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United States District Court,
E.D. Louisiana.

Debra Rice SAFFORD
v.
ST. TAMMANY PARISH FIRE PROTECTION DISTRICT NO. 1, et al.
No. Civ.A.02-0055.Jan. 5, 2004.

Attorneys and Law Firms

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Opinion

ORDER AND REASONS

[VANCE, J.](#)

**1* Before the Court is motion of defendant St. Tammany Parish Fire Protection District No. 1 (the "Fire District") to review Magistrate Judge Shushan's order that granted plaintiff leave to file her fourth amended and supplemental complaint. For the following reasons, the Court affirms in part and reverses in part the magistrate judge's ruling.

I. BACKGROUND

Plaintiff Debra Rice Safford asserts that the Fire District failed to promote her from volunteer to full-time firefighter because of her gender and age. Safford claims that in May 2000, the Fire District passed over her application for a full-time firefighter position in favor of four younger, less-qualified men. Safford further alleges that in August 2001, she was passed over in favor of three younger, less-qualified men. Defendants assert that she was not given the job because she failed to perform well in an interview, she was the only applicant that had received a negative reference from a previous employer, and she did not timely submit a current civil service exam score to the Fire District's Civil Service Board for the August 2001 round of hiring. Plaintiff states that although her volunteer firefighter status is currently inactive,¹ her application is still on file with the Fire District, and she continues to be eligible for employment with the defendant.

- ¹ Plaintiff contends that she fears retaliation from other firefighters as a result of this suit against the fire district and she stopped volunteering as a firefighter to avoid potentially life-threatening situations in which she would be forced to rely on the other firefighters.

On September 22, 2001, plaintiff instituted a claim with the Equal Employment Opportunity Commission.² On January 8, 2002, Safford filed a complaint against the Fire District and its insurer. Safford alleges that the Fire District discriminated against her on the basis of age and gender in violation of 42 U.S.C. § 1983; 42 U.S.C. § 2000e, *et seq.* ("Title VII"); 29 U.S.C. § 623, *et seq.* ("ADEA"); and Louisiana anti-discrimination laws.

- 2 She received a right to sue letter from the EEOC dated January 11, 2002.

Defendants moved for summary judgment on plaintiff's claims stemming from the May 2000 round of hiring based, *inter alia*, on the argument that such claims are time-barred. In an Order and Reasons entered on June 25, 2002, the Court, per Chief Judge Berrigan, denied defendants' motions for summary judgment, affording plaintiff time to conduct discovery on her claims. The Court held that plaintiff's claims related to the May 2000 round of hiring were not time-barred under the continuing violation doctrine.

On July 21, 2003, Safford sought leave to file her fourth amended and supplemental complaint. Safford indicated that the purpose of the amendment was to: (1) incorporate all previous amendments into a single pleading, (2) add allegations regarding events that occurred since the filing of the last amendment, and (3) add Steve Farris³ and Milton Kennedy⁴ as defendants. The Fire District objected and argued that Safford's [Section 1983](#) claims against Farris and Kennedy were futile as they were untimely and failed to meet the heightened pleading requirement.

- 3 Plaintiff asserts that Farris was a Commissioner appointed to the Fire District by the City Counsel for the city of Slidell, Louisiana, and was Chairman of the Fire Board during the period of time in question. *See* Fourth Amended Complaint, Rec. Doc. 116, at ¶ I.
- 4 Plaintiff asserts that Kennedy was the Fire District's Fire Chief during the period of time in question. *See* Fourth Amended Complaint, Rec. Doc. 116, at ¶ I.

Magistrate Judge Shushan granted in part and denied in part plaintiff's motion for leave to file a fourth amended complaint. Specifically, Magistrate Judge Shushan allowed Safford to amend her complaint but required her to limit her ADEA and state law claims to the Fire District. *See* Hearing On Motion, Rec. Doc. 113, at 3. After the magistrate's ruling, plaintiff filed her fourth amended complaint in which she clarified that her Title VII, ADEA, and state anti-discrimination law claims do not apply to the individual defendants. The Fire District now moves the Court to review the magistrate judge's ruling.

