NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0074

DONNA JEAN WILSON

VERSUS

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY
AGRICULTURAL AND MECHANICAL COLLEGE
D/B/A LSU MEDICAL SCHOOL OF NEW ORLEANS

Judgment Rendered: APR 0 8 2016

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On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Docket No. 609,971, Section 27
Honorable Todd W. Hernandez, Judge Presiding

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BEFORE: McDONALD, WELCH, CRAIN, DRAKE, AND HOLDRIDGE, JJ.

Welch, J. concurs without reasons.
McDonald, J. concurs.
Crain, J. concurs and assigns reasons

HOLDRIDGE, J.

This appeal stems from an employment discrimination suit that a professor, Donna Jean Wilson, brought against her employer, the Board of Supervisors of Louisiana State University Agricultural and Mechanical College d/b/a LSU Medical School of New Orleans (LSU). Ms. Wilson alleged that LSU repeatedly discriminated against her because of a back injury she suffered in 2008. The district court sustained a peremptory exception in which LSU raised the objection of prescription and dismissed the suit as untimely. For the reasons set forth below, we affirm in part, reverse in part, and remand.

FACTUAL AND PROCEDURAL BACKGROUND

According to Ms. Wilson's original petition and her supplemental and amending petition in this suit, she started suffering from back problems on January 21, 2008. She alleged that in February 2008, LSU began a series of acts of harassment, discrimination, and retaliation against her that related to her back injury. Ms. Wilson filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on October 8, 2009. The parties agree that, subsequently, Ms. Wilson filed the first of two suits against LSU in state district court on May 19, 2011 (Wilson I).[1] LSU acknowledged in court that the Wilson I petition alleged that LSU had engaged in unlawful employment discrimination against Ms. Wilson due to her back injury.[2] The district court dismissed Wilson I, without prejudice, for insufficient service of process.

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[1] The Wilson I petition is not part of the record of this case before us on appeal. Thus, we have before us a record containing neither that petition nor facts establishing the date it was filed. That said, we do have before us certain assertions by the parties about the Wilson I petition. While we do not render decisions based upon the mere assertions of the parties, we do note that the parties here agree that the Wilson I petition was filed May 19, 2011, in the state district court. The record on appeal does show that the docket number of Wilson I at the 19th Judicial District Court was 601,921.

[2] Counsel for LSU acknowledged at a hearing in district court that the allegations Ms. Wilson made in the Wilson I petition were based on the same allegations that she made in Wilson II.

On March 6, 2012, Ms. Wilson filed the present suit (Wilson II), generally alleging that LSU unlawfully discriminated against her because of her back injury, and that LSU did so from February 2008 until she filed the Wilson II petition. In Wilson II, the plaintiff also alleged that she was subjected to a "hostile and abusive work environment on account of her physical disability." The Wilson II petition contends that LSU's conduct makes it liable under four statutes: the Louisiana Employment Discrimination Law (LEDL),[3] the Louisiana Whistleblower Statute,[4] the federal Family and Medical Leave Act,[5] and Title VII of the federal Civil Rights Act of 1964 (Title VII).[6] Later, Ms. Wilson supplemented and amended the Wilson II petition to allege that she received a "right to sue" notice from the EEOC on April 16, 2012, and had met all conditions precedent for a Title VII claim. Attached to the supplemental and amending petition, and thus incorporated therein, was the "right to sue" letter issued by the EEOC stating that Ms. Wilson had 90 days to file suit regarding her "Americans with Disabilities Act" (ADA) claims. Subsequently, LSU filed exceptions including a peremptory exception urging an objection of prescription. After a hearing, the district court sustained that exception and dismissed Wilson II as untimely.[7]

In the wake of Wilson II's dismissal, Ms. Wilson brought this devolutive appeal, urging two assignments of error:

1. The district court erred in concluding that Ms. Wilson's claims are prescribed and that the continuing nature of the violations alleged in both the original petition, which was verified by Ms. Wilson,

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[3] LSA-R.S. 23:301-69.

