

**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 THE COURT OF APPEAL,  
FOURTH CIRCUIT, PARISH OF ORLEANS**

**KNOLL, JUSTICE**, concurring in part, dissenting in part.

I concur with the majority's conclusion that the plaintiff has failed to establish a claim for intentional infliction of emotional distress and that the individual defendants named in the suit were entitled to summary judgment dismissing them from the suit. I cannot agree, however, with the majority's conclusion that the plaintiff's claim for employment discrimination has not prescribed because the defendant's alleged actions constituted a continuing tort.

The majority's reliance upon the continuous tort doctrine is flawed because no evidence properly admitted supports the majority's conclusion that March 10, 1995, was "when [Mr. King's] working conditions became too intolerable to continue." Nothing but the plaintiff's own subjective and conclusive allegations suggests that conditions for Mr. King after January 20, 1995, continued and got worse to the point that he was forced to tender his resignation on March 10, 1995, effective March 24, 1995. A subjective belief of discrimination, no matter how genuine, cannot support a claim of discrimination. *Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 567 (5th Cir.1983), *cert. denied*, 467 U.S. 1215 (1984). Discrimination claims under La.R.S. 23:1006 are subject to a one-year liberative prescriptive period. La.Civ. Code. art. 3492. The courts, however, have recognized an exception applicable in exceptional circumstances where unlawful employment practices manifest themselves over time from continuous conduct causing continuing damages. *Bustamento v. Tucker*, 607 So.2d 532 (La.1992); *South Cent. Bell Tel.Co. v. Texaco Inc.*, 418 So.2d 531 (La.1982). When tortious conduct and resulting damages are of a continuing nature, prescription does not begin until the conduct causing the damages is abated. *Id.* Continuing damages alone, however, do not suffice to create a continuing tort; there must also be continuing acts of fault. *South*

*Central Bell Telephone Co.*, 418 So.2d at 532-33. The principle behind the continuing tort doctrine is that it protects plaintiffs from acts which by themselves may not be unlawful or sufficient to alert the plaintiff that his rights have been violated, but instead require a cumulative process to become actionable. In its early stages, the acts are not identifiable as unlawful, or may not have crossed the threshold that separates the nonactionable from the actionable. *See, e.g., Bustamento*, 607 So.2d at 532. Thus, where the unlawful practice manifests itself over time, rather than as a series of discrete acts or by a defining act alerting the plaintiff of a violation of his rights, the plaintiff is relieved of proving that the entire violation occurred within the actionable period, providing the plaintiff proves a series of related acts, one of which falls within the prescriptive period. Nonetheless, the very concept of cumulation in the continuing tort doctrine suggests a critical limiting principle: A plaintiff may not rely upon the continuing tort doctrine unless it would be unreasonable to expect that the plaintiff knew or should have known that his rights were being violated by unlawful conduct that renders the action untimely.

Thus, in order to allege a continuing tort and extend the statute of limitations, the plaintiff bears the burden of showing a series of unlawful, continuous, and related acts and the resulting continuous damages. *Bustamento*, 607 So.2d at 538; *see generally Speer v. Rand McNally & Co.*, 123 F.3d 658, 663 (7th Cir.1997); *Mascheroni v. Board of Regents*, 28 F.3d 1554, 1561 (10th Cir.1994); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). Further, under the continuous tort exception, the “focus is on what event, in fairness and logic, should have alerted the average[, reasonable,] lay person to protect his rights.” *Webb v. Cardiothoracic Surgery Assoc. of N. Tex.*, 139 F.3d 532, 537 (5th Cir. 1998). Despite the overwhelming jurisprudence to the contrary, the majority improperly shifts the burden to the defendants to prove that the plaintiff’s claim had prescribed. Having relied upon the continuing tort theory, the proper burden was on Mr. King to prove the jurisprudential exception to the law. If the claimant cannot satisfy this burden, the cause of action for employment discrimination is time-barred. The record supports that defining event, in fairness and logic, on which a reasonable person in Mr. King’s position would have been convinced of the alleged unlawful basis for the alleged employment discrimination and alerted to protect his right occurred on or before January 20, 1995, thus failing his burden of showing a continuing tort. Instead, plaintiff and the majority rely upon conclusory allegations in his petition, affidavit, and deposition, evidence which cannot support a finding that the defendant’s actions were continuous.

