



route" and a white representative to the other route. In March of 2000, Strickland's supervisor recommended her for a promotion, but she did not get the job because her supervisor's superiors told him not to hire a white person. In May of 2000 another supervisor wanted to promote Plaintiff to sales representative but was also told by his superiors to hire a black employee, preferably male. Once again, Strickland did not get the promotion. ¶5(a)-(d).

On one occasion when Strickland's supervisor was told to hire a black person to fill a job, he asked his superiors how he was supposed to determine an applicant's race based on a resume or application. The supervisor was told to call applicants to see if they "sounded black" and review the resumes and applications to see if the applicants had "black names" or went to "black schools." ¶5(c). Plaintiff overheard a conversation between another supervisor and his superior after the supervisor called an applicant. The superior persisted in asking whether the applicant sounded black or white on the telephone. When Strickland's supervisor questioned the relevance of that fact, his superior replied, "There is no law against that and I deal with that all the time." ¶5(e). Issues regarding the race of applicants, and efforts to determine the same, occurred on a regular and continuous basis during the two years preceding suit, generally in Strickland's presence. ¶5(g).

Strickland complained about the race discrimination in February 2001. She was later "written up" by her supervisor because she allegedly failed to notify him that she was not coming in to work. ¶5(i). After Strickland filed an EEOC charge, she started receiving pressure concerning reporting to work and the scheduling of hours. That pressure had not been present before she filed her charge. She believes those acts were in retaliation for her complaints. ¶5(j).

**Louisiana's Title 51**

Strickland's original complaint made a reference to La.R.S. 51:2264. Lorillard's motion attacked the claim and Strickland, noting recent revisions in the Louisiana statutes, said in her opposition that she would amend her complaint to delete any reference to Title 51. (Doc. 34, pp 2-3). She later filed a motion for leave to amend that would delete the Title 51 claims (Doc. 37), but the Clerk struck the motion (Doc. 38) for failure to state the position of opposing counsel and failure to sign the proposed amendment. Although the amended complaint has never been resubmitted, the court accepts those proceedings as a concession of Strickland's Title 51 claims. It is recommended they be dismissed.

**Louisiana Title 23**

Strickland's complaint alleges that Lorillard's acts constitute race and sex discrimination under La.R.S. 23:303, et seq. Lorillard argues this claim is barred because Strickland did

not comply with the pre-suit notice requirement of §303(C). That statute states that a plaintiff who believes she has been discriminated against and who intends to pursue court action "shall give the person who has allegedly discriminated written notice of this fact at least thirty days before initiating court action, shall detail the alleged discrimination, and both parties shall make a good faith effort to resolve the dispute prior to initiating court action." Lorillard points out that Strickland has not alleged any notice and cites Malakoff v. Alton Ochsner Medical Foundation, 2000 WL 805232 (E.D. La. 2000), which dismissed a claim for failure to comply with §303(C). Strickland has not responded to this argument, so dismissal of all Title 23 claims is recommended.

## **Section 1981 Claims and Prescription**

### **A. Promotion Claims**

A Louisiana plaintiff's §1981 claim is governed by a one-year prescriptive period provided in La. Civ. Code art. 3492. Lorillard argues Strickland's §1981 claims are all time-barred. Strickland's first attempt to save them is an argument that prescription was suspended during the administrative proceedings on her Title VII charge. She does not contest that, as a matter of federal law, filing and processing a Title VII charge does not toll the running of the prescription on a §1981 claim. Taylor v. Bunge Corp. 775 F.2d 617, 618-19 (5th Cir. 1985). She does argue, without citation

to any authority, that state law provides a mechanism for suspension. Louisiana's Title 23 provides that prescription will be suspended for up to six months on a "cause of action provided in this Chapter" during the pendency of an administrative claim with the EEOC or Louisiana Commission on Human Rights. La.R.S. 23:303(D). But because §1981 claims do not arise under Louisiana's Title 23, §303(D) does nothing to affect prescription on the §1981 claim. See Roth v. N. J. Malin & Associates, Inc., 1998 WL 898367 (E. D. La. 1998) (holding, in applying a predecessor to §303(D), that a pending administrative claim did not suspend prescription on state law claims that did not "arise under" the referenced provisions of the statute). Plaintiff alleges that she was passed over for promotions in March and May of 2000, but she did not file this complaint until August of 2001, so any §1981 claims based on those discrete acts of discrimination are time-barred. It is irrelevant that Strickland had administrative charges related to her Title VII claims pending during that time.