II. DISCUSSION

A. Standard of Review

*2 A magistrate judge may hear and determine any pretrial matter pending before a district court. [28 U.S.C. § 636\(b\)\(1\)\(A\)](#). Federal law affords a magistrate judge broad discretion in the resolution of non-dispositive pretrial matters. *See* [FED. R. CIV. P. 72\(a\)](#). In a non-dispositive matter, a district court will reverse a magistrate judge's ruling only if the party challenging the decision can demonstrate that the determination was clearly erroneous or contrary to law. *Id.*; *see also* [Castillo v. Frank](#), [70 F.3d 382, 385-86 \(5th Cir.1995\)](#). "A motion to review is appropriate when a magistrate judge has obviously misapprehended a party's position, the facts, or the applicable law, or when the party produces new evidence that could not have been obtained through the exercise of due diligence." [Caringal v. Kateria Shipping, Ltd.](#), [2001 WL 41015, at *1 \(E.D.La.\)](#).

The Fire District maintains that Magistrate Judge Shushan's ruling was clearly erroneous and contrary to law. Specifically, defendant argues that the magistrate misapplied the continuing violation theory and that she erred in finding that the heightened pleading standard was satisfied.

B. Continuing Violation Doctrine

The Fire District contends that the magistrate judge misapplied the continuing violation doctrine because the plaintiff did not point to a specific violation that occurred during the limitations period. The plaintiff argues that this Court should not address defendant's continuing violation objection because the defendant failed to assert it before the magistrate judge. The Court finds, however, that the issue was properly raised before the magistrate judge. Defendant argued 1) that plaintiff's claims were futile as they were time-barred and did not relate back under [Federal Rule of Civil Procedure 15\(c\)](#) and 2) that the heightened pleading requirement was not met. The magistrate judge found that plaintiff's claims were not time-barred as a

result of defendants' continuing violation. Given the interrelationship between the continuing violation issue and whether the claim was time-barred, the Court finds that the issue was properly raised before the magistrate judge. Therefore, the Court will address the merits of the Fire District's objection.

The continuing violation theory provides "that where the last act alleged is part of an ongoing pattern of discrimination and occurs within the filing period, allegations concerning earlier acts are not time-barred." *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 866 (5th Cir.1993). Courts have utilized the theory of continuing violation in certain exceptional circumstances. See *Webb v. Cardiothoracic Surgery Assoc. of N. Texas, P.A.*, 139 F.3d 532, 537 (5th Cir.1998) (citing *Messer v. Meno*, 130 F.3d 130, 134-35 (5th Cir.1997)). To find a continuing violation, the court must consider whether the discriminatory acts involve the same type of discrimination, the frequency of the acts, and whether the acts involve a "degree of permanence which should trigger an employee's awareness and duty to assert his or her rights[.]" *Berry v. Bd. of Supervisors of Louisiana State Univ.*, 715 F.2d 971, 981 (5th Cir.1983). "[A] plaintiff can avoid a limitations bar for an event that fails to fall within the statutory period where there is a persisting and continuing system of discriminatory practices in promotion or transfer that produces effects that may not manifest themselves as individually discriminatory except in cumulation over a period of time." *Huckabay v. Moore*, 142 F.3d 233, 238-39 (5th Cir.1998) (quoting *Messer*, 130 F.3d at 134-35).

*3 A recent Supreme Court case addressed the continuing violation theory in the context of discrimination claims. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). The Court overruled the Ninth Circuit's application of the continuing violation theory to discrete discriminatory acts. The Court held that "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.'" *Id.* at 114. Notably, the Supreme Court did not overrule the Fifth Circuit's multi-factor test to determine application of the continuing violation doctrine described above. See *id.* at 107. The Court held that a discrete act "occurred" on the day that it "happened," and therefore the time period for filing a charge begins on the date of the act. See *id.* at 110. The limitation period may still be subject, however, to equitable doctrines such as tolling or estoppel. *Id.* at 113; see also *id.* at 115, n. 7 ("One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue.")

The *Morgan* Court distinguished between claims based on discrete acts, to which the continuing violation theory does not apply, and hostile environment claims. See *id.* at 115. Hostile environment claims, by their very nature, involve repeated conduct, and "in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* Although the Fifth Circuit has not addressed a failure to promote claim since *Morgan*, other circuit courts have relied on *Morgan* to hold that the continuing violation doctrine does not apply to failure to promote claims. See, e.g., *Tademe v. Saint Cloud State Univ.*, 328 F.3d 982 (8th Cir.2003); *Burkett v. Glickman*, 327 F.3d 658 (8th Cir.2003); *Lyons v. England*, 307 F.3d 1092 (9th Cir.2002). The Tenth Circuit, on the other hand, found that in some circumstances a failure to promote claim may be similar to a hostile environment claim. See *Croy v. Cobe Laboratories, Inc.*, 345 F.3d 1199 (10th Cir.2003). In *Croy*, the appellant argued that there was a "glass ceiling" that prevented her promotion. See *id.* at 1203. She alleged that there was a continuous failure to promote her that did not involve discrete acts. See *id.* The *Croy* Court treated her claim as akin to a hostile environment claim but found that the continuing violations doctrine did not save her untimely claims because there was no actionable act of discrimination within the limitations period. See *id.*