[4] LSA-R.S. 23:967.

[5] 29 U.S.C. §§ 2601-54.

[6] Title VII of the Civil Rights Act of 1964 is found in Title 42 of the United States Code, beginning at section 2000(e).

[7] We note that the district court's judgment sustaining LSU's exception of prescription should have allowed Ms. Wilson the opportunity to amend her petition, but it did not do so. See LSA-C.C.P. art. 934.

and the supplemental and amending petition, do not maintain the viability of her claims.

2. The district court erred in failing to find that prescription was interrupted by the filing of the first petition in the [Wilson I] case.

DISCUSSION

Timeliness, In General

Louisiana Civil Code article 3447 explains that liberative prescription serves as a bar to legal actions because of inaction during a certain period of time. Our jurisprudence views employment discrimination cases as delictual in nature. See, e.g., Eastin v. Entergy Corp., 03-1030 (La. 2/6/04), 865 So.2d 49, 53 (stating an age discrimination claim under the Louisiana Age Discrimination in Employment Act, was delictual). Louisiana Civil Code article 3492 provides that, generally, "[d]elictual actions are subject to a liberative prescription of one-year. This period commences to run from the day injury or damage is sustained." For the purposes of prescription, damages are sustained from the date the injury is inflicted, if the injury is immediately apparent to the injured party. Clark v. Wilcox, 04-2254 (La. App. 1st Cir. 12/22/05), 928 So.2d 104, 112, writ denied, 06-0185 (La. 6/2/06), 929 So.2d 1252. Our courts are guided by the principle that, "under Louisiana jurisprudence, prescriptive statutes are to be strictly construed against prescription and in favor of the obligation sought to be extinguished; of 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).

Particularly important for all four of Ms. Wilson's claims is which party bears the burden of proof regarding prescription. This determination depends on whether the well-pleaded allegations in Ms. Wilson's petition set forth a continuing tort or, as the federal jurisprudence calls it, a continuing violation.

In her first assignment of error, Ms. Wilson argues that the district court erred in failing to find that the continuing nature of the violations she alleged

prevented her four claims from being prescribed. While Ms. Wilson did introduce some items into evidence at the district court's hearing on LSU's exception raising the objection of prescription, none of it is relevant to this assignment.[8] Thus, for the purposes of this assignment—arguing that a continuing tort violation enlarged the prescriptive period—the record contains no evidence. Generally, in the absence of evidence, the objection of prescription must be decided based upon the facts alleged in the petition, which must be accepted as true. Kirby v. Field, 04-1898 (La. App. 1st Cir. 9/23/05), 923 So.2d 131, 135, writ denied, 05-2467 (La. 3/24/06), 925 So.2d 1230. Therefore, as the district court here was limited to considering the well-pleaded allegations in the petition and the supplemental and amending petition when deciding the prescription issue, the district court's ruling was necessarily a ruling upon a question of law. District court rulings on questions of law are subject to *de novo* review before this court. E.g., TCC Contractors, Inc. v. Hosp. Serv. Dist. No. 3 of Parish of Lafourche, 10-0685 (La. App. 1st Cir. 12/8/10), 52 So.3d 1103, 1108.

Ms. Wilson's petition makes seven specific allegations of fact pertaining to LSU's conduct in setting forth all four of her claims. She alleged that, starting in February 2008, and continuing through the filing of the Wilson II petition, the following occurred:

> A. As Petitioner conversed with defendant about returning to work within the summer of 2008, defendant said, "face it DJ, you're not a good risk";
>
> B. Denise Bienvenue suggested to Petitioner to take disability retirement and go work part-time someplace else;

[8] Ms. Wilson offered, and the district court accepted into evidence, five exhibits attached to her memorandum in support of her opposition to the exception. These were: Exhibit A, the judgment in Wilson I; Exhibit B, service of process details about service in Wilson II; Exhibit C, an order authorizing the filing of the supplemental and amending petition in Wilson II; Exhibit D, a letter about deposition dates in Wilson II from LSU's counsel to Ms. Wilson's counsel; and Exhibit E, a letter about written discovery requests in Wilson II, also from LSU's counsel to Ms. Wilson's counsel. In addition, Ms. Wilson offered, and the district court accepted into evidence, the entire record of the Wilson II proceeding, including the supplemental and amending petition and the attachment to it. The attachment referred to is a right to sue notice from the U.S. Department of Justice to counsel for Ms. Wilson.

