NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0334

JOE ROGALSKI, NEDINA CHAISSON, AND MELISSA SHAPCOTTE

VERSUS

EDUCATION MANAGEMENT, INC. D/B/A BLUE CLIFF COLLEGE

Judgment Rendered: JAN 0 3 2017

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On Appeal from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Trial Court No. 159,016, Div. C

The Honorable Juan W. Pickett, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND CALLOWAY,[1] JJ.

[1] Hon. Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

Pettigrew, J. Concurs CAC

CALLOWAY, J.

This appeal arises out of summary judgment in favor of the defendant/appellee, Education Management, Inc. d/b/a Blue Cliff College (hereinafter "Blue Cliff"), dismissing all of the plaintiffs' claims against Blue Cliff, with prejudice. On February 11, 2010, the plaintiffs filed suit alleging they were discharged by Blue Cliff, their employer, based on their race, Caucasian, in violation of the Louisiana Employment Discrimination Law, La. R.S. 23:301, *et seq.* (hereinafter "LEDL"). Blue Cliff is an accredited institution offering career training and hands-on experience through a diverse catalog of academic programs, including cosmetology, massage therapy, dental and medical assisting, and other programs. Nedina Chaisson[2] and Melissa Shapcotte were employed as cosmetology teachers at Blue Cliff's Houma campus, and Joe Rogalski was employed as the director of that campus.

An incident occurred at the cosmetology school's beauty salon on November 7, 2008, wherein a customer made a comment regarding then-recently elected President of the United States, Barack Obama, which caused a disruption in the salon. Chaisson and Shapcotte were working with students in the salon on the day of the incident. Following an investigation, Rogalski expelled four African-American cosmetology students who were involved in the incident. Shortly after the expulsions, Blue Cliff reinstated the students and discharged Chaisson, Shapcotte, and Rogalski. The reason given by Blue Cliff for Chaisson and Shapcotte's discharge was "inappropriate professional behavior in the classroom," and its reason for discharging Rogalski was that he mishandled the November 7th incident and expelled the four students without a proper investigation and without due process.

On September 21, 2015, Blue Cliff filed a motion for summary judgment. A hearing was held on October 16, 2015. At the conclusion of the hearing, the trial court granted summary judgment in favor of Blue Cliff and dismissed all of the plaintiffs' claims, with prejudice, assigning oral reasons for its ruling. The trial court signed a judgment in accordance with its ruling on October 30, 2015. The plaintiffs now appeal and assign error to the trial court's grant of summary judgment in favor of Blue Cliff, as well as to the trial court's consideration of an affidavit submitted in connection with Blue Cliff's motion despite the plaintiffs' objections.

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[2] Nedina Chaisson's surname is also spelled as "Chiasson" in the record on appeal.

LAW AND DISCUSSION

Motion to Strike

The plaintiffs allege the trial court erred in admitting the affidavit of Reginald L. Moore, Sr., the president and CEO of Blue Cliff, over their motion to strike. The plaintiffs argue that twelve unverified, unsworn witness statements were attached to Mr. Moore's affidavit and were offered by Blue Cliff to show the truth of the matters presented therein, rather than the fact that the statements were made or that Blue Cliff conducted an investigation. The plaintiffs filed a motion to strike based upon La. C.C.P. art. 967 and La. C.E. arts. 801 and 901.

A motion to strike is a proper procedural vehicle to challenge an affidavit. *Klohn v. Louisiana Power & Light Co.*, 394 So. 2d 636, 637 (La. App. 1 Cir. 1980), *writ denied*, 399 So. 2d 612 (La. 1981). Affidavits must be based on personal knowledge and must set forth facts that would be admissible in evidence. La. C.C.P. art. 967(A). The inadequacy of an affidavit is a "formal defect," and the opponent waives the defect unless he or she files a motion to strike or otherwise objects to the affidavit. *See* La. C.C.P. art. 966(F);[3] *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 (La. 2/29/00), 755 So. 2d 226, 235 n.4. By filing the motion to strike, the plaintiffs have preserved their right to challenge Mr. Moore's affidavit on appeal. Because the trial court is accorded vast discretion in determining whether to admit or exclude evidence, its decision will not be reversed absent a showing that it abused that discretion. *See Fournerat v. Farm Bureau Ins. Co.*, 2011-1344 (La. App. 1 Cir. 9/21/12), 104 So. 3d 76, 83, *writ denied*, 2012-2148 (La. 11/21/12), 102 So. 3d 59.