Mr. King's claim is for employment discrimination resulting in constructive discharge. The majority recognizes this by noting: "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 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." (emphasis added). A constructive discharge occurs when the trier of fact is satisfied that the working conditions to which the employee is subjected to are so intolerable that a reasonable person would feel compelled to resign, not when he necessarily does so. *Plummer v. Marriott Corp.*, 94-2025 (La.App. 4 Cir. 4/26/95), 654 So. 2d 843, 848, writ denied, 95-1321 (La. 9/15/95), 660 So. 2d 460; *Ricks*, 449 U.S. at 257-59 (holding that limitation periods for an employment discrimination claim based on Title VII and 42 U.S.C. § 1981 commenced on the date the alleged unlawful decision was made and the plaintiff was given notice and noting that "continuity of employment, without more, is insufficient to prolong the life" of the action). The effect of the majority's opinion is that prescription in constructive discharge cases will never commence until the employee, no matter how unreasonable the decision may be, decides to quit, making subjective continuing torts imprescriptible despite the presence of objective defining events that belie that position. In this case, Mr. King's running for public office in an effort to leave Phelps, the January 20, 1995 employment evaluation, and Mr. King's own deposition and affidavit provide the necessary objective criteria to support a finding that Mr. King's action had prescribed.

The record clearly evidences the latest date on which a reasonable person in Mr. King's position would believe he was constructively discharged and convinced of the alleged discriminatory basis for that discharge was January 20, 1995. On this date, Mr. King had an associate evaluation at which time Phelps informed him that his chances of becoming a partner in the firm were nonexistent and that he should consider leaving the firm. (R. 292-93). When questioned about this evaluation in his deposition and how *he subjectively* interpreted it, Mr. King stated: "What I understood that to mean is exactly what they said, that I should consider . . . a career change, that I don't have a future there at Phelps. . . . I took it as a comment that you are, this is it for you. **You are fired without them saying that you are fired.**" *Id.*(emphasis added). Under the continuous tort exception, the "focus is on what event, in fairness and logic, should have alerted the average[, reasonable,] lay person to protect his rights." *Webb v. Cardiothoracic Surgery Assoc. of N. Tex.*, 139

F.3d 532, 537 (5th Cir. 1998). The record shows, and the plaintiff admits, that all the events described would have alerted any reasonable person in Mr. King's position that on January 20, 1995, he was constructively discharged and convinced of the alleged discriminatory basis for that discharge, and that he had a duty to act promptly to protect his rights. It is immaterial that he continued to work for the firm as an associate until he tendered his resignation. A plaintiff cannot rely upon the continuing tort doctrine when he knows or should have known at the time the conduct occurred that his rights had been violated and he should take action to secure his rights. *See, e.g., Sabree v. United Bhd. of Carpenters & Joiners Local No. 33*, 921 F.2d 396, 402 (1st Cir. 1990) ("A knowing plaintiff has an obligation to file promptly or lose his claim. This can be distinguished from a plaintiff who is unable to appreciate that he is being discriminated against until he has lived through a series of acts and is thereby able to perceive the overall discriminatory pattern."); *Webb*, 139 F.3d at 537 (same); *Speer v. Rand McNally & Co.*, 123 F.3d 658 (7th Cir. 1997) (same); *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996) (same). Mr. King was immediately aware of this act at the time of its occurrence, stated what he believed to be the effect of the evaluation, and was on notice that his rights had been allegedly violated. Based upon this factual predicate, Mr. King needed no additional facts after the January 20, 1995, meeting to understand that he was constructively discharged and convinced of the alleged discriminatory basis for that discharge.

Thus, the trial court and court of appeal were not manifestly erroneous in finding that the plaintiff's claims had prescribed. Because plaintiff filed his action more than one-year after he knew or should have known that his rights were allegedly violated failed to timely take action to secure his rights, the suit was clearly prescribed.

For these reasons, I respectfully dissent.