Civil Service Commission appeals process); *Unkefer v. Tex. Youth Comm'n*, No. 2-06-466-CV, 2007 WL 1776042, at *3 (Tex. App.—Fort Worth June 21, 2007, no pet.) (holding 180-day period began when Texas Youth Commission employee

received notice of termination not when the TYC executive director rendered his final decision upholding her termination).[2]

Applying the foregoing precedent, the 180-day limitations period began to run in the instant case when Reyes received the Board's August 29, 2011 letter. Reyes's letter notifying the Commission of her request for a hearing pursuant to section 21.253 is dated September 13, 2011; therefore, the evidence conclusively establishes the 180-day period began on September 13, 2011 at the latest. Because Reyes filed her complaint with the Texas Workforce Commission more than 180 days after that date, her claims in the underlying suit were jurisdictionally barred. *Chatha*, 381 S.W.3d at 511-14. Accordingly, the trial court properly granted the District's plea to the jurisdiction.

CONCLUSION

The trial court's order is affirmed.

Sandee Bryan Marion, Chief Justice

[2] In her brief, Reyes cites *Green v. Brennan*, 136 S. Ct. 1769 (2016), to support her argument. In *Green*, however, the Court was addressing when the limitations period accrued for a constructive discharge claim and held the period began to run "when the employee gives notice of his resignation, not on the effective date of that resignation." 136 S. Ct. at 1782. In reaching that holding the Court cites *Ricks* as explaining "that an ordinary wrongful-discharge claim accrues—and the limitations period begins to run—when the employer notifies the employee he is fired, not on the last day of his employment." *Id*.