Here, Safford alleges that Fire District has systematically discriminated against female firefighters in their weighting and use of subjective interview performance scores. Safford also asserts that she remained a full-time, active volunteer firefighter with her application on file after the August 2001 round of hiring. She avers that she was never granted another interview despite several rounds of hiring and promotion during the year before her fourth amended complaint. The magistrate judge found that Safford's allegations of systematic discrimination were sufficient to find a continuing violation. She concluded that as a result, the plaintiff's claims against Farris and Kennedy are not time-barred. For the reasons stated below, the Court reverses the magistrate judge's application of the continuing violation theory. Because the Court finds that the continuing violation doctrine does not save plaintiff's untimely claims against Farris and Kennedy, the Court need not address what impact, if any, the *Morgan* decision may have on the Court's earlier application of the continuing violation doctrine to plaintiff's claims against the Fire District.

1. One-year Limitation Period

*4 “The [continuing violation] doctrine will render a complaint timely as to a course of conduct only if the complaint is timely as to the most recent occurrence.” *Huckabay*, 142 F.3d at 240. Perpetuation of the effects of time-barred discrimination does not warrant application of the continuing violation doctrine in the absence of independent actionable conduct within the statutory period. See *Messer*, 130 F.3d at 135. The Fire District argues that the continuing violation doctrine does not apply to the plaintiff’s claims against Farris and Kennedy because the fourth amended complaint fails to allege a specific actionable violation that occurred during the one-year period before July 21, 2003.⁵ Plaintiff contends, on the other hand, that her application has remained on file with the Fire Department, and there have been several rounds of hiring/promotion during the one-year limitation period. Although not clearly identified in her complaint, plaintiff points to a round of hiring in late July/early August 2002, which she describes as “the first round of hiring in which the Board had given Kennedy the power, alone, to hire and fire.” (Pla.’s Opp. to Def.’s Mot. for Rev. of Mag. Judge’s Order, at p. 10) (emphasis omitted). Plaintiff asserts in her complaint that the defendants hired Michael Landry, a younger, male firefighter with two negative employment references, yet rejected her application because she had one negative employment reference. Although plaintiff fails to identify when the defendants hired Landry, plaintiff attaches a letter from Kennedy to her opposition memorandum that suggests that Landry was hired within a year of her motion for leave to amend her complaint. (See Pla.’s Memo. in Opp., Ex. E). Because it appears that plaintiff may be able to prove a set of facts to support her claim that Kennedy committed an actionable violation within the one-year limitation period, the Court concludes that plaintiff has stated a claim against Kennedy. The Court therefore affirms the magistrate’s order that allowed plaintiff to amend her complaint to add Kennedy as a defendant. The Court notes that plaintiff may add Kennedy as a defendant because she alleged discriminatory conduct that occurred within the limitation period, and the Court considers the continuing violation doctrine below to determine whether claims based on discriminatory conduct by Kennedy that occurred outside of the one-year limitation period are timely.

- 5 Although section 1983 does not contain a statute of limitations, “district courts use the forum state’s personal injury limitations period.” *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir.1994); see also *Wilson v. Garcia*, 471 U.S. 261, 266-67, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). Accordingly, as plaintiff’s Section 1983 claim is best characterized as a tort under Louisiana law, it is governed by the one-year prescriptive period for delictual actions dictated by Louisiana Civil Code article 3492. See *Taylor v. Bunge Corp.*, 775 F.2d 617, 618 (5th Cir.1985); *Parrino v. Board of Supervisors of La. State Univ.*, 1990 WL 136764, at *1 (E.D.La.) (citing cases).

With respect to Farris, on the other hand, plaintiff fails to identify any hiring or promotion decision in which Farris was involved that occurred within a year of her motion for leave to amend dated July 21, 2003. Plaintiff contends that the Fire Board gave Kennedy the power to independently hire and fire firefighters without any involvement by the Board in June 2002, more than one year before July 21, 2003. Plaintiff fails to allege a specific actionable violation by Farris that occurred within the applicable year period. Accordingly, the Court reverses the magistrate’s ruling that applied the continuing violation doctrine to allow plaintiff to add Farris as a defendant.

