

CAUSE NO. 09-06233

GINGER WEATHERSPOON,	§	IN THE 44 th -B JUDICIAL
	§	
Plaintiff,	§	
	§	
v.	§	DISTRICT COURT OF
	§	
OFFICE OF THE ATTORNEY GENERAL	§	
OF TEXAS,	§	
	§	
Defendant.	§	DALLAS COUNTY, TEXAS

DEFENDANT'S PLEA TO THE JURISDICTION

TO THE HONORABLE JUDGE CARLOS R. CORTEZ:

Defendant Office of the Attorney General of Texas ("OAG") files this Plea to the Jurisdiction, and would respectfully show the following:

**I.
SUMMARY OF ARGUMENT**

1. This Court is without subject matter jurisdiction over the Plaintiff's Texas Whistleblower Act¹ claims because Plaintiff Weatherspoon failed to plead sufficient allegations to waive the sovereign immunity of the Defendant OAG.

**II.
STANDARD OF REVIEW FOR DISMISSAL**

2. A plea to the jurisdiction challenges the court's authority to determine the subject matter of the controversy.² Subject matter jurisdiction cannot be presumed and cannot be waived.³ When reviewing a plea to the jurisdiction, a court should limit itself to the jurisdictional issue

¹ Texas Government Code 554.001 *et. seq.*

² *Bland Independent School District v. Blue*, 34 S.W.3d 547, 553-554 (Tex. 2000). *Axtell v. Univ. of Texas*, 69 S.W.3d 261, 263 (Tex. App.—Austin 2002, no pet.)

³ *Continental Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 449 n.2 (Tex. 1996).

and avoid considering the merits of the claims.⁴ The purpose of a plea to the jurisdiction is to dismiss a cause of action without regard to whether the claim has merit.⁵ The plaintiff bears the burden of alleging facts affirmatively showing that the trial court has subject-matter jurisdiction.⁶ Plaintiff is required to affirmatively demonstrate the court's jurisdiction to hear the lawsuit under some statute that waives sovereign immunity.⁷

3. If a trial court lacks subject-matter jurisdiction, it has no discretion and must dismiss the case.⁸ *Hampton* found that if the cause of action is barred by sovereign immunity the trial court lacks subject matter jurisdiction and the court should therefore dismiss the case with prejudice.⁹ The Court must decide whether Plaintiff has affirmatively demonstrated this Court's jurisdiction to hear this suit, based on the facts alleged by Plaintiff and, when necessary to resolve jurisdictional facts, on evidence submitted by the parties.¹⁰

III. ARGUMENT AND AUTHORITIES

Plaintiff Weatherspoon failed to plead jurisdictional facts to establish a Whistleblower Act violation in order to waive Defendant OAG's sovereign immunity.

⁴*Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 552 (Tex. 2000).

⁵*Bland ISD v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

⁶*Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Texas Dep't of Crim. Justice v. Miller*, 48 S.W.3d 201, 203 (Tex. App.—Houston [1st Dist.]1999), *rev'd on other grounds*, 51 S.W.3d 583, 589 (Tex. 2001)).

⁷*Miller*, 51 S.W. 3d at 587.

⁸*Hampton v. University of Texas M.D. Anderson Cancer Center*, 6 S.W.3d 627, 629 (Tex. App.—Houston, (1st Dist.) 1999, reh'g overruled). Indeed, if the trial court's lack of subject-matter jurisdiction can only be cured by the defendant's consent to be sued, the plaintiff should not be given an opportunity to amend his pleadings. *Liberty Mutual Insurance Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex. App.—Austin, 1994, reh. overruled.).

⁹*Liberty Mutual Insurance Co. v. Sharp*, 874 S.W.2d 736, 738-739 (Tex. App.—Austin, 1994, reh. overruled). Also see *City of Austin v. L.S. Ranch, Ltd.*, 970 S.W.2d 750, 752 (Tex. App.—Austin, 1998, reh. overruled); and TEX.CIV.PRAC.& REM. CODE ANN. § 51.014(a)(8) interlocutory appeal from denial of plea to the jurisdiction for governmental entity.

¹⁰*Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004); *Bland ISD*, 34 S.W.3d at 555; see, e.g., *State v. Sledge*, 36 S.W.3d 152, 155 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (trial court conducted hearing and received oral testimony, affidavits, exhibits, and stipulations).

4. To prevail on her Whistleblower Act claims, Plaintiff Weatherspoon must allege that: (a) she is a public employee; (b) she acted in good faith in making a report; (c) the report involved a violation of law by the agency or a public employee; (d) the report was made to an appropriate law enforcement authority; (e) she suffered retaliation for making the report; and (f) she timely initiated a grievance of their termination.¹¹

5. Defendant OAG is an agency of the State of Texas¹² and is entitled to sovereign immunity from the Plaintiffs' Whistleblower Act claims because she failed to allege jurisdictional facts as required by TEX. GOV'T CODE § 554.002(a), and TEX. GOV'T CODE § 554.006. See *State v. Lueck*, 290 S.W.3d 876 (Tex. 2009).

6. TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2007) provides that “[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.”

7. This Court should find an inadequate waiver of sovereign immunity based on a failure of Plaintiff Weatherspoon's pleadings to accurately reflect the requirement that Plaintiff meet the requirements set forth above. In *State v. Lueck*, 290 S.W.3d 876 (Tex. 2009) the court held that:

The issue before us today is whether these elements of a statutory cause of action, like statutory prerequisites to suit, are requirements that can implicate the merits of the underlying claim, as well as the jurisdictional inquiry of sovereign immunity from suit as a threshold matter. We hold that the elements of section 554.002(a) can be considered to determine both jurisdiction and liability.

8. Having failed to put Defendant University on notice of a Whistleblower Act claim sufficient to waive sovereign immunity this Plea to the Jurisdiction should in all things be granted herein.

¹¹ TEX. GOV'T CODE § 554.002(a) and § 554.006.

¹² Tex. Constitution, art. IV, § 22. See *Veterans of Foreign Wars v. Abbott*, 2003 WL 21705376 , at p. 2 (Tex.App.-Austin, 2003, no writ).

**V.
CONCLUSION**

Plaintiff's retaliation claims under the Whistleblower Act should be dismissed with prejudice for failing to meet the statutory prerequisites to waive Defendant OAG's sovereign immunity to assert a Whistleblower Act claim.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent by *Federal Express, Overnight Delivery*, and *Email* on the 23rd day of August, 2010, to:

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Mr. Derek H. Sparks
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Attorney for Plaintiff

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WILLIAM T. DEANE
Assistant Attorney General

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ORDER GRANTING DEFENDANT’S PLEA TO THE JURISDICTION

BE IT REMEMBERED that on this day, the Court considered the Defendant’s Plea to the Jurisdiction and all responses thereto. After considering said motion and responses, the Court is of the opinion that Defendant’s plea should be GRANTED.

IT IS THEREFORE ORDERED that Defendant’s Plea to the Jurisdiction is hereby GRANTED.

IT IS FURTHER ORDERED that this cause is hereby DISMISSED with prejudice to refile, and that all requested relief not granted herein is hereby expressly DENIED.

SIGNED THIS _____ DAY OF _____, 2010.

JUDGE PRESIDING