IN THE COURT OF CLAIMS OF OHIO

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NANCY J. MCNEELY :

Plaintiff : CASE NO. 2004-07590 Judge J. Craig Wright

v.:

DECISION

ROSS CORRECTIONAL INSTITUTE

Defendant :

: : : : : : : : : : : : : : : : : :

- $\{\P 1\}$ On October 20, 2005, defendant filed a motion for summary judgment. After being granted an extension of time, plaintiff responded to defendant's motion for summary judgment on February 13, 2006. The motion is now before the court for non-oral hearing.
 - $\{\P\ 2\}$ Civ.R. 56(C) states, in part, as follows:
- {¶3} "*** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's

- favor. ***" See, also, Gilbert v. Summit County, 104 Ohio St.3d 660, 2004-Ohio-7108, citing, Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317.
- {¶4} Plaintiff alleges age discrimination under both R.C. 4112.02 and Sections 621-634, Title 29, U.S.Code, the Age Discrimination in Employment Act of 1967 (ADEA). The crux of plaintiff's complaint is that she was wrongfully denied equal terms and conditions of employment and a promotional opportunity because of her age. Plaintiff timely filed charges with the Ohio Civil Rights Commission (OCRC) and the Equal Employment Opportunity Commission (EEOC). Plaintiff then filed an action in the federal court on December 15, 2003, which she voluntarily dismissed. She subsequently filed her action in this court on July 22, 2004.
- $\{\P 5\}$ Defendant raises two arguments in support of its motion for summary judgment. First, defendant argues that plaintiff failed to timely file her claims within the applicable statute of limitations. Second, defendant asserts that because plaintiff elected to pursue her administrative remedy she is now barred by R.C. 4112.08 from filing this action.
- {¶6}R.C. 4112.02(N) provides in relevant part that "[a]n aggrieved individual may enforce the individual's rights relative to discrimination on the basis of age as provided for in this section by instituting a civil action, within one hundred eighty days after the alleged unlawful discriminatory practice occurred ***." Plaintiff states that she was denied a promotional opportunity because of her age on September 27, 2002. As such, plaintiff had to file her claim under R.C. 4112.02(N) on or before March 27, 2003. Plaintiff did not file her complaint in federal district court until December 15, 2003; she did not file her claim in this court until July 22, 2004. Clearly, plaintiff's claims

- under R.C. 4112.02(N) were filed outside the 180-day limitation period.
- {¶7} With regard to plaintiff's claims under ADEA, plaintiff was issued a right-to-sue letter by the EEOC on September 15, 2003. Section 626(e), Title 29, U.S.Code provides that once a charge is dismissed by the EEOC, the individual that filed the charge shall be notified and then have 90 days in which to file a civil action. The right-to-sue letter issued to plaintiff states that "your lawsuit under the ADEA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice. Otherwise, your right to sue based on the above-numbered charge will be lost." As such, plaintiff's ADEA claim had to be filed on or before December 15, 2003.
- {¶8} Although plaintiff filed her ADEA claim in federal court within the prescribed time limitation, she dismissed that claim voluntarily. Plaintiff argues that the instant complaint was timely because she filed her complaint within one year of the date she dismissed her case in the federal court. Defendant contends that R.C. 2305.19, Ohio's "savings statute," does not preserve claims predicated upon federal statutes that contain a specific limitations period. The court agrees.
- $\{\P 9\}$ The United States District Court for the Southern District of Ohio tackled this very issue in Parrish v. HBO & Co. (1999), 85 F.Supp.2d 792, 797. Parrish sued a former employer for age discrimination both under the ADEA and the Ohio Revised Code. As in this case, Parrish voluntarily dismissed his case and refiled it outside the 90-day limitation period set by the ADEA. The court dismissed the claim as being time-barred.
- $\{\P\ 10\}$ The Parrish court stated that "[i]t is well-established that a state saving statute cannot 'save' a federal claim that is governed by its own statute of limitations" and that "the United

States Supreme Court expressly rejected the use of Ohio Rev. Code §2305.19 to 'save' an untimely claim under the Federal Employers' Liability Act, which, like the ADEA, contains its own statute of limitations." Citing Burnett v. New York Central R.R. Co. (1965), 380 U.S. 424. Additionally, the court noted that the Sixth Circuit has "repeatedly refused to apply a state saving statute to revive an untimely federal claim, when the federal statute under which the plaintiff has sued contains its own limitations period." Citing Johnson v. Railway Express Agency, Inc. (1973), 489 F.2d 525; Ester v. Amoco Oil Co. (1995), 65 F.3d 168.

- $\{\P\ 11\}$ Based upon the foregoing, the court concludes that plaintiff's ADEA claim is barred by the 90-day limitation period.
- As an additional basis for dismissal of plaintiff's state law claim, defendant arques that those claims are barred by the statutory election of remedies. R.C. 4112.08 provides in relevant part that "any person filing a charge under division (B)(1) of section 4112.05 of the Revised Code [with the OCRC], with respect to the unlawful discriminatory practices complained of, is barred from instituting a civil action under section 4112.14 or division (N) of section 4112.02 of the Revised Code." added.) Consequently, once plaintiff elected to file a charge with the OCRC, she was thereafter barred from instituting any civil claims under Chapter 4112 of the Revised Code. See Vinson v. Diamond Triumph Auto Glass, Inc., 149 Ohio App.3d 605, 2002-Ohio-5596.
- $\{\P \ 13\}$ Based on the above analysis, the court finds that defendant is entitled to judgment as a matter of law as to plaintiff's claims under the ADEA and R.C. 4112.02. Therefore, defendant's motion for summary judgment shall be granted.

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JUDGMENT ENTRY

ROSS CORRECTIONAL INSTITUTE

Defendant :

A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT Judge

Entry cc:

Byron L. Potts Attorney for Plaintiff

415 East Broad Street, Suite 112

Columbus, Ohio 43215

Eric A. Walker Attorneys for Defendant

Jana M. Brown

Assistant Attorneys General
150 East Gay Street, 23rd Floor

Columbus, Ohio 43215-3130

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Lisa M. Eschbacher Assistant Attorneys General 150 East Gay Street, 22nd Floor Columbus, Ohio 43215-3130

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