UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

DR. DWIGHT VINES and
DR. VAN MCGRAW

versus

NORTHEAST LOUISIANA UNIVERSITY, BOARD OF TRUSTEES, UNIVERSITY OF LOUISIANA SYSTEM

CIVIL ACTION NO.: 97-0873

JUDGE ROBERT G. JAMES

MAG. JUDGE KAREN HAYES

RULING

Before this Court is a Joint Motion for Partial Summary Judgment filed on behalf of defendants Northeast Louisiana University ("NLU") and the Board of Trustees, University of Louisiana System ("the Board"). NLU and the Board assert that they are entitled to a summary judgment as a matter of law dismissing Dr. Dwight Vines' ("Dr. Vines") and Dr. Van McGraw's ("Dr. McGraw") state law age discrimination claims because suit was not brought within the time limits set forth in La. Civ. Code art. 3542. The plaintiffs oppose the motion arguing that suit was filed timely. Specifically, Vines and McGraw assert that: (1) Louisiana law provides that the one year prescriptive period commences from the date of actual termination rather than notice of termination; (2) the terminations were not final; (3) the re-employment policy is facially discriminatory and constitutes a continuing violation; (4) the prescriptive period was equitably tolled; and (5) prescription was interrupted by their administrative filings.

For the following reasons NLU and the Board's Joint Motion for Partial Summary Judgment [Doc. # 27] is GRANTED.

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FACTS

In 1989, Dr. McGraw voluntarily retired as Dean of the College of Business Administration and began receiving retirement benefits under the Teachers Retirement System of Louisiana ("TRSL"). Dr. McGraw then returned to the faculty as a professor in the Department of Marketing and Management in the College of Business Administration the following academic year. Two years later, Dr. Vines voluntarily retired as President of NLU, began receiving retirement benefits under the TRSL, and returned as a professor in the Department of Marketing and Management in the College of Business Administration. The plaintiffs' appointments following their retirements were on a year to year non-tenured basis.

The practice of re-employing state retirees began to receive a great deal of public criticism. As a result of this growing criticism, the Board adopted a policy in January of 1996 whereby individuals who elected retirement under the TRSL would be prohibited from re-employment on a regular full time basis except in certain specific circumstances. On April 1, 1996, pursuant to this policy, the plaintiffs were notified by NLU that their appointments would not be renewed for the 1996-1997 academic year. This decision not to renew their appointments was confirmed in writing the following day.

After receiving notification that their appointments would not be renewed, the plaintiffs contacted several Board members asking that the policy be reviewed and reconsidered. The plaintiffs further assert that Lawson Swearingen ("Swearingen"), the President of NLU, stated that the policy was being reconsidered and that no further action would be taken to implement the policy pending reconsideration. In August of 1996, the plaintiffs were informed that the policy would remain in place. On June 18, 1996, the plaintiffs filed a charge of discrimination

with the Equal Employment Opportunity Commission ("EEOC") and subsequently filed the present action on May 5, 1997. The plaintiffs assert that the Board's policy concerning the re-employment of retirees discriminated against them on the basis of their age in violation of state and federal statutes. NLU and the Board assert that they are entitled to a summary judgment as a matter of law dismissing the plaintiffs' state law age discrimination claims because suit was not brought within the time limits set forth in La. Civ. Code art. 3542. The plaintiffs oppose the motion arguing that suit was filed timely.

LAW AND DISCUSSION

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there are no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ. Pro. 56(c). The moving party bears the initial burden of informing the court the basis for its motion by identifying portions of the record which highlight the absence of genuine issues of material fact. *Topalian v. Ehrmann*, 954 F.2d 1125, 1132 (5th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992). A fact is "material" if proof of its existence or nonexistence would affect the outcome of the lawsuit under applicable law in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable fact finder could render a verdict for the nonmoving party. *Id.* The moving party cannot satisfy its initial burden simply by setting forth conclusory statements that the nonmoving party has no evidence to prove its case. *Ashe v. Corley*, 992 F.2d 540, 543 (5th Cir. 1993).

If the moving party can meet the initial burden, the burden then shifts to the nonmoving

party to establish the existence of a genuine issue of material fact for trial. *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir. 1994). The nonmoving party must show more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In evaluating the evidence tendered by the parties, the court must accept the evidence of the nonmovant as credible and draw all justifiable inferences in its favor. *Anderson*, 477 U.S. at 255.

