King v. Phelps Dunbar, LLP.: A Catch-22 for Louisiana Law Firms

Kelly Brechtel
NOTES

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The continuing tort doctrine is a judicially created theory that suspends the commencement of the applicable prescriptive period if a defendant's violation of the law is deemed to be continuing in nature. In the employment setting, the doctrine has been described as a procedural device that modifies the normal prescriptive period "when the employer's discrimination exists prior to and during the [prescriptive] period." There is a caveat to the continuing tort doctrine: courts will not allow an employee to rely on the doctrine if the employee knew or should have known that the discrimination against him or her gave rise to a claim against the employer. This qualification of the continuing tort doctrine thereby requires a fact-specific inquiry into the particular type of employment. A unique situation arises, then, when an attorney seeks to rely on the doctrine in alleging discrimination by his firm. In King v. Phelps Dunbar, L.L.P., the Louisiana Supreme Court, in a dubious decision, allowed an attorney to avail himself of the continuing tort doctrine. The decision will result in many Louisiana law firms rethinking the manner in which they will handle employment decisions with their attorneys.

I. FACTS AND PROCEDURAL HISTORY

In October 1990, Danatus King, an African-American attorney, became an associate in the commercial litigation section at the firm of Phelps Dunbar, L.L.P., ("the Firm"). In the following months, several partners repeatedly asked King to transfer to and perform services in the tort and insurance section of the Firm. King was advised that the reason the Firm requested the transfer was because of its many tort and insurance cases in Orleans Parish Civil District Court where the jury pool was predominantly African-American. Thus, King could "be the Firm's black face in that venue." King rejected each of the transfer requests. In his petition, King alleges that because of his decision not to transfer, the Firm created a hostile work environment comprised of unwarranted criticism of his professional competence as well as diminished work assignments. Finally, on January 20, 1995, three partners informed King during his associate evaluation meeting that his chance of becoming a partner at the Firm was nonexistent, and he therefore needed to consider a career change. Subsequently, King alleged that he could no longer

3. 743 So. 2d 181 (La. 1999).
4. Plaintiff's Petition at 3, King v. Phelps Dunbar, L.L.P., 743 So. 2d 181 (La. 1999) (No. 96-3815) [hereinafter "Plaintiff's Petition"].

The trial court sustained the Firm's exception of prescription. Because King's claim was delictual in nature, the trial court applied Louisiana Civil Code article 3492's one-year prescriptive period on the basis that prescription began when injury was sustained on January 20, 1995 (the date of the evaluation meeting). The fourth circuit court of appeal affirmed the exception of prescription, noting that King acknowledged in his deposition that he believed he was constructively discharged at the associate evaluation meeting; thus, prescription commenced on that date. The appellate court said that a constructive discharge claim is subjectively based on the plaintiff's own perception. Therefore, applying the continuing tort doctrine, which revolves around the defendant's actions, to a constructive discharge claim would essentially give the plaintiff free rein to decide when prescription begins. Nevertheless, the Louisiana Supreme Court ignored the fourth circuit's decision and reversed the exception of prescription. The supreme court based its ruling on the notion that until King's final day of employment, the working environment could be considered so hostile as to constitute a continuing tort under Bustamento v. Tucker and Huckabay v. Moore. If the Firm dismissed King solely because of his race and his refusal to make the requested transfers, there is undoubtedly a cause of action for employment discrimination. It seems the Louisiana Supreme Court recognized that this case presented an opportunity to warn firms that this type of behavior was unlawful. To make its point, though, the court had to find a way to sustain King's claim.

This casenote will argue that the Louisiana Supreme Court improperly applied the continuing tort doctrine to a constructive discharge claim in order to effect a desired result. In tracing the origins, purpose, and empirical application of the continuing tort doctrine, this casenote will illustrate that under both Louisiana and federal jurisprudence, the facts presented in the King case do not warrant such an application. Finally, the conclusion of this analysis predicts that King, if it remains the law in Louisiana, will force employers to protect themselves by requiring terminated employees to leave immediately, instead of affording those who have been terminated a "grace period" within which to leave.

7. King, 743 So. 2d at 188-89.
9. 142 F.3d 233 (5th Cir. 1998).
10. This casenote in no way attempts to argue that Mr. King does not have a valid claim against the Firm. Rather, this casenote is strictly focused on the belief that Mr. King regretfully brought his claim after prescription had run. Consequently, the Louisiana Supreme Court should not have used the continuing tort doctrine to keep the claim alive because under the facts in the petition, there was no continuous course of discriminatory conduct.
11. A Catch-22 situation arises after King. A law firm will have one option: to adopt a harsher policy that requires a terminated attorney to vacate immediately. Otherwise, if a firm continues to allow a terminated attorney to remain until he or she has acquired a new job, it will be exposing the firm
II. HISTORY, PURPOSE AND APPLICATION OF THE CONTINUING TORT DOCTRINE

A. In General

In most situations, a plaintiff bears the burden of proving that the acts giving rise to the cause of action took place within the applicable prescriptive period. However, the continuing tort doctrine, or the continuing violation doctrine as it is known in federal jurisprudence, is the exception to the rule. The doctrine is designed to relieve a plaintiff from establishing that all conduct complained of occurred within the actionable period if the plaintiff can show a series of related acts, one or more of which falls within the prescriptive period. There is a protective element in the doctrine because the:

- core purpose is an equitable tolling notion in that prescription should not begin to run until facts supportive of a discrimination claim are or should be apparent to a reasonably prudent person similarly situated; however, the mere perpetuation of the effects of time-barred discrimination does not constitute a violation in the absence of independent actionable conduct occurring within the statutory period.

