Statutory Deadlines for Bringing Claims are Jurisdictional and Can be Challenged by a Plea to the Jurisdiction

By Michael Shaunessy
McGinnis Law
Published October 2020

In April, the Texas Supreme Court held that meeting the statutory deadline for filing suit in a Whistleblower Act Claim is jurisdictional and was properly raised by a plea to the jurisdiction. *City of Madisonville v. Simms*, ___ S.W.3d. ___, 2020 WL 1898540 (Tex.)(April 17, 2020). While *Simms* was only bringing claims under the Whistleblower Act, the Court made clear that its holding applied to compliance with statutes of limitations in any statute that waives sovereign immunity.[1]

Simms was a police officer working for the City's police department. *Id*. p. 1. Plaintiff claimed that a confidential informant informed him that Sergeant Jeffrey Covington, also of the Madisonville Police Department, intended to plant drugs in Covington's ex-wife's car in order to get her arrested and thereby obtain an advantage in their pending child-custody suit. *Id*. There was longstanding conflict between Simms and Covington. *Id*. Simms told Madisonville Police Chief Charles May about the tip regarding the drug setup, but May dismissed the allegations. *Id*.

Simms later discovered that Covington had been compiling an "investigative file" on Simms (including GPS-location data and recordings from Simms' police vehicle), presumably to have him fired. *Id*. Simms believed Covington wanted him fired because of their longstanding hostility. *Id*.

Shortly after Simms went to the police chief regarding his "tip" about Covington, he was fired on July 27, 2012. *Id*. May gave Simms a "dishonorable" discharge on his F-5 form filed with the Texas Commission on Law Enforcement. *Id*. Simms appealed the "dishonorable" discharge through the State Office of Administrative Hearings ("SOAH"). SOAH held a hearing on April 17, 2014, and, during that hearing, May admitted that he permitted Covington to conduct an internal investigation of Simms. *Id*. The hearing examiner ruled in Simms' favor and reclassified his discharge as "honorable." *Id.* Ninety days after the F-5 hearing, Simms sued the City and the Police Department under the Whistleblower Act, alleging he was fired for reporting Covington's drug-planting scheme. *Id*.

The City filed a plea to the jurisdiction asserting the trial court lacked jurisdiction[2] because Simms did not file suit within 90 days of the being fired. *Id.* p. 2. The trial court granted the plea, but the

[1] The opinion refers only to sovereign immunity, the form of immunity applicable to the State, its agencies, etc. However, the Supreme Court has held that sovereign immunity and governmental immunity are identical, the only difference being that governmental immunity is the title for immunity from suit and liability applicable to local governmental entities. *Harris County Hosp. Dist. v Tomball Reg'l Hosp*., 283 S.W.3d 838, 842 (Tex. 2009). Thus, the fact that the opinion does not reference governmental immunity is irrelevant to its applicability to both state and local entities.

[2] Sovereign immunity embraces two principles: *immunity from suit* and immunity from liability. First, the State retains immunity from suit without legislative consent, even if the State's liability is not disputed. Second, the State retains

El Paso Court of Appeals reversed the trial court, holding that the limitations was an affirmative defense, which was appropriate for a motion for summary judgment, but limitations did not deny the court of jurisdiction. *Simms v. City of Madisonville*, 584 S.W.3d 158, 163 (Tex. App.—El Paso 2018).

The Supreme Court began its analysis by noting that the Code Construction Act requires strict compliance with any statute that waives immunity. *Simms*, p. 2.

> Section 311.034 of the Code Construction Act, entitled "Waiver of Sovereign Immunity," makes statutory prerequisites to suit jurisdictional as to claims against governmental entities. TEX.GOV'T CODE § 311.034. We held in [*Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 515 (Tex. 2012)] that "the term 'statutory prerequisite' refers to statutory provisions that are mandatory and must be accomplished prior to filing suit." 381 S.W.3d at 512. When a statutory prerequisite to suit is not met, "whether administrative (such as filing a charge of discrimination) or procedural (such as timely filing a lawsuit)," the suit may be properly dismissed for lack of jurisdiction. *Id*. at 515.

Simms, p. 2.