It is undisputed that the plaintiffs' state law age discrimination claims are governed by the one year prescriptive period for delictual actions set forth in La. Civ. Code art. 3542. However, the plaintiffs and defendants disagree as to when that period commenced to run, and whether it was equitably tolled or otherwise interrupted.

In order to determine whether summary judgment is proper the Court must first decide: (1) when the one year prescriptive period commenced to run; (2) whether the prescriptive period was equitably tolled; and (3) whether prescription was interrupted by the plaintiffs' administrative filings.

I. When did the one year prescriptive period on the plaintiffs' state law discrimination claims commence?

Louisiana law is unsettled as to whether an employment discrimination claim accrues on the date of notification of the decision or the date of termination. *Harris v. Home Savings & Loan Assoc.*, 95-223 (La.App. 3 Cir. 7/27/95), 663 So. 2d 92, *writ denied*, 95-2190 (La. 11/17/95), 664 So. 2d 405; *Brunette v. Dept. Of Wildlife & Fisheries*, 96-0535 (La.App. 1 Cir. 12/20/96), 685 So. 2d 618, *writ denied*, 97-0186 (La. 3/14/97), 689 So. 2d 1385; *Winbush v. Normal Life of La., Inc.*, 599 So. 2d 489 (La.App. 3 Cir. 1992); *King v. Phelps Dunbar, L.L.P.*,

97-2519 (La.App. 4 Cir. 6/3/98), 716 So. 2d 104, vacated in part and remanded for trial on the merits 98-1805 (La. 6/4/99), --- So. 2d ---, 1999 WL 388160. In the absence of a definitive ruling by the Louisiana Supreme Court, several federal courts have noted Louisiana's frequent reliance on federal interpretation of similar federal statutes and applied these well-established principles in order to determine whether state law discrimination claims have prescribed. *Williams v. Conoco, Inc.*, 860 F.2d 1306 (5th Cir. 1988); *Foster v. International Business Machines*, 95-3456 (E.D.La. 1996) 1996 WL 194938, *aff'd*, 103 F.3d 125 (5th Cir. 1996), *cert. denied*, 118 S.Ct. 62, 139 L.Ed.2d. 25 (1997). In *Williams*, the Fifth Circuit held that "the one year prescriptive period begins running upon notification that the employee will be discharged." *Id.* at 1308, citing *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks*, 449 U.S. at 257, 101 S.Ct. at 504.

In *Ricks*, the plaintiff was employed as a college professor at the defendant university. *Id.* at 252. Three years after joining the faculty, the tenure committee met and recommended that he not receive a tenured position. *Id.* The tenure committee agreed to reconsider its decision the following year but again voted to deny tenure. *Id.* As a result of this denial, Ricks filed a grievance which was taken under advisement. *Id.* Meanwhile, on June 26, 1974, the university offered Ricks a one year "terminal" contract. *Id.* at 253. On September 12, 1974, Ricks was notified that his grievance had been denied. *Id.* at 254. Ricks continued teaching at the university under the "terminal" contract until June 30, 1975. *Id.*

On April 4, 1975, Ricks filed a charge of discrimination with the EEOC pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981, claiming that he had

been denied tenure because of his national origin. *Id.* He subsequently filed suit in federal court on September 9, 1977. *Id.* The district court dismissed Ricks' claims as untimely. *Id.* at 255. The Supreme Court agreed with the district court and held that "the limitations periods commenced to run when the tenure decision was made and Ricks was notified." *Id.* at 259. The Court went on to hold that this notification occurred on June 26, 1974, when Ricks was offered the "terminal" contract. *Id.* In doing so, the Court rejected Ricks' argument that the limitations period began to run on the last day worked or the day Ricks was notified of the grievance committee's decision. *Id.* The Court stated:

> [E]ntertaining a grievance complaining of the tenure decision does not suggest that the earlier decision was in any respect tentative. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made.
>
> As to the latter argument, we already have held that the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods.

Id. at 261.

The plaintiffs assert that *Ricks* is distinguishable because the decisions not to renew their appointments were not final. The Court is not persuaded by the plaintiffs' arguments.

First, the plaintiffs assert that these decisions were not final because they had not been approved by the Board. The decision not to renew an appointment or contract, unlike a decision to hire or terminate someone, is not a personnel action which requires Board approval. NLU simply allowed the existing one year appointments to expire on their own terms.