2. Application of the Continuing Violation Doctrine to Kennedy

*5 The magistrate judge found that the continuing violation doctrine applied to both Kennedy and Farris and rendered timely claims against the defendants that would otherwise be time-barred. As noted above, the Court concludes that the continuing violation doctrine does not render any claims against Farris timely because plaintiff fails to allege an actionable violation within the limitation period. The Court now turns to the application of the continuing violation doctrine to Kennedy.

As the Court noted earlier, the *Morgan* Court’s distinction between claims based on discrete acts and hostile environment claims call into question the viability of the continuing violation doctrine in the failure to promote context. Even before *Morgan*, however, the Fifth Circuit has applied the continuing violation theory in the context of Title VII actions and noted:

The core idea [of the continuing violations theory,] is that [e]quitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights.

Messer, 130 F.3d at 135 (quoting *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1560-61 (5th Cir.1989)).⁶ Further, “where a pattern of harassment spreads out over years, and it is evident long before the plaintiff sues that she was a victim of actionable harassment, she can not reach back and base her suit on conduct that occurred outside the statute of limitations.” *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 352 (5th Cir.2001); see also *Webb*, 139 F.3d at 537 (upholding district

court's rejection of the continuing violation doctrine when events had transpired two or three years before plaintiff filed her complaint that should have put plaintiff on notice that she was a victim of sexual harassment). As noted above, the Fifth Circuit has identified three factors that courts may consider to determine if a continuing violation exists, the third of which is whether the act in question has "the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights[.]" *Id.* (citing *Huckabay*, 142 F.3d at 239).

- 6 Courts also apply the continuing violation doctrine to Section 1983 claims. *See, e.g., RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1062 (9th Cir.2002) (addressing continuing violation doctrine in the context of a Section 1983 claim); *Cancel v. Mazzuca*, 2003 WL 1702011, at *4 (S.D.N.Y.) (allowing plaintiff to add a defendant because Section 1983 claim against defendant not time barred under continuing violation theory).

Here, plaintiff asserts that the Fire District discriminated against her when it did not promote her to full-time firefighter and instead hired younger males. Her January 2002 complaint is a clear indication that events had transpired to alert her to act to protect the rights that she believed the Fire District was violating. In her original complaint, she asserted the following regarding Kennedy:

On information and belief, Milton Kennedy, Chief of the Defendant Fire District and a male, is younger than Plaintiff. Chief Kennedy conducted interviews for the various employment positions and personally oversaw employment procedures. He was the Chief of Defendant Fire District during the entire period pertinent hereto. When questioned as to the reasons why Plaintiff was passed over again for employment, he refused to answer questions until he had the opportunity to consult with the Fire District's attorney. The questions were never answered.

*6 Plaintiff clearly believed as of January 2002 that Chief Kennedy was directly involved in the hiring process that she attacks as discriminatory. Plaintiff's fourth amended complaint, in which she seeks to add Kennedy, contains almost identical allegations against him with no further particulars. *See* Fourth Amended Complaint, Rec. Doc. 116, at ¶ XXV (instead of alleging that "Chief Kennedy conducted interviews for the various employment positions and personally oversaw employment procedures," plaintiff now alleges that "[o]n information and belief, Chief Kennedy personally oversaw employment and promotion procedures and was on the Hiring Committee.")

Plaintiff contends that she did not determine that she had a cause of action against Kennedy because he actively hid his participation in and control over the hiring process. She asserts that she was unaware of the extent of his involvement in the process until late 2002 or early 2003, when she obtained a memo written by Kennedy that revealed his significant involvement. (*See* Pla.'s Opp., Ex. E). She argues that he perpetuated a "myth" that he was not involved in the hiring process, beginning with his testimony at a deposition in another case involving related issues in March 2002.⁷

- 7 Case No. 00-2623, *Rhyce v. Martin*, was before Division "A" of this Court until it settled.

To begin with, plaintiff's allegation that Kennedy concealed his involvement in the hiring process is in the nature of an allegation of fraudulent concealment, which must be specifically pleaded. *See* FED. R. CIV. P. 9(b); *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir.1993) (noting that "allegations of fraud must meet a higher, or more strict, standard than the basic notice pleading required by Rule 8.") Plaintiff's amended complaint contains no such specific allegations of fraudulent concealment. Further, plaintiff's assertion that she did not know that she had a claim against Kennedy earlier is belied by her complaint. To begin with, she states in her complaint that Kennedy conducted interviews and "personally oversaw employment procedures." In the face of these allegations, her assertion that she was unaware of the extent of his involvement in the hiring process falls flat. Further, she argues that Kennedy's attempts to conceal his involvement in the process began with a deposition in the *Rhyce* case in March 2002, two months after she filed her complaint in this case. Plaintiff contradicts herself when she contends that her ignorance of Kennedy's involvement at the time she filed her complaint was a result of active concealment by Kennedy that began two months later.