The Supreme Court then pointed out that the Whistleblower Act establishes a 90-day statute of limitations for filing suit. *Simms*, p. 2. Sec. 554.005 of the Whistleblower Act states:

> LIMITATION PERIOD. Except as provided by Section 554.006 [where the governmental entity has an internal grievance procedure], a public employee who seeks relief under this chapter **must sue** not later than the 90th day after the date on which the alleged violation of this chapter:
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> (1) occurred; or
>
> (2) was discovered by the employee through reasonable diligence.

TEX. GOV'T CODE § 554.005 (emphasis added).

The Court held that the use of the word "must" in the Whistleblower Act established a mandatory statute of limitations. *Simms*, pp. 2-3. The Court then explained that " an employee with a Whistleblower Act claim must strictly abide by the procedural limitations set out in the Act to obtain relief. … That includes the statute of limitations, which states that an employee with a Whistleblower Act claim "must sue" within ninety days to obtain relief." *Id*., pp. 2-3. Because the statute established a mandatory limitations period, it created "a jurisdictional statutory prerequisite to suit, and a claim that fails to meet that deadline may properly be disposed of by a jurisdictional plea." *Id*. p. 3.

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immunity from liability though the Legislature has granted consent to the suit. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997)(citations omitted); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) ("[i]mmunity from liability and immunity from suit are two distinct principles".). The Texas Supreme Court went on to explain the differences between the two different aspects of immunity.

The Court pointed out that just as a plaintiff must plead facts that establish the prerequisites for filing suit, the suit must be filed within the statute of limitations.

> "[State v. Lueck, 290 S.W.3d 876, 884–85 (Tex. 2009)] dealt with a governmental entity's challenge to the lack of "jurisdictional facts" pleaded by a former employee to satisfy the substantive elements of a Whistleblower Act claim. … Because the Whistleblower Act's immunity-waiver provision says the former employee must 'allege a violation of this chapter,' we considered whether the employee's claims amounted to a violation of the Whistleblower Act to determine whether immunity had been waived. *Id*. at 881 (emphasis added). Along the way, we dismissed the employee's argument that we could not consider these 'jurisdictional facts' because they were non-jurisdictional statutory prerequisites to suit. *Id*. at 883. Noting that statutory prerequisites to suit are jurisdictional in claims against a governmental entity, see *id*. (quoting TEX.GOV'T CODE § 311.034), we held that 'the elements of section 554.002(a) are not statutory prerequisites to suit, but rather, elements of a statutory cause of action in a suit against a governmental entity.' *Id*."

Simms, p. 3.

The Supreme Court concluded that it's appropriate for a governmental entity to challenge a trial court's jurisdiction if: (1) the Whistleblower petition fails to allege facts that meet the statutory prerequisites for filing a claim; and/or (2) the suit was not filed in a timely manner. *Simms*, p.3.

The Court went on to point out that its ruling in *Simms* applies beyond the Whistleblower Act. "[A] statutory prerequisite to suit, whether administrative (such as filing a charge of discrimination) or procedural (such as timely filing a lawsuit) is jurisdictional when the defendant is a governmental entity." *Simms*, p.3. Thus, for governmental entities, limitations is not an affirmative defense but, instead, it is jurisdictional and can form the basis of a plea to the jurisdiction that can be raised at the outset of litigation and can be required to be ruled on before plaintiff can obtain discovery[3].

[3] When a governmental entity's plea to the jurisdiction challenges whether plaintiff has alleged jurisdictional facts, rather than challenging ability to prove jurisdictional facts, then discovery should be stayed until after the trial court rules on the plea. *Creedmoor-Maha Water Supply Corp v. Texas Comm'n on Environmental Quality*, 307 S.W.3d 505, 513 (Tex. App.—Austin 2010, no pet)(whenever a plea to the jurisdiction is based upon the plaintiff's pleadings, then no evidence is presented at the hearing and, as a result, no discovery is needed before the court rules upon the plea to the jurisdiction); *City of Galveston v. Gray*, 93 S.W.3d 587, 590 (Tex.App.—Houston [14th Dist.] 2002, pet denied); *In re Hays County Sheriff's Department*, 2012 WL 6554815 (Tex.App.—Austin 2012)(Pemberton, J, concurring).