

# IN THE SUPREME COURT OF TEXAS

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No. 03-1123  
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VAN INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

SCOTT A. McCARTY, RESPONDENT

=====  
ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE TWELFTH DISTRICT OF TEXAS  
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JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE OWEN, JUSTICE WAINWRIGHT, JUSTICE MEDINA, and JUSTICE GREEN joined.

JUSTICE O'NEILL filed a dissenting opinion.

JUSTICE JOHNSON did not participate in the decision.

Scott A. McCarty filed suit against Van Independent School District under Chapter 451 of the Texas Labor Code, contending he was terminated in retaliation for filing a workers' compensation claim. The District filed a plea to the jurisdiction asserting McCarty had not exhausted his administrative remedies, which the trial court denied. The District filed an interlocutory appeal.<sup>1</sup> The court of appeals affirmed.<sup>2</sup>

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<sup>1</sup> See TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

<sup>2</sup> \_\_\_ S.W.3d at \_\_\_.

Generally, this Court does not have jurisdiction to consider a petition from an interlocutory appeal.<sup>3</sup> But there is an exception for cases in which one of the courts of appeals holds differently from a prior decision of this Court.<sup>4</sup> The District asserts such a conflict here; we agree and reverse.

McCarty worked for fourteen years as a maintenance employee for the District. He asserts that he was injured on the job on July 26, 2001, and after filing a compensation claim was terminated on August 2, 2001. The District asserts he was terminated for falsifying records and making false statements to his supervisor.

The court of appeals held and the parties agree that McCarty was required to file a notice of appeal to the District's Board of Trustees within seven days of his termination.<sup>5</sup> He did not do so until August 23, two weeks after the deadline.

In a more detailed request two months later, McCarty asked the Board to grant him a hearing regarding "the facts surrounding my wrongful termination" and "[i]f necessary. . . regarding my failure to comply with the time requirements of the Grievances [sic] Procedure." At the Board's regular meeting on November 12, 2001, the minutes reflect that after an executive session<sup>6</sup> the Board "[d]enied Scott McCarty's grievance and upheld the administrative decision on the basis of Mr. McCarty's untimely request for a hearing and also based on the evidence presented in the hearing."

McCarty filed this lawsuit eight months later. The District filed a plea to the jurisdiction

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<sup>3</sup> See TEX. GOV'T CODE § 22.225(b)(3).

<sup>4</sup> *Id.* at § 22.225(c); § 22.001(a)(2).

<sup>5</sup> \_\_\_\_ S.W.3d at \_\_\_\_.

<sup>6</sup> See TEX. GOV'T CODE § 551.074(a) (exempting deliberations on dismissal of public employee from Open Meetings Act).

arguing McCarty's suit should be dismissed for failure to exhaust administrative remedies. When the trial court denied the plea, the District filed an interlocutory appeal.

The court of appeals held that exhaustion of remedies was a prerequisite to the trial court's jurisdiction, citing our opinion in *Wilmer-Hutchins Independent School District v. Sullivan*.<sup>7</sup> Neither party challenges this holding.<sup>8</sup>

But the Twelfth Court of Appeals held that the District waived the exhaustion requirement when its Board heard McCarty's grievance and rendered a decision on the merits.<sup>9</sup> The court relied on opinions by the Third Court of Appeals that a school board waives any objection to untimeliness by conducting an evidentiary hearing on an employee's grievance.<sup>10</sup>

But the Board here expressly refused to waive the issue of timeliness. While waiver may sometimes be established by conduct, that conduct must be unequivocally inconsistent with claiming a known right.<sup>11</sup> Hearing the merits of a party's complaint while reserving a ruling on its timeliness

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<sup>7</sup> 51 S.W.3d 293, 294 (Tex. 2001).

<sup>8</sup> Although Chapter 451 of the Labor Code contains no explicit exhaustion requirement, the court below and others have required exhaustion of retaliation complaints by school employees. See \_\_\_ S.W.3d at \_\_\_; *Washington v. Tyler Indep. Sch. Dist.*, 932 S.W.2d 686, 689 (Tex. App.—Tyler 1996, no pet.); *Jones v. Dallas Indep. Sch. Dist.*, 872 S.W.2d 294, 296 (Tex. App.—Dallas 1994, writ denied). As we did in *Wilmer-Hutchins*, we again assume this is correct without deciding it as McCarty “acknowledges that exhaustion of remedies is a prerequisite to the trial court's jurisdiction in a case like this involving disputed fact issues.” *Wilmer-Hutchins*, 51 S.W.3d at 294 (citations omitted).

