NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0992

MORRIS FONTENOT

VERSUS

GLOBAL X-RAY AND TESTING CORPORATION

On Appeal from the 23rd Judicial District Court
Parish of Assumption, Louisiana
Docket No. 29,690, Division "A"
Honorable Ralph Tureau, Judge Presiding

Guy O. Mitchell **Ville Platte, LA**	**Attorney for** **Plaintiff-Appellant** **Morris Fontenot**
Christopher H. Hebert **Rabalais, Hanna & Hebert** **Lafayette, LA**	**Attorney for** **Defendant-Appellee** **Global X-Ray and Testing Corp.**

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered December 23, 2008

PARRO, J.

The plaintiff in this suit for unpaid overtime wages appeals a judgment granting the defendant's motion for summary judgment, sustaining the defendant's exception raising the objection of prescription, and dismissing the plaintiff's claims. For the following reasons, we affirm.

Factual and Procedural Background

Morris Fontenot (Fontenot) had been working as an x-ray technician for Global X-Ray and Testing Corporation (Global) for approximately 16 years in April 2004 when he quit due to physical problems. Following his departure, Fontenot was last paid on April 23, 2004. On July 24, 2006, Fontenot filed a suit for back wages against Global based on Global's alleged failure to pay time-and-a-half for overtime work.

In its answer, Global stated that Fontenot was paid $620 per week regardless of the number of hours worked, and if Fontenot worked more than 40 hours in a week, he was also paid $15.50 per hour for each of those hours. Relying on the "fluctuating workweek" pay plan authorized by 29 C.F.R. § 778.114, Global maintained that its method of payment was clearly understood and specifically agreed to by Fontenot and was not in violation of the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq. Accordingly, Global maintained that Fontenot had received all compensation to which he was entitled. Considering the fact that more than two years had passed since Fontenot's last day of work and last payment of wages when Fontenot filed suit, Global asserted that Fontenot's claim had prescribed, citing 29 U.S.C.A. § 255.

Subsequently, Global filed a motion for summary judgment and an exception raising the objection of prescription. In that pleading, Global urged that Fontenot's suit was filed untimely under the provisions of the Fair Labor Standards Act. In support of its motion and exception, Global submitted a memorandum and offered the affidavit of its vice president, Jennifer Hebert, in which she, in pertinent part, declared:

3.

Because the x-ray technicians it employed were not earning enough money due to lack of work in the oilfield and due to the nature of their scheduling, Global X-Ray & Testing Corporation made a decision at some point in 1994 to change the way it paid these employees. The technicians were guaranteed $620.00 per week, regardless of the number of hours they [worked] and even if they worked no hours. However, in weeks where the technicians worked in excess of 40 hours, they were paid $15.50 per hour for each hour over 40 hours in addition to the $620.00 per week guarantee.

4.

Morris Fontenot was paid by Global X-Ray & Testing Corporation using the above formula and did so without complaint during the entire time he was employed here. Attached hereto as Exhibit A is a handwritten document prepared by Morris Fontenot addressed to Mr. Joel Moreau, then the owner of Global X-Ray & Testing Corporation, dated April 6, 1999, setting forth his satisfaction with the above method of payment.

* * *

7.

As the record in the Payroll Register History reflects, in weeks where Morris Fontenot worked 40 hours or less, he was paid his guaranteed rate of $620.00, in weeks where he worked more than 40 hours, he was paid his guaranteed rate of $620.00 per week plus $15.50 for every hour worked over 40 hours.

In pertinent part, the signed and handwritten document by Fontenot, referenced in Ms. Hebert's affidavit, provides:

4/6/99

Attn: Mr. Joel Moreau

To Whom It May Concern:

My pay rate for ultrasonic technician exceeds my [pay rate] at time and a half for X-RAY, in which it is based. I am [satisfied] with my pay rate.

The separation notice from Fontenot's personnel file shows that April 15, 2004, was his last day of work and the reason given for his leaving was his physical inability to perform the work.

Global's reply memorandum indicates that an opposition to its motion and

exception was filed by Fontenot; however, no such opposition was filed into the record. Global also suggested that Fontenot offered his affidavit in support of his opposition. In that affidavit, Fontenot supposedly averred that Global changed its method of paying overtime wages from time-and-a-half for overtime to its current method, Global required that Fontenot sign an acknowledgement of the new pay scale, he was not consulted nor did he agree to the change in payment of overtime, and he only signed the agreement because he was afraid of losing his job.