C. Two weeks subsequent to the Petitioner's injury, she was told by the defendant, "if you aren't back by two weeks, then you're never coming back";

D. Petitioner was informed by defendant in an email, "since you will not be able to return to work at a minimum 75% level, I am asking that you do not do any part-time work until we can better delineate appropriate actions ... .";

E. Defendant acted in total disregard to Petitioner's complaint of severe pain;

F. Petitioner was harassed by defendant for her refusal of inappropriate work assignments; and,

G. Such other vindictive behavior and verbal attacks as will be more fully shown at trial of this matter.

Although the parties' briefs tend to treat all four claims the same for purposes of prescription, certain differences exist in each claims prescriptive period. Thus, for clarity, we will discuss each claim individually.

State Employment Discrimination

For state employment discrimination cases brought under the LEDL, LSA-R.S. 23:303(D) provides for a one-year prescriptive period. However, the LEDL further provides that, if the EEOC or the Louisiana Commission on Human Rights (LCHR) conducts an administrative review or investigation of the discrimination claim, then the prescriptive period is suspended during the pendency of that administrative proceeding, which may not exceed six months. LSA-R.S. 23:303(D). When prescription is suspended, "[t]he period of suspension is not counted toward the accrual of prescription," and when suspension occurs, "[p]rescription commences to run again upon the termination of the period of suspension." LSA-C.C. art. 3472. Ordinarily, a party urging an exception of prescription bears the burden of proving that the prescriptive period has elapsed. Eastin, 865 So.2d at 54. However, if the petition shows that it is prescribed on its face, then the burden shifts to the plaintiff to prove that the prescriptive period has not elapsed. Id. If the plaintiff has alleged a continuous course of conduct

extending into the time that prescription requires filing suit, the plaintiff's action is not prescribed on the face of the petition. See Jones v. State ex rel. Dep't of Corr., 13-0482 (La. App. 1st Cir. 11/1/13), 2013 WL 5918755, at *5, writ denied, 13-2783 (La. 2/14/14), 132 So.3d 965. Thus, the defendant maintains the burden of establishing the facts necessary to sustain the plea of prescription. See Id.

Therefore, the burden of proof in this case, as to whether Ms. Wilson's LEDL claim as well as her other claims prescribed should have been on LSU, not Ms. Wilson. However, the district court's written ruling on prescription implicitly, and incorrectly, put the burden on Ms. Wilson to prove that her claims were not prescribed. The part of the ruling addressing the issue of whether a continuing violation precluded all four claims from being prescribed states: "No testimony or other evidence of a continuing violation was put before the court. The original petition filed over two years after the EEOC complaint is prescribed on its face." The district court's placing the burden of proof on Ms. Wilson on the continuing tort issue constituted legal error. See Id.

The courts have recognized an exception to the general rules of prescription where unlawful employment practices manifest themselves over time causing continuing damage. Bustamento, 607 So.2d at 532. Louisiana jurisprudence usually refers to such an allegation as the "continuing tort doctrine." Jones, 2013 WL 5918755, at *3. The same concept is recognized in the federal jurisprudence, which usually calls this kind of allegation the "continuing violation theory." E.g., Messer v. Meno, 130 F.3d 130, 134-35 (5th Cir. 1997). A prerequisite for invoking the continuing tort doctrine is the occurrence of at least one act of tortious conduct within the year immediately preceding filing suit. Bustamento, 607 So.2d at 539. Our supreme court has explained how continuing torts differ from torts that are not continuing:

> Louisiana decisions draw a distinction between damages caused by continuous, and those caused by discontinuous,

> operating causes. When the operating cause of the injury is continuous, giving rise to successive damages, prescription begins to run from the day the damage was completed and the owner acquired, or should have acquired, knowledge of the damage. When the operating cause of the injury is discontinuous, there is a multiplicity of causes of action and of corresponding prescriptive periods. Prescription is completed as to each injury, and the corresponding action is barred, upon the passage of one year from the day the owner acquired, or should have acquired, knowledge of the damage.