Secondly, the plaintiffs assert that these decisions were not final because the internal

review process was not exhausted. However, the plaintiffs were no longer tenured professors and there was no requirement that an internal review process be exhausted prior to these decisions becoming final. The fact that the plaintiffs sought reconsideration of these decisions and attempted to qualify for an exception to the general policy does not alter the finality of the decision which was made and communicated to the plaintiffs on April 1, 1997. Contrary to the plaintiffs' assertions, the continuance sought was not part of the decision making process. The decision not to renew their appointments had already been made.

Finally, the plaintiffs assert that *Ricks* is not applicable because the re-employment policy is facially discriminatory and constitutes a continuing violation. The plaintiffs claim that the policy discriminates solely upon retiree status and requires retirees to meet standards different from non-retirees in order to obtain employment. However, the policy on its face applies to retirees, not persons over 40.

"There is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Hazen Paper Co. v. Biggins*, 507 U.S. 604,609, 113 S.Ct. 1701, 1705, 123 L.Ed.2d 338 (1993). See also *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144 (5th Cir. 1995), *cert. denied*, 516 U.S. 1047, 116 S.Ct. 709, 113 L.Ed.2d 664 (1996); *Geiger v. AT&T Corp.*, 962 F.Supp. 637 (E.D.Penn. 1997). The employee bears the burden of proving that age actually played a role in the process and had a determinative influence on the outcome. *Hazen Paper*, 507 U.S. at 610. In *Hazen Paper* the Supreme Court held:

> When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the correlating factor is correlated

> with age, as pension status typically is. . . . Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, see 29 U.S.C. § 631(a), may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."

Id. at 611. However, the Court went on to state, "[w]e do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly." *Id.* at 612-13. "To raise an issue for trial on age proxy discrimination, [the plaintiff] must create an issue of fact as to whether [the defendant] used the correlation between retirement status and age as a shield to terminate retirees' contracts because of their age." *Geiger*, 962 F.Supp. at 643.

La. Rev. Stat. § 11:761 bases retirement from the state system on years of services as well as age. In fact, a state employee can attain retirement eligibility based solely upon his years of service. While retirement status is correlated to age, there is no evidence to suggest that this status was used as a shield to terminate the plaintiffs because of their age. Furthermore, the re-employment policy only prohibits the re-employment of individuals who have retired from service in the state retirement system. Consequently, the policy would not affect the employment of retirees from the private sector. Therefore, the Court finds that the policy does not facially discriminate on the basis of age.

Nevertheless, even if the policy was found to be facially discriminatory, the prescriptive

period runs from the most recent application of the policy to the plaintiffs. The Supreme Court's holding in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), did not modify the *Ricks* rule, rather it only stated "that a separate discriminatory act occurs each time a potential defendant makes a discriminatory employment decision." *Kuemmerlein v. Board of Education of Madison Metropolitan Sch. Dist.*, 894 F.2d 257 (7th Cir. 1990). The alleged facially discriminatory policy was last applied to the plaintiffs on April 1, 1996 when NLU decided not to renew their appointments for the following academic year.

The Court thus concludes that the one year prescriptive period began to run on April 1, 1996, the date the plaintiffs were notified of the non-renewal.

II. Was the one year prescriptive period equitably tolled?

The plaintiffs assert that genuine issues of fact remain as to whether prescription should be equitably tolled due to the assurances they received from various members of the Board and Swearingen. The plaintiffs assert that Swearingen assured them that "he would take *no further action* to implement the policy until he knew what the Board was going to do with the policy." The plaintiffs also claim they were encouraged not to file suit, believing the matter could be worked out. In August of 1996, the plaintiffs were notified that the Board was going through with the implementation of the policy. Therefore, the plaintiffs argue that their claims had not prescribed until August of 1997.

"The limitations periods governing employment discrimination claims commence to run on the date the alleged discriminatory employment decision is made and communicated to the plaintiff. The Fifth Circuit has consistently focused on the date the plaintiff knows or reasonably should know that the discriminatory act has occurred." *Odaiyappa v. University of New Orleans*,

92-4005 (E.D. La. 1993), 1993 WL 533966. These limitation periods are subject to equitable tolling in certain circumstances. However, "mere assurances that a termination will be reviewed do not warrant application of equitable tolling." *Id.* at 4, citing *Conaway v. Control Data Corp.*, 955 F.2d 358, 636 (5th Cir. 1992), *cert. denied*, 506 U.S. 864, 113 S.Ct. 186, 121 L.Ed.2d 131 (1992).

