SUPREME COURT OF LOUISIANA

NO. 98-C-1805

DANATUS NORMAN KING

VERSUS

PHELPS DUNBAR, L.L.P., DANNY SHAW, HARRY ROSENBERG AND ROY CHEATWOOD

ON WRIT OF CERTIORARI TO COURT OF APPEAL, FOURTH CIRCUIT, PARISH OF ORLEANS

JOHNSON, JUSTICE.[*]

We granted certiorari in this case to review the Court of Appeal's decision dismissing Plaintiff's claims for racial discrimination, intentional infliction of emotional distress, loss of earning capacity, and damage to reputation. Plaintiff contends the Court of Appeal erred in dismissing his claims against the individual defendants, Roy Cheatwood, Harry Rosenberg, and Danny Shaw, on summary judgment; and in dismissing his claims for racial discrimination and intentional infliction of emotional distress against Phelps Dunbar, L.L.C. and the individual defendants on an exception of prescription. Because we conclude the exception of prescription should have been referred to the merits, we vacate that portion of the Court of Appeal's decision and remand the matter for trial on the merits. The summary judgment dismissal of the claims against the individual defendants is affirmed.

FACTS AND PROCEDURAL HISTORY

Plaintiff, Danatus Norman King is an African-American attorney who was employed by Defendant, Phelps Dunbar, L.L.C., as an associate in the commercial litigation section from 1990 to 1995. While in the commercial litigation section, he was supervised by the individual defendants, Roy Cheatwood, Harry Rosenberg, and Danny Shaw. Mr. King alleges that he was assigned to work on the files of Defendant's African-American clients and that he was asked to transfer to the tort and insurance section of the firm because of his race. According to Mr. King's pleadings, most cases in the tort and insurance section were tried before predominately African-American jurors in the Civil District Court for Orleans Parish and Defendant wanted him to be the

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[*] Marcus, J., not on panel. See Rule IV, Part 2, Sec. 3.

firm's black face in that venue. He also alleges that the transfer request was prompted by pressure on the Defendant from the New Orleans Aviation Board's general counsel to hire African-American attorneys for the tort and insurance section and have those attorneys work Aviation Board files. Mr. King claims that his refusal to be transferred led to a hostile work environment and retaliatory tactics such as unwarranted criticism of his work, refusal to grant work assignments to him, and accusations of his being too sensitive to racial matters. Mr. King alleges that the refusal to grant work assignments caused him to beg for assignments from other associates, even junior associates, and had an adverse effect upon his income because he was unable to bill hours.

On January 20, 1995, Mr. King underwent an associate evaluation with two of the three individual defendants, Roy Cheatwood and Harry Rosenberg. During this evaluation, he was informed that his chances of becoming a partner were nonexistent and that he should consider a career change. Mr. King was not terminated following this evaluation. He remained employed as an associate by the Defendant, and he alleges that the hostility of his work environment increased. He contends that the allegedly hostile work environment became unbearable to him and on March 10, 1995 he tendered his resignation to be effective March 24, 1995. The firm accepted and confirmed his resignation in a letter signed by Roy Cheatwood, a general partner and one of the individual defendants.

Mr. King filed the instant action on March 11, 1996 claiming racial discrimination under La. Rev. Stat. Ann. § 23:1006 and La. Rev. Stat. Ann. § 51:2231 et seq., intentional infliction of emotional distress ("IIED"), and loss of earning capacity and damage to reputation. Mr. King named as defendants, Phelps Dunbar, L.L.C. ("Phelps"), and the three partners, Roy Cheatwood, Harry Rosenberg, and Danny Shaw. The trial court rendered summary judgment dismissing Mr. King's claims against the individual defendants and granted the exception of prescription dismissing his claims against Phelps and the individual defendants.

On appeal, the Fourth Circuit found no error in the summary judgment dismissal of the claims against the individual defendants. The Court determined that the individual defendants were not employers as that term is used in Louisiana employment discrimination law and that as a matter of law the plaintiff had failed to allege facts to support a claim for intentional infliction of severe emotional distress. On the issue of prescription, the Court found that since Mr. King

acknowledged he was constructively discharged January 20, 1995, prescription commenced on that date.[1] The Court went on to conclude that the delictual nature of plaintiff's claims subjected them to a one year prescriptive period. Therefore, Mr. King's claims were prescribed when the suit was filed and the trial court was correct in granting defendants' exception of prescription. King v. Phelps Dunbar, 97-2519 (La. App. 4th Cir. 6/3/98), 716 So. 2d 104. We granted Mr. King's writ application to review the correctness of these determinations. King v. Phelps Dunbar, 98-1805 (La. 11/25/98), — So. 2d — .

