

Affirmed in Part and Reversed in Part and Remanded and Memorandum Opinion filed July 14, 2020.



In The

Fourteenth Court of Appeals

NO. 14-18-00591-CV

NORIS ROGERS, Appellant

V.

HOUSTON COMMUNITY COLLEGE, Appellee

**On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 17-DCV-240191**

MEMORANDUM OPINION

Appellant Noris Rogers appeals the trial court's final judgment granting appellee Houston Community College's (HCC) plea to the jurisdiction on appellant's breach of contract claim and no-evidence motion for summary judgment on appellant's discrimination claims. Appellant brings two issue on appeal. First, that the trial court erred in granting HCC's no-evidence motion for summary judgment on appellant's discrimination claims. Second, that the trial

court erred in granting HCC's plea to the jurisdiction. We affirm in part and reverse and remand in part.

I. NO-EVIDENCE SUMMARY JUDGMENT

Appellant filed a claim against HCC for discrimination under the Texas Commission on Human Rights Act (TCHRA) based on disability under section 21.105 of the Labor Code. The trial court granted HCC's no-evidence summary judgment motion. On appeal, appellant contends that HCC's motion lacked the required specificity for a no-evidence motion. Appellant complains that the elements listed by HCC in its motion are not elements of the claim he is asserting.

A. Legal Principles

We review a trial court's ruling on a summary judgment motion de novo. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). When a judgment does not recite the specific ground on which it is granted, summary judgment will be affirmed on appeal if any theory advanced in the motion is meritorious. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995). In a no-evidence motion for summary judgment, the movant contends that no evidence supports one or more essential elements of a claim for which the nonmovant would bear the burden of proof at trial. Tex. R. Civ. P. 166a(i); *Bradshaw*, 457 S.W.3d at 79. The trial court must grant the motion unless the nonmovant raises a genuine issue of material fact on each challenged element. Tex. R. Civ. P. 166a(i); *Bradshaw*, 457 S.W.3d at 79.

It is well settled that a trial court cannot grant a summary judgment motion on grounds not presented in the motion. *Timpte Inds., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). In a no-evidence summary judgment, a party is required to identify the grounds for the motion. Tex. R. Civ. P. 166a(i); *Gish*, 286 S.W.3d at

310. The underlying purpose of this requirement is to provide the opposing party with adequate information to oppose the motion and define the issues for the purpose of summary judgment. *Id.* at 311. This is analogous to the “fair notice” pleading requirements in the Texas Rules of Civil Procedure. *Id.*

The Labor Code prohibits discrimination that occurs “because of or on the basis of a physical or mental condition that does not impair an individual’s ability to reasonably perform a job.” Tex. Labor Code § 21.105; *see also id.* § 21.051. To establish a prima facie case of discrimination based on disability, a plaintiff must show that the plaintiff (1) has a disability; (2) is qualified for the job; and (3) suffered an adverse employment decision because of the disability. *Donaldson v. Tex. Dept. of Aging & Disability Svcs.*, 495 S.W.3d 421, 436 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). Once the plaintiff makes the prima facie showing, the burden shifts to the employer to articulate a legitimate non-discriminatory reason for its differential treatment of the employee. *See Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 477 (Tex. 2001). The offer of a legitimate reason eliminates the presumption of discrimination created by the plaintiff’s prima facie showing. *Id.* The burden then shifts back to the plaintiff to show that the employer’s reason was a pretext for discrimination. *Id.*

B. Background

In his second amended petition, appellant alleged HCC discriminated against him due to his type II diabetes, chronic cervical spine disease, chronic low-back pain, chronic hepatitis C, and benign prostatic hypertrophy. Appellant contends that he was terminated because he was not able to perform carpentry work or general and electrical construction work due to his disabilities but that such work was not part of his employment duties.

HCC filed a no-evidence motion for summary judgment asserting there is no evidence that: (1) any non-protected class employees were treated differently; (2) there was a causal link between appellant's disability and the adverse action; or (3) HCC's non-discriminatory reasons for ending appellant's employment were mere pretext.

