Reversed and Remanded and filed September 21, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00584-CV

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FRANK L. VERNAGALLO, Appellant

V.

CONSTABLE GARY FREEMAN, CONSTABLE PRECINCT 2 AND HARRIS COUNTY, TEXAS, Appellees

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On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 98-31875

O P I N I O N

Appellant, Frank Vernagallo, appeals the granting of a motion to dismiss for want of jurisdiction in favor of the appellees, Constable Gary Freeman, Constable Precinct 2, and Harris County, Texas. The trial court dismissed the case because it determined that Vernagallo, after he was fired as a deputy with Constable Freeman, did not exhaust administrative remedies before filing suit. Concluding that Vernagallo did exhaust his administrative remedies, we reverse the trial court's dismissal and remand this case for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

Vernagallo originally sued appellees for retaliation under the Texas Whistleblower Act (the "Act").[1] *See* TEX. GOV'T CODE ANN. § 554.001- .006 (Vernon Supp. 2000). Appellees, in turn, alleged that, before suing under the Act, Vernagallo failed to exhaust or initiate the applicable grievance and appeals procedures. Subsequently, appellees filed a motion entitled, "Defendant's Motion for Summary Judgment or, in the Alternative, Motion to Dismiss for Want of Jurisdiction" on this ground. As noted, the trial court granted this motion, finding that Vernagallo failed to exhaust the administrative remedies available to him before filing the action.

Vernagallo worked as a deputy constable for appellees, Harris County Precinct 2 and Constable Gary Freeman. After discovering some acts he considered to be in violation of the department's policies and procedures, Vernagallo reported these violations to the appropriate law enforcement officers. Constable Freeman subsequently terminated Vernagallo, citing as the basis for his termination, incidents of misconduct uncovered from an internal affairs' investigation. Believing Freeman's reasons to be a pretext for his termination, Vernagallo called the Harris County Personnel Department and asked whether the Harris County Personnel Regulations were in effect when he was terminated. The personnel department employee informed Vernagallo that the Harris County regulations were in effect at that time, and that he should follow the regulations. Vernagallo also asked whether there was a grievance procedure for termination, and the employee informed him that no procedure existed. Additionally, the afternoon he was terminated, Vernagallo (the union steward), the union president, and three union attorneys, met with Constable Freeman to ask him to reconsider his decision to terminate Vernagallo. Constable Freeman did not change his mind.

DISCUSSION AND HOLDINGS

[1] The Act prohibits a state agency or local government from suspending, terminating, or otherwise discriminating against a public employee who in good faith reports a violation of law to an appropriate law enforcement agency. *See* TEX. GOV'T CODE ANN. § 554.002 (Vernon Supp. 2000).

In his sole point of error, Vernagallo argues that the trial court erred in granting appellees' motion because he exhausted his administrative remedies before he filed suit.[2] Additionally, Vernagallo argues that because confusion existed as to which administrative remedy applied to him, we should not penalize him, and should find that he exhausted his administrative remedies and filed his lawsuit timely. As we explain below, we agree that Vernagallo took sufficient action to exhaust or initiate his grievance procedures before filing suit.

The Standard of Review

Subject matter jurisdiction is determined by whether the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). In reviewing a dismissal for want of jurisdiction,[3] we construe the pleadings in favor of the plaintiff and look to the plaintiff's intent. *See id.* We must look solely to the allegations in the plaintiff's petition, and must

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[2] Prior to 1995, subsection (a) of the Texas Whistleblower Statute required an employee to "exhaust any applicable grievance or appeal procedures" before filing suit. *See* Act of May 22, 1993, 73rd Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 610 (amended 1995) (current version at TEX GOV'T CODE ANN. § 554.006 (Vernon Supp. 2000)). The current version of the statute provides that an employee must "initiate action under the grievance or appeal procedures" of the employing entity before filing suit. *See* TEX. GOV'T CODE ANN. § 554.006(a) (Vernon Supp. 2000). Here, the trial court's order granting summary judgment for appellees relied on the statute and caselaw before the 1995 amendment. However, the 1995 amendment did not change the legislative intent of the Act; the statute is designed to afford an employer an opportunity to correct its errors by resolving disputes before being subject to litigation, and the change to subsection (a) of the statute does not alter this intent. *See City of San Antonio v. Marin*, No. 04-99-00511, 2000 WL 177467, at *3 (Tex. App.—San Antonio 2000) (holding that the legislature's action in substituting the word "initiate" for the word "exhaust" has no effect on the implementation of the statute; the change clarifies that "exhaustion", in the literal sense of the word, is not required under the statute); *see also Harlandale Indep. Sch. Dist. v. Hernandez*, 994 S.W.2d 257, 258 n.1 (Tex. App.—San Antonio 1999, no pet.) (holding that the change in the statute did not alter the jurisdictional nature of the administrative process). Therefore, because the statute's amendment does not change our result, we will address appellant's point of error as written.