DISCUSSION

Summary judgment procedure is favored in Louisiana. La. Code Civ. Proc. art. 966(A)(1). A motion for summary judgment which shows that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law shall be granted. La. Code Civ. Proc. art. 966(C)(1). An issue is genuine if reasonable persons could disagree. Smith v. Our Lady of the Lake Hospital, 93-2512 (La. 7/15/94), 639 So. 2d 730, 751. "If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue." Id.

The individual defendants filed a motion for summary judgment on the issue of whether or not they are employers as that term is defined for the purpose of employment discrimination law under the provisions of former La. Rev. Stat. Ann. § 23:1006. Employment discrimination on account of race, color, religion, sex, disability or national origin is presently governed by La. Rev. Stat. Ann. §§ 23:331 to 23:334, and appellate courts are bound to adjudge a case before it in accordance with the law existing at the time of its decision. Segura v. Frank, 93-1271 (La. 1/14/94), 630 So. 2d 714, 725, citing Dripps v. Dripps, 366 So. 2d 544 (La. 1978). Where the law has changed during the pendency of a suit and retroactive application of the new law is permissible, the new law applies on appeal. Id. The determination of whether a new law is given retroactive application is governed by La. Civ. Code Ann. art. 6, which provides:

> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretive laws apply both prospectively and retroactively,

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[1] Mr. King testified in his deposition that he took the comments made during his January 20, 1995 evaluation, that his chances of making partner were nonexistent and that he should consider making a career change, to mean "this is it for you, you are fired without them saying that you are fired."

unless there is a legislative expression to the contrary.[2]

The application of La. Civ. Code Ann. art. 6 involves a two-part inquiry. First, we determine whether the legislature expressed its intent regarding retrospective or prospective application in the enactment. If the legislature did express its intent, our inquiry is complete. If not, we must determine whether the enactment is substantive, procedural, or interpretive. Cole v. Celotex Corp., 599 So. 2d 1058, 1063 (La. 1992). La. Rev. Stat. Ann. §§ 23:1006 to 23:1008, which governed discrimination in employment on account of race, color, religion, sex, disability, or national origin, were repealed in their entirety by Section 4 of Acts 1997, No. 1409. Section 1 of Acts 1997, No. 1409 enacted Chapter 3-A of Title 23 relative to employment discrimination and consolidated the provisions of law governing employment discrimination into one chapter. The provisions of Chapter 3-A of Title 23 create and define the rights and duties of employers and employees relative to discrimination in the workplace. Therefore, the enactment of these provisions by Acts 1997, No. 1409 is substantive and cannot be retroactively applied. Since plaintiff's suit was filed March 11, 1996, prior to the August 1, 1997 effective date of Acts 1997, No. 1409, the provisions of former La. Rev. Stat. Ann. § 23:1006 govern the adjudication of this appeal.

For the purpose of employment discrimination law, La. Rev. Stat. Ann. § 23:1006 utilized the definition of employer given in La. Rev. Stat. Ann. § 51:2232(4) which provides: "'[e]mployer' means . . . any person employing eight or more persons within the state, or any person acting as an agent of an employer, directly or indirectly." Mr. King does not allege that the individual defendants are his employers, conversely, he states that Phelps Dunbar, L.L.C. is an employer within the meaning of La. Rev. Stat. Ann. §§ 23:1006 and 51:2231 et seq. and that he was employed by Phelps. Further, the individual defendants submitted affidavits that they do not employ anyone. Based on this evidence, reasonable persons could only conclude that the individual defendants are not employers within the meaning of La. Rev. Stat. Ann. § 51:2232(4). Therefore, the Court of Appeal was correct in affirming the summary judgment dismissal of the individual defendants on the issue of whether they were employers under the provisions of former La. Rev. Stat. Ann. § 23:1006.

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[2] See also La. Rev. Stat. Ann. § 1:2, which provides: "[n]o Section of the Revised Statutes is retroactive unless it is expressly so stated."

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In White v. Monsanto, 585 So. 2d 1205 (La. 1991), we recognized a cause of action for emotional distress intentionally caused by extreme and outrageous conduct. A plaintiff seeking to recover for intentional infliction of emotional distress must establish:

> (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct.
> The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Persons must necessarily be expected to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.

White v. Monsanto, 585 So. 2d 1205, 1209.