Bustamento, 607 So.2d at 539, n.8 (quoting official revision comment (c) to LSA-C.C. art. 3493) (citations omitted).

As noted, the state employment discrimination claim that Ms. Wilson alleged rests upon the LEDL. LSA-R.S. 23:301-69. The LEDL, in pertinent part, makes it unlawful to discriminate in employment against a disabled person because of the person's disability. LSA-R.S. 23:323(A). It has a one-year prescriptive period, which may be extended up to a total of eighteen months, if the complainant has filed a complaint with the EEOC or the LCHR. LSA-R.S. 23:303(D). Here, Ms. Wilson's petition alleged that she sought, and received, administrative review of her complaint of discrimination from the EEOC. Therefore, Ms. Wilson would have had up to eighteen months from the last allegedly discriminatory conduct to bring suit.

Ms. Wilson alleged in her petition that LSU's discriminatory conduct continued up through the day she filed the Wilson II petition. In this assignment of error, Ms. Wilson argues that the continuing tort doctrine applies to the facts of this case, and that doctrine delays the start of the running of prescription until the defendant's unlawful conduct stops. To properly plead a continuing tort, the plaintiff must plead "material allegations of fact, as opposed to allegations deficient in material detail, conclusory factual allegations, or allegations of law." Kirby, 923 So.2d at 135. However, of the seven specific allegations Ms. Wilson makes regarding her claim of continuing state employment discrimination, none of

the allegations articulate specific facts about LSU's conduct sufficient to set forth a continuing violation.

Noticeably, of Ms. Wilson's five allegations articulating specific facts (A, B, C, D, and F), not one of them specifically alleged conduct within the eighteen-month window before the filing of Wilson II. Allegation A appears to have occurred during, or before, the summer of 2008. Allegation C is specifically alleged to have been two weeks after Ms. Wilson's injury. The three other allegations (B, D, and F) are silent as to when they allegedly occurred.

In sum, considering the well-pleaded allegations in the petition, we conclude that Ms. Wilson failed to adequately plead a continuing violation of state employment discrimination based on her allegations, so as to extend the prescriptive period past eighteen months from the last alleged discriminatory conduct. None of Ms. Wilson's allegations fit the requirement for alleging a continuing violation because each fail to paint a picture of conduct by LSU in which "the operating cause of the injury is continuous, giving rise to successive damages ... ." See Bustamento, 607 So.2d at 539, n.8. Although some of the allegations share similarities, they are not continuous or systematic acts of abuse, but instead are separate and distinct acts, which are not continuous on an almost daily basis, by the same actor, or of the same nature. See Gulf & Miss. River Transp. Co. v. Chevron Pipeline Co., 451 Fed. Appx. 372, 375 (5th Cir. 2011) (quoting Bustamento, 607 So.2d at 542).

Therefore, we find that the continuing tort doctrine is not applicable in this case, as Ms. Wilsons' allegations are merely conclusory factual allegations of a continuing tort, which lack material detail. Thus, it was not legal error for the district court to dismiss Ms. Wilson's claim of state employment discrimination as untimely.

Title VII Employment Discrimination

In her petition, Ms. Wilson repeatedly asserts that she has a claim under Title VII. However, a claim under Title VII prohibits discrimination on the basis of an individual's race, color, religion, sex, or national origin and Ms. Wilson asserts no such factual allegations in her petition. See 42 U.S.C. § 2000e-2(a)(1).