[3] Although appellees filed a motion entitled "Defendant's Motion for Summary Judgment or, in the Alternative, Motion to Dismiss for Want of Jurisdiction," we have construed it only as a plea to the jurisdiction because the motion attacks the court's jurisdiction to hear the case. *See State Bar v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980) (holding that we look to the substance of a pleading to determine its nature, not merely at the title given to it); *University of Houston v. Elthon*, 9 S.W.3d 351, 355 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that a pleading's substance is determined by what effect it will have on the proceeding if granted).

assume those allegations are correct. *See Texas Natural Resource and Conservation Comm'n v. White*, 13 S.W.3d 819, 822 (Tex. App.—Fort Worth 2000, no pet.).

Jurisdictional Prerequisites and Intent of the Act

When a party sues under a statutory cause of action, he must comply with the administrative prerequisites; they are jurisdictional. *See University of Texas Medical Branch at Galveston*, 6 S.W.3d at 774. As previously noted, before suing under the act, a public employee must initiate action under the employing state entity's grievance or appeal procedures relating to suspension or termination of employment. *See* TEX. GOV'T CODE ANN. § 554.006 (a). The employee must invoke the applicable grievance or appeal procedures not later than the ninetieth day after the date on which the violation occurred. *See* TEX. GOV'T CODE ANN. § 554.006 (b). If the employer does not render a decision within sixty days from the day the employee initiated the grievance, the employee may file suit against his employer. *See* TEX. GOV'T CODE ANN. § 554.006(d). Through these administrative prerequisites, the legislature intended that the governmental entity have an opportunity to correct its errors by resolving disputes before facing litigation. *See University of Texas Medical Branch at Galveston*, 6 S.W.3d at 774; *Gregg County v. Farrar*, 933 S.W.2d 769, 775 (Tex. App.—Austin 1996, no writ) (citing House Research Organization, Bill Analysis. Tex. H.B. 1405, 71st Leg., R.S. (1989)).

The Parties' Arguments and the Law Applied to this Case

Vernagallo argues that the trial court had jurisdiction over this case because he exhausted the administrative remedies of both Harris County and Precinct Two before filing suit. Vernagallo asserts that, because he was an employee of Harris County, the terms of his employment were governed by the provisions in the Harris County Personnel Regulations, which define grievance procedures for county employees. These regulations state that, "an individual may not file a grievance based upon his/her termination from employment."[4] During

[4] Although the Harris County manual states that a terminated individual may not file a grievance, we note that it also states that any employee may file a grievance if he claims he has been adversely affected by a violation of rules or specific laws. Additionally, the manual dictates that any ambiguity as to its meaning (continued...)

Vernagallo's employment, Constable Freeman gave Vernagallo a copy of the Harris County Personnel Regulations. Once terminated, Vernagallo spoke with an employee in the Harris County Personnel Department, who informed him that he was governed by the Harris County Manual, and that he did not have a grievance procedure for his termination. Vernagallo argues that because he had no further steps to take with Harris County, he exhausted his administrative remedies.

Vernagallo also contends that he exhausted the administrative remedies of Precinct Two. He states that he complied with Precinct Two's procedures because Constable Freeman waived the requirement of a written notice by letter when he met with Vernagallo and union leaders to discuss his termination. At this meeting, Vernagallo and union officials urged the constable to modify his decision to terminate Vernagallo.