Appellant filed a response arguing that HCC failed to challenge any element for which appellant bore the burden of proof. Appellant also made numerous objections to the affidavit submitted with HCC's motion. Appellant attached HCC's discovery responses, emails, the course syllabi, excerpts from the EEOC case file, the class roster and a "certificate request form" to his response. Appellant did not attach an affidavit to attest to the facts that he alleged in the response.

After conducting a hearing, the trial court granted HCC's no-evidence motion for summary judgment without providing a basis for the decision.

C. Analysis

HCC did not challenge that appellant was disabled, or that he was qualified for the job. Instead, HCC argued that "there is no evidence . . . that shows that there was a causal link between [Appellant's] disability and the adverse employment action." Appellant argues that the no-evidence motion did not state any element of his TCHRA claim and that the elements identified are not "on-point." HCC contends that the "parties agree that a causal connection between the adverse employment decision and alleged disability is required" and argues that it explicitly stated in its no-evidence motion that there was no evidence of a causal link. Appellant contends that this argument is being raised for the first time on appeal.

We agree with HCC that the no-evidence motion gave fair notice to appellant that it was challenging the causation element of appellant’s claim. *See Gish*, 286 S.W.3d at 311. It was not a conclusory motion or general no-evidence challenge to an opponent’s case. *See id.* In addition to the argument that there is no-evidence of a causal link, HCC argued that appellant could not provide evidence “that ‘but for’ [appellant’s] disability, his employment would not have ended.” This recites the wrong standard of causation for appellant’s claim under the TCHRA. *See Toennies*, 47 S.W.3d at 479–80 (motivating factor is appropriate standard in TCHRA unlawful employment practice claims). However, HCC also stated that it sought no-evidence summary judgment because there was no causal link between appellant’s disability and the adverse employment action. HCC properly challenged the third element of appellant’s prima facie case—that he “suffered an adverse employment decision because of the disability.” There is no requirement that the challenges be made under separate paragraphs or headings. *See Tex. R. Civ. P. 166a(i)*. The arguments may be restated in different ways within the no-evidence motion so long as they provide fair notice and adequate information for opposing the motion. *See Gish*, 286 S.W. 3d at 310–11. “Although such a motion may be insufficient to give fair notice in a case involving a complex product or raising complicated issues . . . here the complaint was simple and straightforward.” *See id.* at 311. Similarly, in this case, the complaint regarding appellant’s discrimination case was simple and straightforward.

As a result, appellant bore the burden to bring forth some evidence that his disability was a motivating factor for his termination. *See Toennies*, 47 S.W.3d at 477, 480. If appellant cannot establish a prima facie case, then appellant cannot prevail on summary judgment. *See Remaley v. TA Operating LLC*, 561 S.W.3d 675, 680 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (upholding no-

evidence summary judgment when plaintiff failed to bring forth evidence of prima facie case of discrimination).

In his response, appellant stated that he would provide the trial court with evidence that raised a genuine issue of material fact on the elements challenged for establishing a prima facie case. However, appellant argued that the elements listed and challenged were not on point. As stated above, with regard to the causation challenge, we disagree. Appellant does not point to any evidence that would support the third element of his prima facie case for discrimination. While appellant alleged in his response that he was unlawfully terminated because he could not perform certain tasks due to his disability, appellant failed to attach any evidence supporting that statement. Appellant attached various documents to his response but does not make any argument as to how these attachments show that the adverse action taken was because of his disability.

HCC properly challenged appellant's discrimination claim in its no-evidence motion for summary judgment. Appellant did not bring forth any evidence to challenge HCC's motion.

We overrule appellant's first issue.

II. PLEA TO THE JURISDICTION

In his second amended petition, appellant alleged that he was employed by HCC as an adjunct electrical instructor "under a unilateral employment agreement, that was executed, approved and authorized" by the designees of the Chancellor and the College District Board of Trustees as defined in the Local Government Code. Appellant alleged that the documents related to his unilateral employment contract contain all the essential terms of the agreement and satisfy the requirements for the waiver of governmental immunity. Appellant stated that HCC

failed to pay his wages for job-related duties he carried out during his employment, including, planning, development, implementation of curriculum, hands-on activities, and lesson planning.