Rulings on motions to strike are generally interlocutory judgments. *See* La. C.C.P. arts. 1841 and 2083; *Dupuis v. Becnel Co.*, 517 So. 2d 1110, 1111-12 (La. App. 3 Cir. 1987); *Veillon v. Veillon*, 497 So. 2d 1087 (La. App. 3 Cir. 1986). When an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. *Lambert Gravel Company, Inc. v. Parish of West Feliciana*, 2015-1225 (La. App. 1 Cir. 9/20/16), ___ So. 3d ___, 11.

Article 966(F)(2) provides that evidence is "deemed admitted for purposes of the motion for summary judgment unless excluded in a response to an objection made in accordance with

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[3] An appellate court is bound to adjudge a case before it in accordance with the law existing at the time of its decision. *Segura v. Frank*, 93-1271, 93-1401 (La. 1/14/94), 630 So. 2d 714, 725. Louisiana Code of Civil Procedure article 966 was amended by 2015 La. Acts, No. 422, § 1; however, the new version of Article 966 does not apply to this case as the amendment did not become effective until January 1, 2016. Here, the pendency of the instant appeal on the effective date of 2015 La. Acts, No. 422 results in the application of the prior version of Article 966 to the instant matter.

Subparagraph (3) of this Paragraph." Subparagraph (F)(3) further provides that "[o]bjections to evidence in support of or in opposition to a motion for summary judgment may be raised in memorandum or written motion to strike...and shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9."

In accordance with Rule 9.9, the plaintiffs were required to file and serve their motion to strike eight days prior to the hearing on Blue Cliff's motion for summary judgment. The plaintiffs' motion to strike was filed and forwarded to Blue Cliff on October 9, 2015. The hearing on Blue Cliff's motion for summary judgment was held on October 16, 2015. Thus, the motion to strike was filed seven days, and not eight days, prior to the hearing on the motion for summary judgment. *See* La. C.C.P. art. 5059. Therefore, because the plaintiffs' motion to strike the affidavit was not timely filed and served, the affidavit is deemed admitted. *See* La. C.C.P. art. 966(F)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016). The trial court was free to consider the affidavit and give it appropriate weight in ruling on Blue Cliff's motion for summary judgment. The transcript for the summary judgment hearing indicates that the trial court did indeed consider the affidavit and attached statements because he discusses the contents of this evidence in his oral reasons for ruling.

We further note that the trial court's reliance on Mr. Moore's affidavit and the grant of summary judgment in favor of Blue Cliff, without addressing the plaintiffs' outstanding motion to strike, is deemed a denial of that motion. Silence as to any issue that was placed before the court is deemed a rejection of that demand or issue and denial of the relief sought. *Barham & Arceneaux v. Kozak*, 2002-2325 (La. App. 1 Cir. 3/12/04), 874 So. 2d 228, 241, *writ denied*, 2004-0930 (La. 6/4/04), 876 So. 2d 87; *Hayes v. Louisiana State Penitentiary*, 2006-0553 (La. App. 1 Cir. 8/15/07), 970 So. 2d 547, 554 n.9, *writ denied*, 2007-2258 (La. 1/25/08), 973 So. 2d 758.