As an alternative argument, Vernagallo claims that it was unclear which of the procedures - which conflicted with each other - applied to him. Vernagallo argues that, in the event we deem the Harris County and the Constable's provisions conflicting, we should look to certain caselaw to conclude that he exhausted his administrative remedies. He directs us to cases which stand for the proposition that when a grievance procedure is unclear, the Act's limitations will not bar a terminated employee's claim when, on or before the ninetieth day after termination, he has notified the employer that he is invoking his grievance procedure. These opinions specifically state:

> "when it is unclear whether an employer has a post-termination grievance procedure, or it is unclear what the grievance procedure is, . . . [if] the terminated employee, on or before the ninetieth day after the termination occurred, notifies the employer that he is invoking that employee's grievance procedure, informing that employer that it has 30 days in which to conclude the grievance procedure, that the terminated employee's claim is not barred by the statute's limitations provisions."

Upton County, Tex. v. Brown, 960 S.W.2d 808, 814 (Tex. App.—El Paso 1997, no pet.); *Beiser v. Tomball Hosp. Auth.*, 902 S.W.2d 721, 724 (Tex. App.—Houston [1st Dist.] 1995,

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[4] (...continued)
or interpretation should be resolved in favor of the public treasury and against the claimant.

writ denied). If we conclude that confusion existed as to which administrative remedies were applicable to him when he was terminated, Vernagallo urges us to look to these cases to deem his lawsuit timely filed.

On the other hand, Appellees argue that Vernagallo did not exhaust his administrative remedies because, as an employee of Precinct Two, he was governed by Constable Freeman's Manual of Departmental Rules, which defines internal affairs policies. Specifically, this manual states that, "every employee receiving disciplinary action has the right to appeal that decision and may do so, by letter, within ten days to the constable. (This notice must specifically state the reason for appeal)." Further, the manual defines "disciplinary action as reprimand, suspension, reduction in rank, or dismissal from the department." Vernagallo signed a written acknowledgment stating that he would abide by the manual's policies in performing his duties with Precinct Two.

We agree it appears that more than one grievance procedure was in place when Vernagallo was terminated; the Harris County and the Constable's manual both contained procedures relating to suspension and termination. Although we have previously held that Harris County does not have the authority to hire, discharge, or reinstate deputy constables, *Renken v. Harris County*, 808 S.W.2d 222, 225-26 (Tex. App.—Houston [14th Dist.] 1991, no writ), and that a constable's employing precinct manual would apply to that constable and proscribe his grievance and appeal procedures, Constable Freeman instructed his deputy constables that Harris County procedures governed them. Freeman gave Vernagallo a copy of the Harris County manual during his employment, and he gave his constables a memo reminding them that Harris County policy and state law applied to them. Thus, Constable Freeman created confusion as to which policy Vernagallo should follow. Because confusion existed, we look to the rule found in *Upton County* and *Beiser* to determine whether the trial court properly determined that it did not have jurisdiction over the case.

As we stated, *Upton County* and *Beiser* provide that when an employer's grievance procedure is unclear, the terminated employee's claim will not be barred if the employee follows the time frame set out in the statute and the employee timely notifies the employer

of the grievance. *See Upton County, Tex.*, 960 S.W.2d at 814; *Beiser*, 902 S.W.2d at 724-25. This rule is consistent with the Act's purpose - to afford the employer an opportunity to resolve the dispute before the employee files suit.

Here, construing the pleadings in favor of Vernagallo, we find that he alleged sufficient facts demonstrating that he notified appellees he was either invoking grievance procedures or giving them notice of his grievance against them and providing them with a chance to respond and remedy the situation. Vernagallo and union officials met with Constable Freeman and asked him to reconsider his decision to terminate Vernagallo. We find that this meeting was sufficient to notify appellees of Vernagallo's grievances, and give appellees an opportunity to resolve the situation before Vernagallo filed suit against them.

Conclusion

We hold that Vernagallo alleged sufficient facts to affirmatively demonstrate the court's jurisdiction to hear the case; he alleged sufficient facts demonstrating that he notified appellees of his grievances, and afforded appellees an opportunity to correct any error before he filed suit against them. The trial court erred in granting appellees' motion to dismiss for want of jurisdiction. Accordingly, we sustain Vernagallo's sole point of error.

The judgment of the trial court is reversed and remanded.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 21, 2000.
Panel consists of Justices Fowler, Edelman, and Sondock.
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