

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

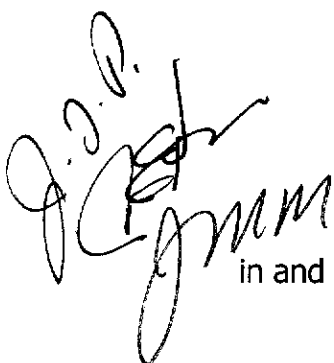
NO. 2012 CA 1799

DOLORES DYESS

VERSUS

KENNETH DAMANN AND LOUISIANA STATE UNIVERSITY

Judgment rendered April 26, 2013.



Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 605,754
Honorable Timothy Kelley, Judge

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

PETTIGREW, J.

In this case, plaintiff seeks review of the trial court's judgment sustaining defendant's exception raising the objection of prematurity and dismissing, without prejudice, plaintiff's suit against defendant. For the reasons that follow, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

At all times pertinent hereto, plaintiff, Dolores Dyess, was working as an administrative assistant under the employ of defendant, The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College¹ ("LSU"). Defendant, Kenneth Damann, was a tenured professor employed by LSU at the time. According to the record, on January 25, 2011, Ms. Dyess was delivering paperwork to another employee's office when Mr. Damann called her into his office. Ms. Dyess alleged that upon entering his office, Mr. Damann slapped her with his open hand on the left side of her buttocks. On October 5, 2011, Ms. Dyess filed a petition for damages against Mr. Damann and LSU, alleging an unwanted touching by Mr. Damann, sexual harassment, and intimidation. Ms. Dyess sought damages including pain and suffering, mental anguish, and loss of enjoyment of life.

In response to said petition, Mr. Damann filed an exception raising the objection of prematurity.² Mr. Damann alleged that Ms. Dyess' claim was premature because she did not provide him with pre-suit written notice at least thirty days before filing suit as required by La. R.S. 23:303(C).³ The matter proceeded to hearing on March 26, 2012, at

¹ Louisiana State University was originally named, in error, as a defendant in this matter. However, in an amended petition, Ms. Dyess correctly added The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College as the proper party defendant.

² LSU filed an answer generally denying the allegations of Ms. Dyess' petition. Ms. Dyess' suit against LSU is still pending.

³ The notice provision of La. R.S. 23:303(C) provides, as follows:

A plaintiff who believes he or 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.

which time the trial court heard testimony from Mr. Damann. After considering the record and the applicable law, the trial court made the following ruling from the bench:

The statute is very clear. [Louisiana Revised Statutes] 23:303(C) says, a plaintiff who believes he or she has been discriminated against or 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 and shall detail the alleged discrimination, and both parties shall make a good faith effort to resolve the dispute prior to initiating court action. The letter that purports to be that notice does not comply with the statute. . . . The failure to comply with the statute is fatal. It is, and I'm going to grant the exception of prematurity and dismiss the matter without prejudice.

In a judgment signed May 15, 2012, the trial court dismissed Ms. Dyess' suit against Mr. Damann, without prejudice.⁴ It is from this judgment that Ms. Dyess has appealed, arguing the trial court erred in ruling that her suit was a discrimination suit under the Louisiana Employment Discrimination Law ("LEDL"), La. R.S. 23:301, *et seq.*, thereby invoking the notice requirements under La. R.S. 23:303(C), and dismissing Mr. Damann from the suit.⁵

DISCUSSION

Louisiana Code of Civil Procedure article 926(A)(1) provides for the dilatory exception raising the objection of prematurity. The objection is designed to retard the progress of the action rather than to defeat it. La. Code Civ. P. art. 923. A suit is premature if it is brought before the right to enforce the claim sued on has accrued. La. Code Civ. P. art. 423. The objection of prematurity raises the issue of whether the judicial cause of action has yet come into existence because some prerequisite condition has not been fulfilled. The viability of the exception is determined by the facts existing at the time the lawsuit is filed. **Mathies v. Blanchard**, 2006-0559, p. 3

⁴ Following judgment on the prematurity exception, Ms. Dyess filed a second amended petition for damages, alleging that Mr. Damann had perpetrated a continuing tort against her through continuing acts of intimidation. Mr. Damann again responded to the petition with an exception raising the objection of prematurity. Neither Ms. Dyess' second amended petition for damages nor this second prematurity exception is at issue in the instant appeal as they are both still pending in the trial court below.

⁵ According to the record, plaintiff originally sought supervisory writs with this court from the May 15, 2012 judgment of the trial court. In an order dated August 2, 2012, this court granted the writ for the limited purpose of remanding the case to the trial court with instructions that the trial court grant plaintiff an appeal. See **Dyess v. Kenneth Damann and Louisiana State University**, 2012-0680 (La. App. 1 Cir. 8/2/12) (unpublished writ action).

(La. App. 1 Cir. 2/21/07), 959 So.2d 986, 988. The standard of review of a judgment sustaining a dilatory exception raising the objection of prematurity is that of manifest error. **Pinegar v. Harris**, 2008-1112, p. 10 (La. App. 1 Cir. 6/12/09), 20 So.3d 1081, 1088.

On appeal, Ms. Dyess argues that the notice requirements of La. R.S. 23:303(C) are inapplicable to her suit because the provisions of the LEDL only apply to complaints between employees and employers, and Mr. Damann does not qualify as an employer. Ms. Dyess further points out that in order to form the basis of a discrimination suit under LEDL, an employee must allege some tangible employment action that forms the basis of the suit. See La. R.S. 23:332.⁶ Ms. Dyess asserts that because she and Mr. Damann were co-workers, the notice provisions of La. R.S. 23:303(C) cannot be applicable to her suit against Mr. Damann. Moreover, Ms. Dyess asserts that she has not alleged any acts of sexual discrimination against Mr. Damann in her petition for damages. Rather, Ms. Dyess maintains that the only allegations made against Mr. Damann were for unwanted touching and intimidation.⁷

Based on our review of the record before us and the applicable law and jurisprudence, we find no error in the trial court's dismissal of that portion of Ms. Dyess' suit against Mr. Damann for sexual discrimination. However, the trial court was manifestly erroneous in dismissing Ms. Dyess' intentional tort claims against

⁶ Louisiana Revised Statutes 23:332(A) provides, as follows, with respect to intentional discrimination in employment:

A. It shall be unlawful discrimination in employment for an employer to engage in any of the following practices:

(1) Intentionally fail or refuse to hire or to discharge any individual, or otherwise to intentionally discriminate against any individual with respect to his compensation, or his terms, conditions, or privileges of employment, because of the individual's race, color, religion, sex, or national origin.

(2) Intentionally limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee, because of the individual's race, color, religion, sex, or national origin.

⁷ At oral argument, counsel for Ms. Dyess advised this court that although she had used the phrase "sexual harassment" in her petition, there was, in fact, no claim for sexual harassment against Mr. Damann, and that the only claims against Mr. Damann that were before the court were the intentional touching and intimidation.

Mr. Damann. Thus, we reverse the trial court's judgment insofar as it dismisses Ms. Dyess' claims against Mr. Damann for unwanted touching and intimidation and remand the matter for further proceedings consistent with this opinion.

CONCLUSION

For the above and foregoing reasons, we affirm the May 15, 2012 judgment insofar as it dismissed Ms. Dyess' claim for sexual discrimination against Mr. Damann. We reverse the May 15, 2012 judgment of the trial court insofar as it dismissed Ms. Dyess' intentional tort claims against Mr. Damann and remand the matter for further proceedings consistent with this opinion. All costs associated with this appeal are assessed equally between plaintiff, Dolores Dyess, and defendant, Kenneth Damann.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.