Motion for Summary Judgment

After adequate discovery, a motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2) and (C)(1) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016).[4] The

[4] Now, *see* La. C.C.P. art. 966(A)(3).

summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. *See* La. C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016).[5] If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016). If the nonmoving party fails to make this requisite showing, there is no genuine issue of material fact, and summary judgment should be granted. La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016). If, however, the mover fails in his burden to show an absence of factual support for one or more of the elements of the adverse party's claim, the burden never shifts to the adverse party, and the mover is not entitled to summary judgment. *LeBlanc v. Bouchereau Oil Co., Inc.*, 2008-2064 (La. App. 1 Cir. 5/8/09), 15 So. 3d 152, 155, *writ denied*, 2009-1624 (La. 10/16/09), 19 So. 3d 481.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Hines v. Garrett*, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 765 (*per curiam*). A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Hines*, 876 So. 2d at 765-66. Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 2000-2507 (La. 12/8/00), 775 So. 2d 1049, 1050 (*per curiam*).

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[5] Now, *see* La. C.C.P. art. 966(D)(1).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *East Tangipahoa Development Company, LLC v. Bedico Junction, LLC*, 2008-1262 (La. App. 1 Cir. 12/23/08), 5 So. 3d 238, 243-44, *writ denied*, 2009-0166 (La. 3/27/09), 5 So. 3d 146. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this case. *Pumphrey v. Harris*, 2012-0405 (La. App. 1 Cir. 11/2/12), 111 So. 3d 86, 89.

The applicable substantive law in this case is the LEDL, set forth in La. R.S. 23:301, *et seq.* Similar in scope to Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000, *et seq.*, the LEDL provides that is it unlawful discrimination in employment for an employer to discharge any individual because of the individual's race. *See* La. R.S. 23:332(A)(1); *King v. Phelps Dunbar, L.L.P.*, 98-1805 (La. 6/4/99), 743 So. 2d 181, 187 (referencing former La. R.S. 23:1006, precursor to current La. R.S. 23:301, *et seq.*). The LEDL, designed to embody the protections of federal anti-discrimination laws, specifically prohibits discriminatory conduct in the workplace. Because of the substantial similarities between state and federal anti-discrimination laws, courts may appropriately consider interpretations of federal statutes when construing Louisiana law. *Hicks v. Central Louisiana Elec. Co., Inc.*, 97-1232 (La. App. 1 Cir. 5/15/98), 712 So. 2d 656, 658.

To establish a *prima facie* case of racial discrimination under the LEDL, the plaintiff must show by a preponderance of the evidence that she: (1) belongs to a protected group; (2) was qualified for the position; (3) suffered an adverse employment action; and (4) was replaced by someone outside of the protected group. *Mbarika v. Board of Sup'rs of Louisiana State University*, 2007-1136 (La. App. 1 Cir. 6/6/08), 992 So. 2d 551, 562, *writ denied*, 2008-1490 (La. 10/3/08), 992 So. 2d 1019.

If a *prima facie* case is established, a rebuttable presumption is created that the employer unlawfully discriminated against the employee. In order to rebut the presumption of discrimination, the defendant must provide a legitimate, non-discriminatory reason for the adverse employment action. To avoid summary judgment once the defendant has presented a legitimate, non-discriminatory reason for its actions, the plaintiff must offer sufficient evidence to create a genuine issue of material fact that the defendant's proffered reason was pretextual, or,

in a "mixed-motive" case, sufficient evidence to create a genuine issue of material fact that the defendant's reason, while true, is only one of the reasons for its conduct, and the plaintiff's race is another "motivating factor" for the defendant's conduct. *Mbarika,* 992 So. 2d at 562.

On September 21, 2015, Blue Cliff filed a motion for summary judgment, a list of essential legal elements, a statement of uncontested material facts, and a memorandum. Blue Cliff argued that the plaintiffs did not have any evidence to establish a *prima facie* case of race discrimination or to establish that the legitimate, non-discriminatory reasons offered by Blue Cliff for their discharge were a pretext for race discrimination. Blue Cliff pointed out that the plaintiffs lacked factual support for two elements essential to their claim of employment discrimination based on race. Specifically, Blue Cliff argued that the plaintiffs were not replaced by members outside of the protected class, noting a Caucasian employee replaced Rogalski as campus director, and that the group of cosmetology instructors hired after the college discharged Chaisson and Shapcotte included a Caucasian, an African-American, and a mixed-race individual. Further, Blue Cliff argued that the plaintiffs were not qualified for their positions: Chaisson and Shapcotte exhibited inappropriate conduct and unacceptable treatment of students, while Rogalski mishandled the incident at the center of this case and expelled the four students without a proper investigation and without due process.