Courts first began to apply the doctrine to situations involving a pattern of ongoing discrimination in which the same person directed similar and continuous acts toward a specific individual. This pattern scenario resulted in the development of a "serial violation" test. Later, courts expanded the application of the doctrine to situations where an employer instituted a discriminatory policy that was continually in effect; for such discriminatory policy situations, courts have now developed a "systemic violation" test. Finally, some jurisdictions attempted to apply the doctrine when employees were confronted with the present effects of past discrimination, but the United States Supreme Court rejected such an application in United Air Lines, Inc. v. Evans.

Because continuing torts are the exception to the rule, courts must first analyze what prescriptive period would ordinarily govern the claim and whether the plaintiff's factual allegations allow him to avail himself of the equitable tolling doctrine. In King, the Louisiana Supreme Court was correct in holding that federal jurisprudence is guiding. Louisiana Revised Statutes 23:1006, the Louisiana

12. Huckabay v. Moore, 142 F.3d 233, 238 (5th Cir. 1998).
14. Id.
16. La. R.S. 23:1006 (West Supp. 1991) provides, in pertinent part:

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
statute prohibiting racial discrimination, is modeled after Title VII of the Civil Rights Act of 1964. Therefore, Louisiana courts have routinely looked to federal decisions for guidance in construing Title VII, and the Louisiana Supreme Court was correct in doing so in King. The federal jurisprudence consistently holds that Title VII claims are tortious in nature; therefore, Louisiana courts have uniformly held that the one-year prescriptive period under Louisiana Civil Code article 3492 governs claims filed under La.R.S. 23:1006. Specifically, Winbush v. Normal Life of Louisiana, Inc. held that in an employment context, claims under Louisiana’s anti-discrimination statute were subject to a one-year liberative prescription period which begins to run from the date of notification of discharge, rather than the date of the actual discharge.

Williams v. Conoco, Inc., involved a similar fact pattern to King. In the Williams case, the U.S. Fifth Circuit Court of Appeals ruled on a racial discrimination claim under Louisiana law in which the plaintiff filed suit more than one year after she was informed she would be discharged but within one year of the actual discharge. The Fifth Circuit sustained the defendant’s exception of prescription because prescription began with the notification of discharge. The court declined to extend the prescriptive period under a continuing tort theory because the court believed that the theory was qualified by a discovery rule. This rule holds that even in a continuing violation context, prescription begins when a party has actual or constructive knowledge of the facts that would entitle him to bring suit. In the Williams case, because there were no acts of discrimination between the notice of termination and the last day of employment, the plaintiff could not avail herself of the continuing tort doctrine. Additionally, the court
reasoned that the fact that the employer gave a reasonable termination notice could not extend the prescriptive period in favor of the plaintiff.

B. Application to King

The Louisiana Supreme Court, in a plurality decision which divided the court in five separate written opinions, mistakenly ignored the relevant cases interpreting Louisiana Civil Code article 3492 and instead relied on out-of-context language from Huckabay v. Moore24 and Bustamento v. Tucker.25 By redirecting focus, the Louisiana Supreme Court was able to craft a method by which it could apply the continuing tort doctrine so that King's claim would not have prescribed.26 The court quoted language from Huckabay, which reasoned that "if a person is subjected to ongoing harassment, i.e. a continual and a permanent condition of the workplace, prescription does not begin to run until the damage is abated."27 The first problem with the court's reliance on this statement is that King did not demonstrate that he was subjected to a continuous hostile work environment in the time between his associate evaluation meeting and his final day of employment. Rather, the court merely accepts, in a cursory manner, King's non-detailed description of that time period in question and assumes it to have been a hostile work environment based on King's allegations of what had occurred in the past.28

Additionally, the relevant facts of Huckabay serve to illustrate that the Louisiana Supreme Court's reliance on that case is misplaced. In Huckabay, the U.S. Fifth Circuit distinguished between actions that fall within the continuing violation exception and those violations which are discrete adverse actions putting the plaintiff on notice of the discrimination. There, the plaintiff was a white, county employee who alleged ongoing racial harassment. The Fifth Circuit applied the continuing violation doctrine to the daily verbal abuse and the covert unequal treatment of the plaintiff by the African-American county commissioner. However, the court held that the plaintiff could not use the equitable tolling doctrine to preserve his claim in regard to his demotion based on allegedly discriminatory factors. The court noted that in regard to Huckabay's demotion, it only occurred once and was "unlike the cumulative effect of the petty annoyances of daily harassment" because it is the "sort of discrete and salient event that should put an employee on notice that a cause of action has accrued."29