After considering the documentation offered, the trial court granted Global's motion for summary judgment, sustained its exception on the issue of prescription, and dismissed Fontenot's claims with prejudice. Fontenot appealed, questioning whether the April 6, 1999 letter that he signed was in compliance with the Fair Labor Standards Act and whether his claim had prescribed.

Discussion

Fontenot's petition contained the following two pertinent allegations: he was paid at an hourly rate of $15.50 for his work as a technician, and approximately 10 years prior to the filing of his suit, Global allegedly stopped paying him time-and-a-half for overtime work. Global asserted that pursuant to the Fair Labor Standards Act, Fontenot had two years to file a claim for unpaid overtime wages. Since more than two years had passed since he had received his last paycheck when Fontenot filed this action, Global urged that Fontenot's claim had prescribed.

Generally, the burden of proving that a cause of action has prescribed rests with the party pleading prescription; however, when the plaintiff's petition shows on its face that the prescriptive period has run, the burden is on the plaintiff to show that prescription has not tolled because of an interruption or a suspension of prescription. See Boudreaux v. Angelo Iafrate Const., 03-2260 (La. App. 1st Cir. 2/4/05), 895 So.2d 596, 598.

A cause of action for unpaid overtime compensation under the Fair Labor

Standards Act of 1938, as amended,[1] "may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C.A. § 255(a). Thus, under the Fair Labor Standards Act, Fontenot could recover unpaid overtime wages for the two-year period prior to suit being filed or for the three-year period prior to the filing if he could establish a willful violation of the Act.

In his petition, Fontenot did not indicate the facts surrounding his current employment status with Global. He simply averred that he "was" working for Global as a technician. However, the documentation offered by Global in support of its exception and motion established that Fontenot last worked for Global on April 15, 2004, with his final payment of wages being made on April 23, 2004. Thus, with respect to the issue of prescription, Global satisfied its burden of showing that more than two years had passed since the accrual of any cause of action that Fontenot may have had under the Act. In light of the evidence submitted by Global and the record, Fontenot's cause of action had prescribed, and the burden of proof shifted to him to establish the applicability of the three-year prescriptive period.

In order for an employer to use the fluctuating workweek method of paying its employees, there must be a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other

[1] 29 U.S.C.A. § 201 et seq.

fixed weekly work period. 29 C.F.R. § 778.114.[2] At the hearing in this matter and in his brief to this court, Fontenot urged the applicability of the three-year prescriptive period based on an alleged willful violation of the Act in that Global began to pay its employees under the new pay method long before it ever attempted to get the employees to sign any such agreement. However, we note that no allegation in his

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[2] Concerning a fixed salary for fluctuating hours, 29 C.F.R. § 778.114 provides:

> (a) An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Act if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.
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> (b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).
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> (c) The "fluctuating workweek" method of overtime payment may not be used unless the salary is sufficiently large to assure that no workweek will be worked in which the employee's average hourly earnings from the salary fall below the minimum hourly wage rate applicable under the Act, and unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked. Typically, such salaries are paid to employees who do not customarily work a regular schedule of hours and are in amounts agreed on by the parties as adequate straight-time compensation for long workweeks as well as short ones, under the circumstances of the employment as a whole. Where all the legal prerequisites for use of the "fluctuating workweek" method of overtime payment are present, the Act, in requiring that "not less than" the prescribed premium of 50 percent for overtime hours worked be paid, does not prohibit paying more. On the other hand, where all the facts indicate that an employee is being paid for his overtime hours at a rate no greater than that which he receives for nonovertime hours, compliance with the Act cannot be rested on any application of the fluctuating workweek overtime formula.

petition hints at the possibility of a willful violation of the Act, and Fontenot offered no evidence in support of his contention of a willful violation.

In considering whether Fontenot had met his burden of proof, the trial court observed in its reasons for judgment that Fontenot merely argued that Global unilaterally decided to change the method of pay and then later forced him to sign an acknowledgement. The trial court noted that Fontenot did not allege or provide evidence that he did not understand that he was being paid a fixed salary for the hours he worked each week rather than for a fixed number of hours. In the absence of any such evidence, the trial court found that Fontenot failed to prove that Global willfully violated the Act and the resulting applicability of the three-year prescriptive period. We agree. Therefore, we conclude that the trial court properly found that Fontenot's claim had prescribed since he filed suit more than two years after he last worked for and was last paid by Global.

Decree

For the foregoing reasons, the trial court judgment is affirmed. Costs of this appeal are assessed to Morris Fontenot.

AFFIRMED.