This court raises the peremptory exception of no cause of action *sua sponte* for Ms. Wilson's Title VII claim in accordance with LSA-C.C.P. art. 927(B) which provides that "the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit ... may be noticed by either the trial court or appellate court on its own motion." See Moreno v. Entergy Corp., 10-2268 (La. 2/18/11), 64 So.3d 761, 762.[9] Nevertheless, consistent with LSA-C.C.P. art. 934,[10] prior to the dismissal of Ms. Wilsons' Title VII claim, we find that she should have been given an opportunity to amend her petition in the event that she is able to state a cause of action against the defendant in these proceedings.

State Whistleblower Statute

Louisiana is a fact-pleading jurisdiction. Thus, mere legal conclusions, unsupported by facts, are not sufficient to state a cause of action. State ex rel. Ieyoub v. Racetrac Petroleum, Inc., 01-0458 (La. App. 3rd Cir. 6/20/01), 790 So.2d 673, 678. Accordingly, to properly analyze the issue of prescription, we look to the facts alleged in Ms. Wilson's petition to discern the causes of action asserted therein. In her petition, Ms. Wilson refers to LSA-R.S. 23:967, the Louisiana Whistleblower Statute. That statute authorizes an employee to file a civil action against an employer who takes reprisal against an employee for a variety of

[9] This court notices on its own motion a peremptory exception of no cause of action pursuant to LSA-C.C.P. art. 927(B) since there must a cause of action before prescription can run. See Austin v. Abney Mills, Inc., 01-1598 (La. 9/4/02), 824 So.2d 1137, 1160.

[10] Louisiana Code of Civil Procedure article 934 provides that when the grounds of an objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court.

reasons, including the employee's objecting to or refusing to participate in an employment practice that is contrary to law. See Id. However, no where in her petition does Ms. Wilson allege any facts establishing that her employer, LSU, took any reprisal against her for any of the of actionable grounds set forth in LSA-R.S. 23:967.

Accordingly, this court raises the peremptory exception of no cause of action *sua sponte* for Ms. Wilson's whistleblower claim and remands this matter to the district court to give her an opportunity to amend her petition in the event that she is able to state a cause of action against the defendant in these proceedings. See LSA-C.C.P. art. 927(B) and LSA-C.C.P. art. 934.[11]

FMLA

Finally, we address Ms. Wilson's FMLA argument, in which she makes a conclusory allegation that actions or inactions of the defendant "constituted ... retaliation/reprisal in violation of the FMLA[.]" A plaintiff carries the burden of proving an FMLA claim by establishing a prima facie case of retaliatory discrimination by showing that she exercised rights afforded by the FMLA, that she suffered an adverse employment action, and that there was a causal connection between her exercise of rights and the adverse employment action. See McDonnell Douglas Corp. v. Green, 411 U.S. 802, 803, 93 S.Ct. 1817. However, Ms. Wilson does not factually allege any of these factors. Rather, her factual allegations are that she was discriminated against due to her physical disability, not because she exercised her rights under the FMLA. See 29 U.S.C. § 2615(a)(1)-(2). Because Louisiana is a fact-pleading jurisdiction, mere legal conclusions, unsupported by facts, are not sufficient to set forth a cause of action. Meckstroth v. La. Dep't of Transp. & Dev., 07-0236 (La. App. 4th Cir. 6/27/07), 962 So.2d 490, 492 (citing

[11] See footnote 9.

State ex rel. Ieyoub v. Racetrac Petroleum, Inc., 01-0458 (La. App. 3rd Cir. 6/20/01), 790 So.2d 673, 678).