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24. 142 F.3d 233 (5th Cir. 1998).
26. However, the court's strong approach to find that King's claim had not prescribed goes against the jurisprudential rule that a decision granting an exception of prescription should not be disturbed unless it is manifestly erroneous. Harvey v. Dixie Graphics, Inc., 593 So. 2d 351, 354 (La. 1992).
28. The court's mere acceptance of King's allegations was because the Supreme Court ruled on the issue on a mere peremptory exception of prescription and not a full fact-finding hearing.
29. Huckabay, 142 F.3d at 240.
Thus, analogizing to King’s claim, the associate meeting where he was denied partnership and told that he should make a career change is equivalent to the salient event of demotion in Huckabay. In fact, King even admitted as much in his deposition. When asked about the associate evaluation meeting in his deposition and how he subjectively interpreted it, King responded: “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.” The Louisiana Supreme Court plurality opinions failed to mention King’s own words when relying upon Huckabay. Such an omission appears intentional since there is no basis upon which to distinguish Huckabay’s distinction of salient acts that put employees on notice with King’s own interpretation of the situation as voiced in his deposition.

As it did with Huckabay, the plurality of the Louisiana Supreme Court also used language from Bustamento v. Tucker to achieve its desired result, but failed to apply that language to the facts alleged in King’s petition. The court quotes the Bustamento opinion which held that:

> when 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.

However, the King court does not indicate what acts or course of conduct continued after the associate evaluation meeting on January 20, 1995. That is because the only allegation in King’s petition regarding the time period after the meeting states that “with each passing day, the employment environment became more and more hostile.” Such an ambiguous allegation clearly does not meet a plaintiff’s burden of proof in seeking to utilize the continuing tort doctrine.

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32. Id. at 542.
33. Plaintiff’s Petition at 4.
34. On the face of King’s petition, the last alleged discriminatory act occurred on January 20, 1995 at the associate evaluation meeting. Thus, it appears that this is when prescription began to run. However, to properly avail himself of the continuing tort doctrine (thus beginning prescription on March 24, 1995), King should have alleged with particularity whatever discriminatory acts continued after the associate evaluation meeting that made the employment environment more hostile. Such allegations could include disrespect from co-workers, failure to be included on assignments previously given to King, etc. More specific allegations would demonstrate that the tort of hostile work environment truly was continuous, and not Mr. King’s subjective perception of hostility which may in fact have been the consequences of the previous discrimination. Without such additional allegations, if a court were to apply the continuous tort doctrine to the facts in King’s petition, a court should find that there was no continuous tort because the associate evaluation meeting was a salient event, putting King on notice of the discrimination. As such, on the face of King’s petition, the proper prescriptive period should have begun on January 20, 1995.
In his petition, King’s only concrete act of alleged discrimination is the diminishment of work assignments both before and after the evaluation meeting. Even if this allegation is accepted as true, however, courts have held that the denial of work assignments does not constitute a continuing tort. In Calhoun v. Federal National Mortgage Association, the U.S. Eleventh Circuit Court of Appeals distinguished an argument based on failure to receive further work assignments by ruling that diminished work assignments are merely the effects of the discriminatory act, or “the point at which the consequences of the act become painful.” The First Circuit expounded further on the premise that a curtailed workload is a continuing effect that does not rise to the level of a continuing violation in DeNovellis v. Shalala. There, the court said that “purgatory” job assignments were not in and of themselves discriminatory acts to be considered a continuous imposition of a hostile work environment. Instead, the court said that to determine when limitations began, the critical focus is the date that the employer made the discriminatory decision and communicated the decision to the employee.

III. KING’S BEST SHOT: THE HARRIS DECISION

In Harris v. Home Savings and Loan Association, the plaintiff sued his employer for age discrimination. Mr. Harris had worked for the defendant company for 36 years when he was told in October of 1992 that when the company found a replacement for him, he would be let go. Mr. Harris would have retired in 1996 when he reached the age of 65. The company did not find a replacement for Mr. Harris until December of 1993, at which time the plaintiff was terminated. Harris filed suit against Home Savings and Loan in March of 1994, and the court held that the claim was timely. The court refused to accept the defendant’s argument that prescription commenced on the date the defendant company informed the plaintiff that he would eventually be terminated. The Louisiana Fourth Circuit Court of Appeal in King stated that the reason the Harris court ruled for the plaintiff was because the notice the defendant gave to Mr. Harris was “a vague and indeterminate notice informing him only that if and when a replacement could be found he would be replaced.” In Mr. Harris’ case, the information communicated to him was distinguishable from a clear two-weeks’ notice.