The comments made by various Board members and Swearingen in the present case do not change the fact that a definitive and final decision not to renew the plaintiffs' appointments had already been made. Furthermore, Swearingen and the Board members did not promise the plaintiffs that the policy would not be implemented. Rather, the Board members and Swearingen merely indicated that they would attempt to seek a reconsideration and reversal of the policy. It is clear that the plaintiffs knew or reasonably should have known on April 1, 1996 that NLU had decided not to renew their appointments based upon the re-employment policy. Therefore, the Court finds that the one year prescriptive period was not equitably tolled.

III. Was the one year prescriptive period interrupted?

Finally, the plaintiffs assert that prescription on their state law claims was interrupted by lodging complaints with the EEOC and the Louisiana Human Rights Commission ("LHRC"). In order to support this assertion the plaintiffs rely on *Totty v. Dravo Corporation*, 413 So. 2d 684 (La.App. 3 Cir. 1982) and *Maquar v. Transit Mgmt. of Southeast La., Inc.*, 593 So. 2d 365 (La. 1992). However, these cases are readily distinguishable and the Louisiana Supreme Court expressly limited its decision in *Maquar* to the narrow and specific facts before the Court. *Maquar*, 593 So. 2d at 368. Louisiana courts and federal courts sitting in diversity have further limited Maquar's application to cases involving claims of retaliatory discharge brought under the

Workers' Compensation Law and filed with the Workers' Compensation Administration. See *Roth v. N.J. Malin & Assoc., Inc.*, 98-1793 (E.D.La. 1998), 1998 WL 898367; *Brouillette v. Transamerican Refining Corp.*, 95-0584 (E.D.La. 1995), 1995 WL 683869; *Tullier v. St. Frances Cabrini Hosp.*, 96-738 (La.App. 3d Cir. 2/5/97), 689 So. 2d 529, 530, *writ denied*, 97-1233 (La. 9/5/97), 700 So. 2d 508; *Smith v. Hollaway Sportswear, Inc.*, 97-698 (La.App. 3d Cir. 12/17/97), 704 So. 2d 420, *writ denied*, 98-0182 (La. 3/20/98), 715 So. 2d 1214.

Courts have consistently held that "the filing of an EEOC charge does not toll, interrupt, or suspend prescription with regard to a plaintiff's state law claims." *Id.* at 5, citing *Fussell v. Bellsouth Telecommunications, Inc.*, 96-1660 (E.D.La. 1998), 1998 WL 12229. See also *Taylor v. Bunge Corp.*, 775 F.2d 617, 618 (5th Cir. 1985); *Jackson v. Entergy Operations, Inc.*, 96-4111 (E.D. La. 1998), 1998 WL 101690, *aff'd*, 159 F.3d 1356 (5th Cir. 1998); *Leahman v. Shell Oil Co.*, 88-1469 (E.D.La. 1989), 1989 WL 30280; *Odaiyappa*, 1993 WL 533966; *Minor v. Facility Mgmt. Of La. Inc.*, 91-4636 (E.D.La. 1993), 1993 WL 98679. Therefore, the Cout finds that the one year prescriptive period was not interrupted by lodging complaints with the EEOC.

CONCLUSION

The plaintiffs were notified on April 1, 1996 that their appointments would not be renewed for the following academic year. This decision was confirmed in writing the following day. The Court concludes that the one year prescriptive period began to run on April 1, 1996, the date the plaintiffs were notified of NLU's non-renewal. The plaintiffs' state law age discrimination claims thereby prescribed on April 1, 1997. The plaintiffs did not file suit until May 5, 1997. The prescriptive period was not tolled or interrupted. Consequently, the plaintiffs' state law claims for age discrimination are prescribed. Accordingly, NLU and the Board's Joint

Motion for Partial Summary Judgment [Doc. # 27] is GRANTED and Dr. Vines' and Dr. McGraw's state law claims for age discrimination are hereby dismissed with prejudice.

MONROE, LOUISIANA, this 3 day of August, 1999.

ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED
8.9.99
BY Shannon McInnis
COPY Jones, Hilferty, Adams
DeCuir, H. M. Pugh
Sanders