A. Legal Principles

Under the common-law doctrine of sovereign immunity, the state cannot be sued without its consent. *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). Sovereign immunity refers to the state's immunity from both suit and liability and protects the state and its divisions, while governmental immunity protects political subdivisions of the state, including counties, cities, and school districts. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). Governmental immunity from suit defeats a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2012).

Whether a trial court has subject matter jurisdiction is a question of law we review de novo. *Id.* at 228. A plea to the jurisdiction can challenge whether the plaintiff has sufficiently alleged facts that demonstrate the trial court's jurisdiction to hear the case, as well as challenge the existence of jurisdictional facts. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012).

When a plea to the jurisdiction challenges the pleadings, we look to whether the plaintiff has alleged facts that affirmatively demonstrate the trial court's jurisdiction to hear the case. *Id.* at 226. We liberally construe the pleadings in favor of jurisdiction, and we look to the plaintiff's intent, accepting as true the facts alleged. *Id.* at 226, 228. To prevail, the party asserting the plea must show that, even if the allegations in the pleadings are taken as true, there remains an incurable jurisdictional defect on the face of the pleadings depriving the trial court of jurisdiction. *Housing Auth. of City of Dallas v. Killingsworth*, 331 S.W.3d 806,

810 (Tex. App.—Dallas 2011, pet. denied) (citing *Concerned Cmty. Involved Dev., Inc. v. City of Houston*, 209 S.W.3d 666, 673 (Tex. App.—Houston [14th Dist.] 2006, pet denied)).

If a plea to the jurisdiction challenges the existence of jurisdictional facts, the court considers relevant evidence by the parties when necessary to resolve the jurisdictional issues raised. *Miranda*, 133 S.W.3d at 227. When reviewing the evidence, we must take as true all evidence in favor of the non-movant and indulge every reasonable inference and resolve any doubts in favor of the non-movant. *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009). The movant must assert the absence of subject matter jurisdiction and present conclusive proof that the trial court lacks subject matter jurisdiction. *Miranda*, 133 S.W.3d at 228. If the movant discharges this burden, then the nonmovant must present evidence sufficient to raise a material issue of fact regarding jurisdiction, or the plea will be sustained. *Id.* If the evidence creates a fact question regarding the jurisdictional issue, then the plea to the jurisdiction must be denied. *Id.* at 227–28. However, if the evidence is undisputed or fails to raise a fact question on the jurisdictional issue, then the court rules on the plea to the jurisdiction as a matter of law. *Id.* at 228.

Governmental immunity protects certain political subdivisions of the State, including public community colleges, from suit and liability. *See Hous. Cmty. Coll. v. HV BTW, L.P.*, 589 S.W.3d 204, 209 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.). The legislature waived immunity as to local government entities that enter into contracts for goods or services for the purposes of adjudicating claims for breach of contract. Tex. Loc. Gov’t Code §§ 271.151(2)(A), 271.152. There are five elements a contract must meet in order for it to be a contract subject to section 271.152’s waiver of immunity: “(1) the contract must be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to

the local government entity, and (5) be executed on behalf of the local government entity.” *City of Houston v. Williams*, 353 S.W.3d 128, 135 (Tex. 2011) (citing Tex. Loc. Gov’t Code § 271.151(2)).

B. Background

In its plea and supplemental plea to the jurisdiction, HCC alleged that it is immune from suit as a governmental entity. HCC argued that appellant did not have a written employment contract with HCC and that appellant’s allegations of such a contract were “without evidence or legal merit.” As evidence for its plea, HCC requested that the trial court take judicial notice of its policies and procedures in effect at the time of appellant’s employment. HCC’s alleged policies and procedures require the Board to authorize written contracts for a contractual employee before the employee is hired. Those employees that do not have written contracts authorized by the Board are considered employed “at-will and have no entitlement to continued employment.” HCC references and presumably quotes from the relevant Board policies in place at the time of appellant’s employment with HCC. However, no policies are attached to either the plea or supplemental plea to the jurisdiction. Instead, HCC requested that the trial court take judicial notice of such policies and provisions, and requests that this Court do so as well.¹