It can be argued that King’s situation is similar and therefore should be decided the same way as Harris. Both plaintiffs were essentially told that their employers no longer desired their services, allegedly because of discriminatory reasons. Additionally, both were not given a definite last day of employment.

35. 823 F.2d 451 (11th Cir. 1987).
36. Id. at 455 (quoting Chardon v. Fernandez, 454 U.S. 6, 8, 102 S. Ct. 28, 29 (1981)).
37. 124 F.3d 298 (1st Cir. 1997).
38. Id. at 310.
39. 663 So. 2d 92 (La. App. 3d Cir. 1995).
40. Id. at 94.
41. Id.
42. King v. Dunbar (sic), 716 So. 2d 104, 109 (La. App. 4th Cir. 1998).
Nevertheless, there are factual differences that distinguish *Harris* from *King*. The Louisiana Fourth Circuit in *King* reasoned that "Mr. Harris cannot be blamed for postponing his litigation with its attendant risk of immediate termination until after he was actually terminated." Clearly, then, the notice which Home Savings gave to Mr. Harris in October of 1992 is that he *would be terminated at some time in the future*. Phelps, on the other hand, told King at his associate evaluation meeting that he needed to seek an employment change. While the language Phelps used may not have been as clear as it could have been, it is apparent that Phelps’ intention was to terminate King at the present time. Therefore, the language in *Harris* that "the prescriptive period for an alleged improper termination . . . begins from the date of termination and not from the date of notification" is inapplicable. The distinction is warranted because King, unlike Harris, suffered damage as of his date of notification of termination, whereas Harris was only threatened with a possible future termination.

### IV. *Berry* and *Ricks* Should Have Been Applied

#### A. The Berry Test

Both commentators and courts have referred to the continuing tort doctrine as one of the most perplexing and inconsistently applied theories in employment discrimination law. Therefore, in order to foster a greater understanding and more consistent application of the doctrine, the U.S. Fifth Circuit Court of Appeals in *Berry* adopted a three-factor test to determine when and if the continuing tort doctrine should apply. The *Berry* test advises courts to examine (1) the subject matter of the discrimination, i.e., whether all the allegations relate to gender or racial harassment; (2) the frequency of the harassment, i.e., whether recurring, as in a biweekly paycheck, or isolated, as in a specific work assignment or employment decision; and (3) "degree of permanence" of the event(s) that should trigger the employee’s awareness of and duty to assert his or her rights.

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43. *Id.* at 109. The *Harris* court noted, "[u]ntil his actual separation from employment, Mr. Harris was only able to demonstrate an intent to discharge." *Harris*, 663 So. 2d at 95.

44. Plaintiff’s Petition at ¶ 24. Indeed it is probable that Phelps specifically chose the language it used at the associate evaluation meeting in as an attempt to avoid liability for racial discrimination. By making it look like King chose to resign, the Firm hoped to avoid liability for a racially discriminatory termination. However, putting emotion and the issue of liability aside, the associate evaluation meeting was an adverse employment decision (denying partnership to King for discriminatory reasons), sufficient to trigger the running of prescription.

45. *Harris*, 663 So. 2d at 94.

46. For an additional policy reason, the appellate court in *King* noted that "the intent to terminate Mr. Harris could easily have been annulled before the actual termination." *King*, 716 So. 2d at 109. However, there is no reason to think that Phelps would alter their decision communicated to King.


49. *Id.* at 981. The plaintiff in *Berry* was a female associate professor at Louisiana State University. On October 14, 1976, LSU notified Berry that her contract would not be renewed upon its
Circuit, and all other jurisdictions that adopted the test, have placed the most weight on the final factor, the degree of permanence. Thus, even if a court agrees that the first two factors have been met, if any of the alleged conduct is sufficient to put a reasonable person on notice of the discrimination, the continuing tort doctrine should not be applied.

The significance of this test is that a specific event will prohibit the use of the continuing tort doctrine. For example, if an employee faces a continuously hostile work environment but, during that period, there are one or more specific acts of discrimination which the employee recognizes as such, the Berry test would require the employee to bring suit within a year of the act, even if the employee is still working for the employer. This test is necessary within the employment context where it is beneficial to have clear-cut rules. First the employer, himself, may not be aware of the discrimination if it is perpetrated by other employees in a managerial role. Thus, requiring an employee to bring suit once a salient event has occurred could possibly allow employers to remedy the situation more quickly. Additionally, there is a problem from an evidentiary standpoint if an employee waits to file suit until he can no longer work in such an environment. This problem results because many instances of the alleged discriminatory conduct may have occurred long before the suit was filed. Other co-workers who may have witnessed such acts may no longer work there, and the alleged victim may no longer clearly remember the specific details of the alleged discrimination. A strict rule which requires that an employee immediately assert his or her rights may encourage both employers and employees to maintain a suitable working environment.