The underlying basis of the continuing violation doctrine supports tolling the limitations period only until facts become apparent to support a claim, but application of the doctrine does not toll the limitations period indefinitely. Plaintiff's complaint demonstrates that as of January 2002, sufficient facts supportive of her action against Kennedy were apparent. She failed, however, to assert a claim against Kennedy until a year and a half later. When she did, her allegations as to the nature of his involvement were nearly identical to those made in her original complaint. Consequently, the Court finds that plaintiff may not avail herself of the continuing violation doctrine to render timely claims based on allegedly discriminatory actions by Kennedy that occurred before the one-year limitations period.

C. Relation Back

*7 Plaintiff's claims against Farris and Kennedy based on allegedly discriminatory actions that occurred before the one-year limitation period are not time barred if her amendment relates back to her original complaint. The magistrate judge did not reach this question because she concluded that the continuing violation doctrine applied and rendered plaintiff's claims timely. Because the Court concludes that the continuing violation doctrine does not apply to plaintiff's claims against Farris and Kennedy, the Court now determines whether her amendment relates back to her original complaint.

Federal Rule of Civil Procedure 15(c), as amended in 1991 and 1993, provides:

An amendment of a pleading relates back to the date of original pleading when

- (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
- (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
- (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

FED. R. CIV. P. 15(c); see also *Jacobsen v. Osborne*, 133 F.3d 315 (5th Cir.1998); *Tufaro v. Bd. of Comm'rs for the Orleans Levee Dist.*, 2003 WL 21276344 (E.D.La.) (Wilkinson, M.J.); *Doss v. Morris*, 2002 WL 1359641 (E.D.La.) (Shushan, M.J.). Here, although the plaintiff's claims arise out of the conduct set forth in the original pleading, the "mistake" prong of Rule 15(c)(3)(B) is not satisfied. Plaintiff has not shown that, but for a mistake concerning the identity of the proper parties, she would have brought the action against Farris and Kennedy. Plaintiff knew the Fire Chief's identity at the time she filed her complaint; she identified him by name in the complaint itself. Further, plaintiff does not contend that she was mistaken about the identity of the Fire Board Chairman at the time she filed her complaint or that Farris ever attempted to obscure his role in the hiring process. The Court therefore concludes that plaintiff's amendment does not relate back to her original complaint. As a result, plaintiff's claims against Farris are futile because they are time barred, and plaintiff's claims against Kennedy based on conduct occurring before the one-year limitation period are likewise time barred.

D. Heightened Pleading Standard

Defendant also argues that plaintiff's amendment is futile because plaintiff's allegations against Kennedy and Farris fail to meet the heightened pleading standard required to overcome defendants' assertion qualified immunity. The Fifth Circuit has held that when a defendant asserts a qualified immunity defense, a plaintiff must respond by articulating "specific conduct and action giving rise to a constitutional violation." *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir.1996). This heightened pleading standard requires more than bald allegations and conclusory statements; it demands particularized factual assertions that focus specifically on defendant's wrongful conduct. See *Wicks v. Mississippi State Employment Serv.*, 41 F.3d 991, 995 (5th Cir.1995). Plaintiff must therefore articulate those facts that, if proven, would substantially prevent defendants from successfully establishing a qualified immunity defense. See *id.*

*8 Defendant asserts that Safford's allegations are conclusory in that she does not point to specific discriminatory conduct that gives rise to a constitutional violation. Because the Court concludes above that plaintiff failed to state a claim against Farris, the Court addresses defendant's argument only as it relates to Kennedy. The magistrate judge noted that Safford alleges that Kennedy was directly involved with the Fire District's employment and promotion process during the period that the Fire Department rejected her application in favor of younger males. Further, Safford specifically identifies in her complaint the hiring of Michael Landry instead over her as discriminatory conduct. The defendant has not demonstrated that the magistrate judge's conclusion that plaintiff met the heightened pleading standard was clearly erroneous or contrary to law. Accordingly, the Court affirms the magistrate's ruling in this respect.

III. CONCLUSION

For the foregoing reasons, the Court affirms in part and reverses in part the magistrate judge's order. The Court affirms the magistrate judge's determination that the plaintiff may amend her complaint to assert a claim against Fire Chief Kennedy but finds that the claim must be based only on conduct that occurred within the one-year limitation period. The Court reverses the magistrate judge's ruling that granted plaintiff leave to amend her complaint to assert a claim against Fire Board Chairman Farris.

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