The Court of Appeal determined that "[a]s a matter of law, none of the facts attested to by the plaintiff rise to the level of outrageous conduct necessary to recover for a claim of intentional infliction of severe emotional distress." King v. Phelps Dunbar, 97-2519 (La. App. 4th Cir. 6/3/98), 7, 716 So. 2d 104, 108. On a motion for summary judgment, if the movant does not bear the burden of proof at trial, he simply has to point out to the court that there is an absence of factual support for an essential element of the adverse party's claim. La. Code Civ. Proc. art. 966(C)(2). If the adverse party fails to produce factual support to establish that he will be able to satisfy his evidentiary burden at trial, there is no genuine issue of material fact and summary judgment is proper. La. Code Civ. Proc. art. 966(C)(2). The plaintiff had the burden of proving his claim for intentional infliction of emotional distress when the issue was raised. He failed to offer any persuasive evidence in opposition to defendants' motion for summary judgment. Accordingly, we affirm the Court of Appeal's decision that the plaintiff has failed to establish a claim for intentional infliction of emotional distress against the individual defendants.

LOSS OF EARNING CAPACITY AND DAMAGE TO REPUTATION

The Court of Appeal found that there was an absence of factual support for Plaintiff's claims for loss of earning capacity and damage to his reputation. Since the Plaintiff would have the burden of proving these issues at trial, the Court of Appeal held that "plaintiff has failed to sustain his summary judgment burden on this issue." King, 716 So. 2d 104, 108.

A claim for damage to reputation falls under an action for defamation. An action in defamation requires proof of: (1) a false and defamatory statement concerning another; (2) an

unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher; and (4) resulting injury. Trentecosta v. Beck, 96-2388 (La. 10/21/97), 703 So. 2d 552, 559. Plaintiff has not produced factual support of these requisite elements. Further, loss of earning capacity is an element of damages recoverable in action for employment discrimination. Since the action for employment discrimination cannot be maintained for the individual defendants, plaintiff cannot recover damages for loss of earning capacity. Therefore, the Court of Appeal's decision dismissing these claims against the individual defendants on summary judgment is affirmed.

PRESCRIPTION

The sole issue left for our consideration is whether Mr. King's action for racial discrimination, in violation of La. Rev. Stat. Ann. § 23:1006 and La. Rev. Stat. Ann. § 51:2231 et seq., and intentional infliction of emotional distress has prescribed. Prior to the 1997 revision, La. Rev. Stat. Ann. § 23:1006 in pertinent part provided that:

> B. It shall be unlawful discrimination in employment for an employer to :
> (1) Intentionally fail or refuse to hire, refer, discharge, or to otherwise intentionally discriminate against or in favor of an individual with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin; or
> (2) Intentionally limit, segregate, or classify an employee in a way which would deprive an individual of employment opportunities, give a favor or advantage to one individual over another, or otherwise adversely or favorably affect the status of an employee because of race, color, religion, sex, or national origin. Provided, however, that nothing contained herein shall be construed so as to create a cause of action against any employer for employment practices pursuant to any affirmative action plan.
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> D. A plaintiff who has a cause of action against an employer for discrimination in employment may file a suit in the district court for the parish in which the alleged discrimination occurred seeking general or special compensatory damages, back pay, restoration of employment, related benefits, reasonable attorney's fees, and court costs.

La. Rev. Stat. Ann. § 51:2231 et seq. provides for the execution of federal anti-discrimination laws in the State of Louisiana and creates the Louisiana Commission on Human Rights ("Commission"). The Commission has the power to adjudicate claims of employment discrimination pursuant to La. Rev. Stat. Ann. §§ 51:2231(C) and 51:2257. An individual alleging employment discrimination under former La. Rev. Stat. Ann. 23:1006 may file a written complaint with the Commission and have the allegations investigated and resolved by the Commission. The record does not indicate that any such complaint was filed by the plaintiff in

this matter. Accordingly, the provisions of La. Rev. Stat. Ann. § 51:2231 et seq. will not be applied to Plaintiff's claims.[3]

Because La. Rev. Stat. Ann. § 23:1006 is similar in scope to the federal prohibition against discrimination, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., Louisiana courts have looked to federal jurisprudence to interpret Louisiana discrimination laws. Bustamento v. Tucker, 607 So. 2d 532, 538 n. 6 (La. 1992). The United States Fifth Circuit has determined that claims under Louisiana's antidiscrimination statute are subject to the one-year prescriptive period found in La. Civ. Code art. 3492. Williams v. Conoco, Inc., 860 F.2d 1306 (5th Cir. 1988). Louisiana courts have consistently applied this one-year prescriptive period to claims brought under La. Rev. Stat. Ann. § 23:1006. See Brunet v. Dept. Wildlife and Fisheries, 96 0535 (La. App. 1st Cir. 12/20/96), 685 So. 2d 618; Harris v. Home Savings & Loan, 95-223 (La. App. 3rd Cir. 7/27/95), 663 So. 2d 92; Winbush v. Normal Life of Louisiana, Inc., 599 So. 2d 489 (La. App. 3rd Cir. 1992). This one-year prescriptive period commences to run from the day injury or damage is sustained. La. Civ. Code art. 3492. Claims for intentional infliction of emotional distress are also governed by the one-year prescriptive period for delictual actions in La. Civ. Code Ann. art. 3492.[4]