Berry alleges that she was let go because of her inability to teach extramural classes for pay as her male colleagues did. Berry filed a Title VII claim with the EEOC on October 12, 1977, alleging that workload and salary discrimination continued from the time she was notified that her contract would not be renewed until her final day of employment in May. Thus, she claimed her suit was timely. The court disagreed, holding that Berry did not file the EEOC charge within 180 days of the alleged "unlawful employment practice." Here, the court said the notice that she would not be rehired was a salient event which put Ms. Berry on notice of the alleged discrimination.

Using the Berry test, the court said that "the continuing violation theory is most appropriate when there is no single act of discrimination sufficient to trigger running of prescription." In this case, continual denials of promotion gave rise to a new claim each time, so that the plaintiff could not use the continuing violation theory. See also Sabree v. United Brotherhood of Carpenters and Joiners Local No. 33, 921 F.2d 396, 402 (1st Cir. 1990) (defining permanence as "basically an inquiry into what . . . [an employee] knew or should have known at the time of the discriminatory act"); Speer v. Rand McNally & Co., 123 F.3d 658 (7th Cir. 1997) (using the Berry test, the continuing violation theory was not applied where the plaintiff knew the nature of the discriminatory acts because the "permanence" factor was not met); Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708 (2d Cir. 1996) (using the permanence factor in the Berry test, prescription begins when the claimant has notice of the allegedly discriminatory action).

This is not to say that employees must immediately rush to sue their employers at the first occurrence of conduct that has the slightest hint of discrimination. Rather, if an employee suspects the employer is discriminating against him or her, the employee should first try to approach the employer and find a way to redress the conduct through internal office procedures. Then, if the conduct is not abated or the parties cannot reach an agreement, the employee must timely assert his or her rights according to the Berry standard.
B. Application of the Berry Test

The most recent case applying the Berry test, and frequently cited by the defendant Phelps Dunbar, L.L.P. in its brief to the Louisiana Supreme Court, is Webb v. Cardiothoracic Surgery Associates of North Texas. In Webb, the plaintiff alleged a continuing pattern of sexual harassment, which began in the spring of 1991 and lasted until her final day of employment in June of 1995. The plaintiff filed suit in July 1995. Using the Berry test, the court focused on alleged acts in 1993 where the plaintiff's supervisor improperly touched her while making repeated sexual comments. The court held that these acts had a sufficient degree of permanence to put the plaintiff on notice that she was the victim of sexual harassment. In fact, in the plaintiff's own deposition, she admitted that at the time of the 1993 conduct she believed the acts to be sexual harassment. Consequently, even though the alleged discrimination did in fact continue over the remaining course of her employment, the plaintiff had a duty to assert her rights when she initially recognized the harassment. She could not rely on the continuing violation exception.

The King court does not even mention the Berry test. The application of the Berry factors to the facts in the King case would have indicated that the continuing tort doctrine was not appropriate. Taking the facts alleged in the petition as true, the factor which requires the discrimination to be of the same subject matter is clearly met. While the frequency factor is ambiguous based on the petition, King could argue that in a hostile environment claim, the ongoing presence of the employee in the hostile environment means that the harassment is an everyday occurrence. Usually, however, there must be a more concrete allegation of how often the discriminatory acts occurred. Nevertheless, considering that courts do not place a great amount of emphasis on this factor, King's allegations of a continual diminishment of work assignments would probably suffice.

It is the third and most important factor where King's claim falls short. As previously discussed, the denial of partnership at the associate evaluation meeting and the statement that King should seek a career change amount to a constructive discharge. Much like the plaintiff in Webb, King's deposition testimony reveals that he understood the nature and the gravity of what had transpired. His perception, and an accurate one at that, was that he was fired. Therefore, if his termination resulted from his refusal to be the Firm's "black face," he should have

54. 139 F.3d 532 (5th Cir. 1998).
55. Id. at 538.
56. Berry, 715 F.2d at 981.
58. Id.
known at that time that a cause of action for racial discrimination had accrued, especially since he is a lawyer. In any event, the Louisiana Supreme Court chose not to apply the Berry test in arriving at its conclusion that King’s claim stated a continuing tort.

C. The Ricks Standard

The King court did discuss, and then quickly dismiss, the applicability of Delaware State College v. Ricks. In that case, the United States Supreme Court decided when prescription commences under Title VII of the Civil Rights Act of 1964. Title VII requires claimants to “file a charge with the Equal Employment Opportunity Commission (EEOC) within one hundred eighty days after the alleged unlawful employment practice occurred.” In Ricks, the defendant college denied tenure to the plaintiff on June 26, 1974. On the same day, he was given a one-year terminal contract notifying him that his last day of employment with the college would be June 26, 1975. The plaintiff filed a charge with the EEOC on April 4, 1975, alleging that the college denied his tenure application and intended to terminate his employment for racially discriminatory reasons. The college moved to dismiss the claim because it had not been filed within 180 days of the denial of tenure and the offer of the one-year terminal contract. The Supreme Court agreed with the college and found that the date of notification of an adverse employment action begins the limitations period. The Court noted, “[M]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.” Therefore, the limitations period began to run on June 26, 1974, and the plaintiff could not rely on the continuing violation doctrine.