¹ The web address listed in the supplemental plea does not contain any of the policies mentioned in the supplemental plea. A further investigation into the website for HCC reflects HCC’s policies and procedures, but not the ones in place during appellant’s employment. HCC attaches the purported policies in the appendix to its brief on appeal, however, this court is not permitted to consider documents attached as appendices to briefs and must consider a case based solely upon the record filed. *WorldPeace v. Comm’n for Lawyer Discipline*, 183 S.W.3d 451, 465 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *see also Horie v. Law Offices of Art Dula*, 560 S.W.3d 425, 439–40 (Tex. App.—Houston [14th Dist.] 2018, no pet.). HCC also references the policies attached to its motion for summary judgment but has not provided any authority allowing this court to consider evidence not attached to its plea.

Appellant filed a response to the plea to the jurisdiction and attached six documents as exhibits, as well as an unsworn declaration. *See* Tex. Civ. Prac. & Rem Code § 132.001. Appellant contends that these documents, when combined, form his unilateral employment contract that was “executed by designees of the Chancellor within the meaning of section 271.152.”

C. Analysis

It is undisputed that appellant was employed part-time by HCC as an instructor. The question is whether a “contract” which meets the legal requirements to waive governmental immunity exists.

1. Appellant has alleged facts demonstrating jurisdiction.

Appellant’s second amended petition alleged that he entered into a “unilateral” contract with HCC that was “executed, approved, and authorized by several designees on the behalf of the Chancellor and the College District Board of Trustees as defined by Section 271.151(2)(A) and (3) of the Local Government Code.” Appellant alleged that there were multiple documents that, when taken together, formed his employment contract and defined the time of performance, the price to be paid, and the services rendered. Liberally construing the pleadings in favor of jurisdiction, looking to appellant’s intent, and accepting as true the facts alleged, HCC has failed to show that there remains an incurable jurisdictional defect on the face of the pleadings which would deprive the trial court of jurisdiction. *See Killingsworth*, 331 S.W.3d at 812 (“Here, Killingsworth marshaled a written employment contract and alleged that the contract was ‘properly executed,’ the DHA’s assertion that the manner in which the contract as approved violated TOMA does not equate to failure to properly execute the contract.”).

2. HCC did not present conclusive evidence of lack of jurisdiction.

HCC submitted its policies and procedures as evidence that appellant did not have a contract within the meaning of Chapter 271. Even if we considered the policies, they fail to negate appellant's contention that his alleged contract was executed as required under those policies. HCC points to its policy that all "employees who do not hold written employment contracts authorized by the Board are at-will" as proof that appellant was merely an at-will employee. However, this provision points out that some employees hold written contracts authorized by the Board, which is what appellant has alleged. HCC argues that the contract was not authorized by the Board but does not provide any evidence to support its argument. HCC did not provide any affidavits, Board meeting minutes, or any other documentation to conclusively show that the trial court lacked jurisdiction, *i.e.*, that the contract was not properly executed as alleged by appellant. HCC further argues that there are no executed documents by HCC's Chancellor and thus no contract, again citing to its policies. However, the policies provided by HCC specifically state that "Applicants . . . that require a written contract must be approved by the Chancellor *or designee* prior to beginning their employment" (emphasis added). The policies also require that the Chancellor designate such individuals in writing, but there is no indication of which individuals, at that time, were designated.

Even if we were to consider the policies, they do not provide conclusive evidence of a lack of jurisdiction. *See Miranda*, 133 S.W.3d at 228. Because HCC failed to bring forth conclusive evidence of a lack of jurisdiction, appellant was not required to bring forth evidence to raise a genuine issue of material fact. *See id.*

We sustain appellant's second issue.

III. CONCLUSION

We affirm the trial court's judgment in part on HCC's no-evidence motion for summary judgment as to appellant's discrimination claim. We reverse the trial court's judgment in part as to HCC's plea to the jurisdiction. We remand the cause to the trial court for further proceedings.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Zimmerer, and Spain.