We have previously held that "prescriptive statutes are to be strictly construed against prescription and in favor of the obligation sought to be extinguished; thus, when there are two possible constructions, that which favors maintaining, as opposed to barring, an action should be adopted." Bustamento v. Tucker, 607 So. 2d 532, 537 (La. 1992); Lima v. Schmidt, 595 So. 2d 624, 629 (La. 1992); Foster v. Breaux, 263 La. 1112, 270 So. 2d 526 (1972). Plaintiff alleges that following his unfavorable performance review, he was subjected to a series of discriminatory violations, and that the increasingly hostile work environment became unbearable at the point

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[3] The definition of employer provided in La. Rev. Stat. Ann. § 51:2232(4) was applied to determine whether the individual defendants are employers under the provisions of former La. Rev. Stat. Ann. § 23:1006. The former provisions of 23:1006 did not contain a definition of employer, therefore, the definition given in 51:2232(4) was utilized. The remaining provisions of La. Rev. Stat. Ann. § 51:2231 et seq. govern the adjudication of employment discrimination claims by the Louisiana Commission on Human Rights.

[4] The only issue before this Court regarding plaintiff's claim for intentional infliction of emotional distress against Phelps is whether or not the claim has prescribed. Since this claim is intertwined with the claim for racial discrimination, the same dates will be considered for both. The resolution of the prescription issue does require consideration of the merits of this claim. The sufficiency of this claim should be considered at trial on the merits.

when he was forced to resign; as such, prescription commenced to run on March 24, 1995, the effective date of his resignation, and this action was filed within one-year of that date. In Bustamento, we noted that in order to determine when prescription commences to run, it is necessary to analyze the nature of plaintiff's cause of action. 607 So. 2d 532, 538. Accordingly, we turn our attention to the jurisprudence interpreting race-based employment discrimination.

Under federal law, the plaintiff bears the burden of proving that the defendant intentionally discriminated against him or her on the basis of race. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed. 2d 407 (1993). First, a plaintiff must establish a prima facie case of racial discrimination. Once a prima facie case is established, a presumption is created that the employer has unlawfully discriminated against the employee and the burden shifts to the employer to prove that the "adverse employment actions were taken for a legitimate, nondiscriminatory reason." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981). The federal courts have recognized the existence of hostile environment harassment theory in race discrimination cases. Lattimore v. Polaroid Corp., 99 F.3d 456, 463 (1st Cir. 1996); Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991). The United States Supreme Court has stated that Title VII is violated when the workplace is permeated with "discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed. 2d 295 (1993). In Huckabay v. Moore, 142 F.3d 233 (5th Cir. 1998), the Court concluded that the hostile environment faced by the plaintiff was a continuing violation such that he was relieved of establishing that all of the complained of conduct occurred within the actionable time period. While Huckabay does not stand for the proposition that all hostile environment claims are continuing violations, Id. at. 239, if a person is subjected to ongoing harassment, that is continual, and a permanent condition of the workplace, then prescription does not begin to run until the conduct causing the damage is abated. Bustamento, 607 So. 2d 532, 542. "[W]hen the acts or conduct are continuous on an almost daily basis, by the same actor, of the same nature, and the conduct becomes tortious and actionable because of its continuous, cumulative, synergistic nature, then prescription does not commence until the last act occurs or the conduct is abated." Id.

In the case presently before us, the plaintiff alleges that he was subjected to a continuously hostile work environment caused by the racially discriminatory practices of the defendant and that this continued and cumulated over a period of time until he was forced to resign effective March 24, 1995. Clearly, under Bustamento, plaintiff's cause of action was not prescribed on the face of the pleadings. Unless prescription is evident from the face of the pleadings, the party raising the peremptory exception of prescription bears the burden of proof. Spott v. Otis Elevator, 610 So. 2d 1355, 1361 (La. 1992). Therefore, the defendants had the burden of proving the exception of prescription. The defendants did not meet this burden at the hearing on the exception of prescription, hence the Court of Appeal's decision affirming the exception of prescription was erroneous. The question of whether the defendants' conduct created a continuously hostile working environment is referred for trial on the merits. Plaintiff's claim for intentional infliction of emotional distress is also referred for trial on the merits. The Court of Appeal's decision affirming the exception of prescription in favor of the defendants is vacated.

DECREE

For the foregoing reasons, we vacate that portion of the court of appeal judgment affirming the exception of prescription against all defendants. The matter is remanded to the District Court for trial on the merits. In all other respects, the decision of the court of appeal is affirmed.

AFFIRMED IN PART; VACATED IN PART; REMANDED.