Ricks should apply to King’s claim, as well. The denial of partnership and advisement that he needed to seek a career change were definitely adverse employment actions. These actions were a sufficient notification of termination. Like the plaintiff in Ricks, King was not forced out of the office on that very day. However, King should not be able to capitalize on the Firm’s offer of a “grace period.”

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60. The Defendant's Opposition to Application for Supervisory Writs From the Court of Appeal, Fourth Circuit at 13, King v. Phelps Dunbar, L.L.P., 743 So. 2d 181 (La. 1999) (No. 97-CA-2519) states that “King, an attorney, was clearly on notice by January 20, 1995, that he (1) had allegedly been subjected to a racially hostile work environment; (2) had lost status and income, (3) had suffered mental anguish, (4) had been told at a formal evaluation that he should make a career change and leave Phelps, which he perceived as a termination. Any one of these facts, and certainly the compilation of these events, should have alerted King, who is not an average lay person, to act to protect his rights.”

63. Id.
64. Ricks, 449 U.S. at 257, 101 S. Ct. at 504.
65. The Supreme Court noted that “a final day of employment rule might discourage colleges even from offering a grace period such as Delaware State’s practice of one-year terminal contracts.” Id. at 260, 101 S. Ct at 505.
D. Application of Berry and Ricks to King

Considering that both the Ricks date of notification standard and the Berry test have been uniformly applied in employment discrimination cases to prevent plaintiffs from utilizing the continuing tort/violation doctrine, the Louisiana Supreme Court had to find a way to maneuver around those decisions in order to hold that King's claim was a continuing tort. While the majority merely sidesteps the issue, Justice Kimball's concurrence reasons:

"[t]he point was not that when Ricks was denied tenure he knew his days were numbered. The point was that the denial of tenure was an adverse personnel decision forbidden if done for discriminatory reasons ...." 

... Here, there was no allegation that an adverse personnel action was taken against King in January 1995; he later voluntarily resigned, evidently with the encouragement of the defendants, but apparently without any definitive personnel decision having been made. 67

This statement is erroneous in two respects. First, while King's petition may not have used the exact language "adverse personnel decision," the facts alleged comport with the definition of the term. The U.S. Fifth Circuit recently held that:

[under Title VII, an adverse employment action can be defined as a discharge, a demotion, refusal to hire, refusal to promote, reprimand or acts of sabotage... by an employer for the purpose of establishing cause for discharge. Thus the phrase adverse employment action is limited to ultimate employment decisions. 68

Here, the decision to deny partnership is equivalent to a failure to promote. The partners' statement that King needed to seek a career change indicates that the Firm considered its actions towards King to be an ultimate employment decision. King's subjective interpretation that he was fired at the associate evaluation meeting reinforces that conclusion. Justice Kimball's statement that King did not allege that the Firm made an adverse personnel action can only apply then to the literal language of the petition. For it is not difficult to see that King, in fact, did allege an adverse employment action. The failure to use the phrase is possibly because King's attorneys knew that if they labeled the January meeting as an adverse

66. Davidson v. Indiana-American Water Works, 953 F.2d 1058 (7th Cir. 1992) held that limitations began the day that the employee was transferred (adverse employment action) and not the day when the full consequences were felt. See also Economou v. Borg-Warner Corp., 829 F.2d 311, 315 (2d Cir. 1987) (holding that the limitations period begins in a constructive discharge claim under the ADEA when the defendants had "established their official position and made that position apparent to plaintiff"). In both these cases, the courts heavily relied on Ricks.


68. Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997); see also Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999).
employment action, it would be impossible to avoid the application of Ricks and Berry.

There is a more reasonable interpretation of Justice Kimball’s statement that there was no "definitive" personnel decision. Ricks may be distinguishable because the denial of tenure and the one-year terminal contract had finality, whereas King’s January meeting lacked that same characteristic because it did not designate a definite last day of employment. However, the United States Supreme Court rejected that distinction less than a year after Ricks in Chardon v. Fernandez. In that case, non-tenured administrators were notified that they would either be terminated or demoted. The administrators argued that Ricks did not apply to their situation because the decision to terminate was revocable and incomplete until the action was finalized; therefore, the inevitable consequence of termination was not present. The Supreme Court disagreed, however, reiterating that limitations began when the administrators received notice of the allegedly unlawful employment decision. A commentator noted that the result of the Supreme Court's decision in Chardon is that: "[a]n employer’s attempt to mitigate the harsh effects of termination will not establish a new beginning date for the charge-filing period. An employee’s optimistic hope of being rehired does not create a continuing violation." Justice Kimball’s argument then is factually incorrect when she states that there was no allegation of an adverse employment action, and legally, it is irrelevant if the adverse employment action was not definitive.