#### **B. Retaliation**

Plaintiff argues that she has other claims under §1981, based on retaliation and hostile work environment, that are timely. (Doc. 34, p. 10). Although it is questionable whether §1981 provides a claim for retaliation<sup>1</sup>, the court need not address the

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<sup>1</sup> Title VII contains a statute that expressly forbids retaliation against employees who oppose an unlawful employment practice or participate in an investigation, but §1981 contains no

issue because the claim fails for lack of an ultimate employment decision. Retaliation claims arising under Title VII or §1981 may succeed only if the employee shows her engagement in protected activity caused the employer to subject her to an "adverse employment action." Goff v. Continental Oil Co., 678 F.2d 593, 599 (5th Cir. 1982) (pre-Patterson §1981 retaliation case). An adverse employment action is sufficient to plead a claim only if it rises to the level of an ultimate employment decision. Ultimate employment decisions include acts such as hiring, firing, granting leave, discharging, promoting and compensating. Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997). Acts that do not rise to the level of an ultimate employment decision include reprimands, criticisms of the employee's work, schedule changes, work tools being stolen, hostility from coworkers, failure to settle internal grievances, not permitting the employee to attend

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such prohibition. It merely prohibits race-based impairment of the right to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws enjoyed by white citizens. The Fifth Circuit once recognized a §1981 retaliation claim, but it reversed course after the landmark Patterson decision in 1989. The Civil Rights Act of 1991 was designed to legislatively overrule much of Patterson and, although ten years have passed since the Act took effect, the Fifth Circuit has not yet squarely decided whether §1981 once again provides a claim for retaliation against an employee who files a Title VII charge. See Douglas v. DynMcDermott Petroleum, 144 F.3d 364, n. 14 (5th Cir. 1998). It appears the Court may have recognized such a claim in the course of affirming a jury verdict in Steverson v. Goldstein, 24 F.3d 666 (5th Cir. 1994), and some district courts have so interpreted that decision. See, e.g., Buchholz v. Lockheed Martin Corp., 1998 WL 308017 (E. D. La. 1998) and Wilson v. Shell Oil Co., 1995 WL 505482 (E. D. La. 1995).

training, moving the employee to a smaller office and ordering the employee to perform manual tasks. Mattern, supra; Bennett v. Total Minatome Corp., 138 F.3d 1053 n. 10 (5th Cir. 1998); Burger v. Central Apartment Management, Inc., 168 F.3d 875 (5th Cir. 1999); and Watts v. Kroger, 170 F.3d 505 (5th Cir. 1999).

A search of Strickland's complaint for an allegation of an ultimate employment decision comes up empty. She does allege that in February 2001, after she complained about race discrimination, she was "written up" by her supervisor because she allegedly failed to notify him that she was not coming in to work. Complaint, ¶5(i). She also alleges that before she filed her charge she set her own hours and worked 10-30 hours per week but, after she filed her charge, she started receiving "continual pressure concerning reporting to work and scheduling hours." ¶5(j). Despite Lorillard's challenge on this issue, Strickland has made no effort to amend her complaint in this regard. Her allegations do not contain enough of an indication of an ultimate employment decision to survive even Rule 12(b)(6) scrutiny.

Plaintiff does attempt to beef up her allegations by arguing in her memorandum (but not alleging in any pleading) that the changes in her job schedule "potentially" jeopardized her ability to continue working at Lorillard and affected (in an undescribed manner) her ability to work a second job. Those vague claims, even if treated as part of the complaint, do not suffice. An employer's act that merely deprives an employee of employment opportunities is

not an ultimate employment decision. Burger v. Central Apartment Management, Inc., 168 F.3d 875, 878-79 (5th Cir. 1999). Accordingly, there is no cognizable §1981 retaliation claim discernable from the complaint.

**C. Hostile Work Environment**

Plaintiff argues she also has a timely §1981 claim because continuing discriminatory practices occurred within the timeliness window and gave rise to a hostile work environment claim. She alleges in ¶7 of her complaint that she was forced to endure Lorillard's discrimination against blacks and females, and she had to observe her supervisors' efforts to determine whether applicants went to black schools or had black voices or names. If these allegations were all the proof Strickland could present at trial, she would probably not prevail on a hostile work environment claim. But this is not the trial.