Nevertheless, consistent with LSA-C.C.P. art. 934, prior to the dismissal of Ms. Wilsons' FMLA claim, this court finds that she should be given the opportunity to amend her petition in the event that she is able to state a cause of action against the defendant in these proceedings. Therefore, this court raises on its own motion the peremptory exception of no cause of action *sua sponte* and remands this matter for Ms. Wilson's FMLA claim to the district court to cure the grounds for the exception. See LSA-C.C.P. art. 927(B).[12]

Employment Discrimination- Failure to Accommodate

Ms. Wilson makes conclusory statements about the defendant's failure to accommodate; however, she makes no factual allegation that she requested any particular accommodation for her disability. In order to establish such a claim, we note that it is the plaintiff's burden to request reasonable accommodations. Jenkins v. Cleco Power, LLC, 487 F.3d 309, 315 (5th Cir. 2007). Therefore, this court raises on its own motion the peremptory exception of no cause of action *sua sponte* and remands this matter for Ms. Wilson's failure to accommodate claim to allow her an opportunity to amend her petition to cure the grounds for the exception. See LSA-C.C.P. art. 927(B) and LSA-C.C.P. art. 934.[13]

Americans With Disabilities Act

Ms. Wilson erroneously named Title VII as a claim in her supplemental and amending petition, instead of alleging a claim under the ADA, which her "right to sue" notice provided from the EEOC. However, the Wilson II petition fails to set forth factual allegations against her employer for disability discrimination based on her disability under the ADA, 42 U.S.C. § 12101, *et seq.* Because there must be a

[12] See footnote 9.

[13] See footnote 9.

cause of action in order to address the issue of prescription, this court raises the peremptory exception of no cause of action *sua sponte* to allow Ms. Wilson the opportunity to amend her petition relative to any possible ADA claim that she may have. See LSA-C.C.P. art. 927(B); Austin v. Abney Mills, Inc., 01-1598 (La. 9/4/02), 824 So.2d 1137, 1160.[14]

Assignment Two

Ms. Wilson's second assignment of error contends that the district court erred in failing to find that prescription in Wilson II was not interrupted by the filing of the petition in Wilson I. As our decision on Ms. Wilson's first assignment resolves this appeal, we need not address her second assignment.

DECREE

For all of the foregoing reasons, we affirm in part the judgment of the district court sustaining the exception of prescription for the state employment discrimination claim. However, we reverse in part the district court's judgment dismissing as untimely the whistleblower claim, the Title VII claim, the FMLA claim, the failure to accommodate claim, and the ADA claim, and remand the matter to the district court with instructions to issue an order granting Ms. Wilson an opportunity to amend her petition to state a cause of action, if she can, within a delay deemed reasonable by the district court. Cost of this appeal, in the amount of $458.00, are to be evenly split between the parties.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[14] See footnote 9.

DONNA JEAN WILSON **STATE OF LOUISIANA**

VERSUS

COURT OF APPEAL

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERESITY AGRICULTURAL AND MECHANICAL COLLEGE D/B/A LSU MEDICAL SCHOOL OF NEW ORLEANS **FIRST CIRCUIT**

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CRAIN, J., concurring.

Despite the conclusory allegation to the contrary, the plaintiff's petition alleges a disconnected series of discrete acts that do not reflect an organized scheme of discrimination necessary to constitute a continuing tort. *Compare Bustamento v. Tucker*, 607 So. 2d 523, 537 (La. 1992); *Jones v. State ex rel. Dep't of Corr.*, 13-0482, 2013WL5918755 at p.5 (La. App. 1 Cir. 11/1/13). Consequently, the petition is prescribed on its face and, on the trial of the exception of prescription, the plaintiff bore the burden of proving that the prescriptive period did not elapse. *See Eastin v. Entergy Corp.*, 03-1030 (La. 2/6/04), 865 So. 2d 49, 54. Relative to her state employment discrimination claim, the plaintiff failed to meet her burden of proving that the prescriptive period did not elapse. *See* La. R.S. 23:303D. Therefore, I concur in affirming the dismissal of the state employment discrimination claim.

I agree with the majority's decision to raise, *sua sponte*, exceptions of no cause of action with regard to the remaining claims. With regard to the majority's decision to sustain those exceptions and remand this matter to allow the plaintiff the opportunity to amend her petition to state a cause of action, I concur in the result.