V. King’s Claim for Constructive Discharge

Justice Knoll’s dissent recognizes that King’s claim is essentially one for constructive discharge. A constructive discharge can be found where the imposition of an unreasonable or unpleasant work environment rises to such a level that a reasonable person in the employee’s shoes would feel compelled to resign. Nevertheless, “the employee's employment is not actually terminated by the employer.” Because of the inherent subjective nature of constructive discharge cases, courts are reluctant to apply the continuing tort doctrine to such claims. Otherwise, plaintiffs would have the choice of deciding when prescription began based upon when the environment became too unbearable, despite the fact that there may be objective, defining moments.

In Davis v. Hibernia National Bank, the plaintiff claimed that her constructive discharge was the last event in a series of continuing violations. She

70. 715 F.2d 971 (5th Cir. 1983).
75. King v. Dunbar [sic], 716 So. 2d 104, 110 (La. App. 4th Cir. 1998).
76. 732 So. 2d 61 (La. App. 4th Cir. 1999).
had applied for various promotions throughout her career at the bank from 1982-1993, all of which the bank denied for allegedly discriminatory reasons. The plaintiff felt compelled to resign in 1993 because the bank allegedly had stifled her career. In refusing to apply the continuing tort doctrine to her constructive discharge claim, the court upheld the defendant's exception of prescription. The court reasoned that each promotion denial was a distinct act of discrimination, and should have alerted the plaintiff to assert her rights. Because the last promotion plaintiff had applied for was more than a year before she filed suit, the plaintiff’s claim had prescribed even though she filed suit within a year from her resignation.

*Donald v. Benson Motor Co., Inc.* is one of the few proper applications of the continuing tort doctrine to a constructive discharge case. There, the plaintiff alleged that his co-workers had repeatedly harassed him because of his race. Specifically, the plaintiff detailed how he was given a watermelon for his birthday instead of a cake, that he was the subject of an effigy hung from the ceiling with a noose tied around its neck, and that he was also the subject of racial slurs and jokes on a consistent basis. This increasingly intensive hostile work environment forced the plaintiff to resign on June 7, 1996. The court allowed the plaintiff to rely on the continuing tort doctrine because “there were numerous and continuing acts of discrimination occurring up until he left Benson’s employment.”

In King’s case, a reasonable person would have felt pressured and compelled to resign no later than January 20, 1995. King felt that his denials to the Firm’s requests to transfer to the tort and insurance section caused the Firm to withhold work assignments, in a discriminatory fashion, even before his associate evaluation meeting. If so, then the addition of this belief to King’s perception of the meeting where he was told (1) he had no future, (2) he would not make partner, and (3) he needed to consider a career change, would inevitably lead a reasonable person to feel that he must resign. However, King argues that the situation did not become too intolerable for him until March 10, 1995, when he tendered his resignation. He therefore asks the Louisiana Supreme Court to let him dictate that prescription commenced on March 24, 1995, his final day of employment. The majority improperly allowed him to do so, ignoring Justice Knoll’s warning that the effect would be 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 defining events that belie that position.”

Absent the associate evaluation meeting, King’s argument would have more merit since it would be without a “defining event.” For instance, King alleges that after he rejected each of the Firm’s requests for him to transfer, the firm environment became increasingly hostile, e.g. unwarranted criticism of his professional

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78. Id. at *4.
competence and diminished work assignments. If this behavior continued on a regular basis to such an extent that King felt his career had been stifled because of the firm’s discriminatory conduct, King may have felt compelled to resign. Such a situation would be a constructive discharge. Under this set of facts, if the Firm’s conduct resulted from King’s refusal to act as its “black face,” King would have a discrimination claim against the Firm. Therefore, without the associate meeting, the Firm would not have presented King with a specific event of discrimination, and as such, King may have been able to rely on the continuing tort doctrine in a constructive discharge claim.

VI. RAMIFICATIONS OF THE KING DECISION

In all employment discrimination cases, tension exists between the policy of promoting an injured employee’s ability to be made whole and the competing policy of freeing employers from the burden of litigating stale claims. Recognizing these competing policies, courts have been strict in delineating between an employer’s continuing violation and the continuing effects felt by employees.

It can be argued that requiring an employee to bring suit as soon as he realizes that his employer violated his rights can create an awkward working environment. First, if an employee files suit against his employer while still employed, there may be negative repercussions in the sense of employer hostility or decreased employee effectiveness. Additionally, an employer may opt to change his or her decision to fire or not promote an employee; thus, it can be argued that suit upon notice of an employer’s decision would negate any possibility that a change could occur.

The Harris court had an additional apprehension that:

a claimant’s cause of action may very well be undermined, if not completely thwarted, by a wily employer who misleads the claimant into believing that ameliorative measures may be taken within a year of notification to prevent a termination and then does nothing to annul the decision to terminate.