To overcome this Rule 12(b)(6) motion Strickland need only present a short and plain statement of her claim that gives Lorillard fair notice of the claim and the grounds upon which it rests. Swierkiewicz v. Sorema N. A., 122 S.Ct. 992, 998 (2002) (reversing dismissal of Title VII claim although not all elements of a prima facie case were pleaded). Given that liberal standard and the fact-intensive nature of a hostile work environment claim<sup>2</sup>,

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<sup>2</sup> See Ramsey v. Henderson, 2002 WL 398360 (5th Cir. 2002) (setting forth test for racial hostile work environment and noting that time barred events may be relevant background for more recent events). Section 1981 intentional discrimination claims are

it is the better exercise of this court's discretion to deny the motion to dismiss the hostile work environment claim. The issue can be revisited later in a motion for summary judgment or at trial and tested together with the corresponding Title VII hostile work environment claim.

Greater factual development will also permit the court to better decide where this case fits within the framework of decisions that have addressed whether and when an employee may assert a hostile work environment claim based on discrimination or harassment against coworkers of another sex or race. Some courts reject such claims. Others permit them if the plaintiff can show that she was actually injured because of the discrimination against other employees. See Leibovitz v. New York City Transit Authority, 252 F.3d 179 (2d Cir. 2001); Bermudez v. TRC Holdings, Inc., 138 F.3d 1176 (7th Cir. 1998); and EEOC v. Mississippi College, 626 F.2d 477, 483 (5th Cir. 1980) (permitting white woman to charge a Title VII violation of her own personal right to work in an environment unaffected by race discrimination if she met Article III standing requirements). See also 5A Wright & Miller, Federal Practice and Procedure: Civil 2d §1357, P. 343 (1990) (court should be especially reluctant to dismiss on the basis of the pleadings alone when the asserted theory of liability is novel or extreme

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analyzed under the same framework as applies in Title VII, but the §1981 claim is not constrained by the administrative prerequisites that apply to Title VII claims. Walker v. Thompson, 214 F.3d 615, 625 (5th Cir. 2000).

because such theory should be explored in the light of actual facts).

**Intentional Infliction of Severe Emotional Distress**

Strickland, based on the same facts pleaded in support of her hostile work environment claim, invokes the Louisiana tort of intentional infliction of severe emotional distress. She attempted to amend her complaint (Doc. 37) to more specifically plead each element of the tort, but her motion for leave was stricken for procedural deficiencies. The elements and requirements of this tort are outlined in cases such as Nicholas v. Allstate, 765 So.2d 1017 (La. 2000) (addressing the tort in the context of the workplace) and Morris v. Dillard Department Stores, Inc., 277 F.3d 743 (5th Cir. 2001). The plaintiff must establish truly outrageous conduct to prevail on the claim.

Lorillard argues that Strickland has not pleaded sufficiently outrageous conduct, but the Fifth Circuit has reversed a Rule 12(b)(6) dismissal in similar circumstances. Walker v. South Central Bell, 904 F.2d 275 (5th Cir. 1990) (allegation of race discrimination permitted inference of outrageous conduct sufficient to permit intentional infliction claim to proceed to the merits). The actual facts underlying this claim, as with the hostile work environment claim, may be tested by other procedural means after they have been more fully developed.

Accordingly;

**IT IS RECOMMENDED** that the Motion to Dismiss filed in CV 01-1564 as Doc. 4 be **GRANTED IN PART** by:

**(1) DISMISSING WITHOUT PREJUDICE** the plaintiff's Louisiana Title 23 claims for failure to give pre-suit notice,

**(2) DISMISSING WITH PREJUDICE** the plaintiff's Louisiana Title 51 claims, and

**(3) DISMISSING WITH PREJUDICE** the plaintiff's §1981 claims based on (a) retaliation and (b) denials of promotions in March 2000 and May 2000.

The motion should be **DENIED** in all other respects.

#### Objections

Under the provisions of 28 U.S.C. §636(b)(1)(C) and Fed.R.Civ. Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the Clerk of Court, unless an extension of time is granted under Fed.R.Civ.P. 6(b). A party may respond to another party's objections within ten (10) days after being served with a copy thereof. Counsel are directed to furnish a courtesy copy of any objections or responses to the District Judge at the time of filing.

A party's failure to file written objections to the proposed findings, conclusions and recommendation set forth above, within 10 days after being served with a copy, shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions

accepted by the district court. See Douglass v. U.S.A.A., 79 F.3d 1415 (5th Cir. 1996) (en banc).

THUS DONE AND SIGNED at Shreveport, Louisiana, this the 8<sup>th</sup> day of April, 2002.

  
ROY S. PAYNE  
UNITED STATES MAGISTRATE JUDGE

cc'd to RSP, Judge Stagg

COPY SENT:

DATE: 4/9/02

BY: DRB

TO: Denny

Munger

Wells

Petersen

Shaham