<sup>9</sup> \_\_\_ S.W.3d at \_\_\_.

<sup>10</sup> See *Hernandez v. Meno*, 828 S.W.2d 491, 494 (Tex. App.—Austin 1992, writ denied); *Havner v. Meno*, 867 S.W.2d 130, 134 (Tex. App.—Austin 1993, no writ). But see *Grigsby v. Moses*, 31 S.W.3d 747, 750 (Tex. App.—Austin 2000, no pet.) (holding school board did not waive objection to untimeliness by listening to but not ruling on employee's grievance).

<sup>11</sup> *First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466, 471 (Tex. 2004); *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003).

is not unequivocally inconsistent with later denying the complaint on the latter ground.<sup>12</sup>

Here, District policy allowed the parties to waive time deadlines “by mutual consent.” Reasonable board members might want to grant such consent only in cases that appear to have merit. If any inquiry along those lines waives the deadline (despite an express reservation to the contrary), then no board will ever do it, and all extensions will be denied. We hold that the District did not waive its deadlines if the Board heard some evidence on McCarty’s termination.<sup>13</sup>

In *Wilmer-Hutchins*, a custodian claimed that a school district fired her for filing a workers’ compensation claim, just as McCarty does here.<sup>14</sup> She acknowledged that exhaustion of administrative remedies was a prerequisite to the trial court’s jurisdiction, just as McCarty does here.<sup>15</sup> While we held in *Wilmer-Hutchins* that subject-matter jurisdiction could not be conferred by estoppel,<sup>16</sup> we have held it cannot be conferred by waiver either.<sup>17</sup> Accordingly, the court of

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<sup>12</sup> *Cf.*, e.g., TEX. R. CIV. P. 301 (providing court may render judgment non obstante veredicto when directed verdict would have been proper).

<sup>13</sup> As the session was closed, it is unclear how the court of appeals concluded as a matter of law that the evidence presented at the hearing necessarily went to the merits. Although the Board minutes state that McCarty’s grievance was denied based on untimeliness “and also based upon the evidence presented in the hearing,” there is no way to tell what that evidence might have related to. While the minutes reflect the passage of two hours between the time the Board took up McCarty’s complaint and the time it issued a decision, this only shows the Board members were patient – the minutes also show their meeting began at 6:30 p.m. and was concluded more than seven hours later at 1:45 a.m.

<sup>14</sup> 51 S.W.3d at 293.

<sup>15</sup> *Id.* at 294.

<sup>16</sup> *Id.* at 294-95.

<sup>17</sup> *Univ. of Tex. Southwestern Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004); *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (quoting *Fed. Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (1943)).

appeals' opinion conflicts with *Wilmer-Hutchins*, and we have jurisdiction to correct that conflict.<sup>18</sup>

Our dissenting colleague would hold that school boards cannot impose deadlines for administrative complaints, or at least cannot enforce them. This would certainly be an issue of first impression to the parties, none of whom ever made such an argument in the trial or appellate courts. We postpone consideration of such a sweeping ruling to a case in which it is raised.<sup>19</sup>

We also decline to adopt our dissenting colleague's view that administrative procedures can be ignored if a creative applicant convinces a court that some other procedure was just as good. An employee's letter, phone call, or chance conversation with a member might give a board "the first chance to consider his grievance,"<sup>20</sup> but exhaustion of administrative remedies generally requires compliance rather than avoidance.

Accordingly, without hearing oral argument, we reverse the court of appeals' judgment and dismiss the case for want of jurisdiction.<sup>21</sup>

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Scott Brister  
Justice

**OPINION DELIVERED:** May 27, 2005

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<sup>18</sup> TEX. GOV'T CODE § 22.225(c), (e).

<sup>19</sup> Nor is "the real issue" whether untimeliness is "jurisdictional" or "simply a procedural requirement that could be waived." The Board's own policy allowed extensions; the Board simply refused to grant one, and McCarty never asserts that refusal was error. An extension by the Board would constitute waiver of a procedural right; reversing dismissal of an untimely complaint on the belief that it was really a ruling on the merits would substitute the judgment of courts for that of school boards.

<sup>20</sup> \_\_\_ S.W.3d at \_\_\_.

<sup>21</sup> See TEX. R. APP. P. 59.1.