The situation that the Harris court contemplates, however, constitutes fraud, or at least some form of misrepresentation. Under an estoppel or detrimental reliance theory, an employee should be able to recover from the employer under such circumstances despite the fact that the prescriptive period under a date of notification standard may have prevented a mere discrimination claim. Without such fraud or deceit, however, employees can not be relieved from their duty to bring suit once it is recognized that the employer violated his or her rights.

82. Id.
84. The key to this analysis is that the employee must recognize that his or her rights have been violated. This is in contrast to situations where the continuing tort doctrine can be applied. The Bustamante court noted that the doctrine is appropriate in situations where, “it would be most difficult to pin-point the specific moment in time when such conduct became sufficiently outrageous ... to
The language of La. R.S. 23:1006 contemplates such suits during the tenure of employment.\(^{85}\) Noting that the term "unlawful employment practice" includes more than the hiring and terminating of employees, Louisiana courts have held that the statute allows the initiation of suits for claims resulting from mere unfavorable evaluations.\(^{86}\) Thus, the statute is meant to cover all potentially adverse situations that could arise in an employment relationship. The legislature obviously considered the need to protect employers from facing a "perpetual limbo"\(^{87}\) in which employees could file suit for actions occurring throughout their entire period of employment.

The United States Supreme Court has echoed the rationale that an employee cannot sit on his or her rights and wait for the most opportune time to assert them. The Court has consistently held that once there is an adverse employment decision, employees are required to take the necessary action in response.\(^{88}\) Specifically in regards to the continuing tort/violation doctrine, the Court is aware that employers:

\begin{quote}
need guidance on the parameters of the doctrine, for it is very easy for employees who sue their employers to throw in the case every bad thing done to them during the entire tenure of their employment. Thus, courts should look hard at the nature of the conduct alleged to have occurred and if any of the allegations are serious and permanent, the employer should be able to convince the court that they put the employee on notice of the need to file a charge at the time rather than waiting to claim a continuing violation.\(^{89}\)
\end{quote}

Such a statement supports minimal use of the continuing violation doctrine only in cases which clearly warrant such equitable tolling since the doctrine is inherently fact-specific in nature and often hard to predict.\(^{90}\)

Law firms face a specific challenge in trying to determine the applicability of the continuing tort doctrine in their employment arena. Firms would like to think that in a fact-specific inquiry, courts would give due weight to the fact that it is an

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become actionable and thus to commence the running of prescription." 607 So. 2d 532, 538 (La.1992).
88. Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 109 S. Ct. 2261 (1989), held that as soon as a discriminatory policy goes into effect, employees must challenge it even though injury is only speculative; the continuing violation doctrine shall not be applied just because a discriminatory policy is continually in effect. See Leon Friedman, Employment Discrimination Law Under the New Supreme Court Majority: The Court Turns Right, ALI-ABA Video Law Review (1989). A similar analysis has been used in the application of the continuing violation doctrine to ADEA claims. See Jim Beall, The Charge-Filing Period of the ADEA: Accrual and Equitable Modification, 91 Mich. L. Rev. 798 (1993); but see, Fontelroy v. Day & Zimmermann, Inc., 83 F.3d 431 (10th Cir. 1996).
attorney who is claiming employment discrimination. This is relevant because an attorney most likely has enough knowledge of the law and the facts of his or her own situation to recognize when a cause of action for discrimination accrues. If, however, courts refuse to acknowledge an attorney’s skill in ascertaining discrimination when it is in a personal context, firms will have to make their position a little too clear.

This is to say that firms choosing to terminate an attorney will be forced not only to deny the attorney a partnership position, but also to make the attorney clean out his or her desk accompanied by an official escort out of the office. Such an unambiguous termination would provide courts with a bright-line rule, yet the policy it creates is detrimental to the employee. In King’s situation, he was told that he would not make partner at Phelps and that he should consider a career change. However, the Firm allowed King to continue to collect a paycheck while searching for new employment. The effect of the Louisiana Supreme Court’s plurality decision will be that firms may not extend a grace period within which terminated attorneys can make necessary arrangements without feeling all of the consequences of unemployment.

As one commentator described the continuing violation doctrine, “the purpose is to assist unsophisticated claimants with valid claims, not to open the door for indiscriminately lazy individuals.” One would like to think that this statement does not mean to encompass attorneys. That is not to say that an attorney may not, in all cases, rely on the continuing tort doctrine, or that the law firms employing attorneys should be immune from committing continuing torts. If a firm creates a continuously hostile work environment, but does not commit any distinct act or adverse employment decision which would put the attorney on notice that his or her rights were being violated, there would be no reason not to allow reliance on the continuing tort doctrine. Such was not the case in King however, and as a result of the King decision, law firms will have to ensure that they put the attorney on notice of their position in order to protect themselves from future claims.

Kelly Brechtel

91. The Supreme Court has recognized that such “advance notice of termination is a customary and reasonable employment practice which affords an employee an opportunity to find another job.” Chardon v. Fernandez, 454 U.S. 6, 8, 102 S. Ct. 28, 29 (1981).
92. Hitchcock, supra note 72, at 1062.