In support of its motion for partial summary judgment, Blue Cliff submitted the following exhibits:

> (A) copy of the affidavit of Reginald L. Moore, Sr., the president and CEO of Blue Cliff and attached thereto, copies of thirteen handwritten student statements collected during the investigation of the incident;[6]
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> (B) transcript excerpts of the deposition of Nedina Chaisson taken on November 26, 2013, and attached thereto, a copy of Chaisson's discharge letter;
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> (C) transcript excerpts of the deposition of Joe Rogalski taken on November 25, 2013;
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> (D) transcript excerpts of the deposition of Melissa Shapcotte taken on November 25, 2013, and attached thereto, a copy of Shapcotte's discharge letter;
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> (E) transcript excerpts of the deposition of Doug Robertson taken on December 5, 2013;
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> (F) transcript excerpts of the deposition of Bridget Handley taken on December 5, 2013;

[6] The trial court granted Blue Cliff's motion to file a supplemental affidavit of Mr. Moore.

(G) copy of the affidavit of Caroline Wallace, the human resources manager of Blue Cliff;

(H) copy of the first set of discovery requests propounded on Shapcotte by Blue Cliff, and Shapcotte's answers; and a

(I) copy of the first set of discovery requests propounded on Rogalski by Blue Cliff, and Rogalski's answers.

The plaintiffs opposed the motion for summary judgment and filed a response to Blue Cliff's statement of uncontested material facts. The plaintiffs argued that genuine issues of material fact existed as to whether Blue Cliff's reasons for the discharges were legitimately non-discriminatory. The plaintiffs contend Blue Cliff used hearsay statements from students and allegations of past performance, despite any formal reprimand, to "cover up" the discretionary discharges, which the plaintiffs argue were a direct result of the incident that occurred on November 7, 2008. Blue Cliff filed a reply to the plaintiffs' opposition.

Following our *de novo* review, we find that Blue Cliff pointed out the plaintiffs lacked factual support for an element essential to their employment discrimination claim, namely, that they were replaced by individuals outside of the protected group. According to Blue Cliff's human resources manager Caroline Wallace, whose affidavit was submitted in support of Blue Cliff's motion for summary judgment: (1) Rogalski was replaced by Mike Rowan, a Caucasian; and (2) Shapcotte and Chaisson were replaced by one African-American, one Caucasian, and one mixed-race person. None of the plaintiffs produced factual support sufficient to show that he or she was replaced by a non-Caucasian employee; therefore, summary judgment is appropriate in Blue Cliff's favor, without having to address the remaining three requirements of a race discrimination claim. *See* La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016).[7]

Conclusion

The plaintiffs bore the burden of proof in this case. Through their motion for summary judgment and supporting evidence, Blue Cliff pointed out the absence of factual support for one or more elements essential to the plaintiffs' claims. Therefore, the burden of proof shifted to the plaintiffs to come forward with affirmative evidence sufficient to demonstrate a likelihood that they would be able to meet their burden of proof at trial. Based on our *de novo* review of the record, we find that the plaintiffs have failed to produce factual evidence sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial, *i.e.*, a *prima facie* case

[7] Now, *see* La. C.C.P. art. 966(D)(1).

of employment discrimination under the LEDL. Thus, there is no genuine issue of material fact, and Blue Cliff is entitled to summary judgment as a matter of law. We therefore affirm the October 30, 2015 judgment in Blue Cliff's favor, dismissing the plaintiffs' claims with prejudice.

DECREE

Based on the foregoing, the October 30, 2015 judgment is hereby affirmed. All costs of this appeal are assessed to the plaintiffs/appellants, Nedina Chaisson, Melissa Shapcotte, and Joe Rogalski.

AFFIRMED.