

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Teresa Davis, :
 :
 Petitioner-Appellant, :
 :
 v. : No. 13AP-40
 : (C.P.C. No. 12CV-08-9788)
 State Employment Relations Board et al., : (REGULAR CALENDAR)
 :
 Respondents-Appellees. :

D E C I S I O N

Rendered on August 15, 2013

Byron L. Potts & Co., L.P.A., and Byron L. Potts, for appellant.

Michael DeWine, Attorney General, and X. Brian Edwards, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Teresa Davis, appeals from a judgment of the Franklin County Court of Common Pleas dismissing her petition for a writ of mandamus to compel appellee, the State Employment Relations Board ("SERB"), to vacate its decision dismissing appellant's unfair labor practice ("ULP") charge and to compel SERB to complete an investigation of the charge. For the following reasons, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} Appellant was employed by the city of Columbus, Department of Public Services, Refuse Collection Division ("city"), and a member of Ohio Council 8, AFSCME, AFL-CIO, Local 1632. On August 23, 2011, appellant was reprimanded for

insubordination and neglect of duty for failure to complete her route and for failure to notify her supervisor that she did not complete her assigned route. On September 9, 2011, appellant was written up "for attendance" and neglect of duty. When appellant was notified of her disciplinary hearing, she told management she was "not going to deal with this today" and left work for the day. When she left, appellant refused to either sign the notice or to take the notice with her.

{¶ 3} On October 18, 2011, appellant appeared at the disciplinary hearing represented by union representatives. However, because appellant agreed to tender her resignation effective November 1, 2011, a hearing did not occur.

{¶ 4} On April 17, 2012, appellant filed a ULP charge with the SERB alleging that the union violated R.C. 4117.11(B)(1) and (B)(2) by failing to represent her at the October 18, 2011 grievance hearing. SERB sent appellant a letter advising her that the ULP charge was deficient and that, absent information supporting the tolling of the 90-day statute of limitations, investigator Judy Knapp would recommend dismissal of her charge. The letter stated that appellant had no later than April 24, 2012 to file an amended charge. Appellant filed an amended ULP charge on April 30, 2012 alleging the same violation but asserting that she was not aware that the union may have committed a possible ULP until January 31, 2012, the date she first met with counsel and received legal advice on the matter.

{¶ 5} Knapp issued an investigator's memorandum recommending SERB dismiss the charge as untimely filed. SERB determined that the facts giving rise to the charge occurred more than 90 days prior to appellant's filing of the ULP charge and that no mitigating circumstances existed to warrant the equitable tolling of the statute of limitations. Consequently, SERB dismissed appellant's ULP charge.

{¶ 6} Appellant filed a writ of mandamus in the Franklin County Court of Common Pleas arguing that the 90-day statute of limitations should have been equitably tolled. The Franklin County Court of Common Pleas held SERB did not abuse its discretion in dismissing the ULP charge as untimely and ultimately dismissed appellant's request for a writ of mandamus.

II. ASSIGNMENT OF ERROR

{¶ 7} Appellant filed the instant appeal raising the following assignment of error:

THE DEFENDANT APPELLEE, STATE EMPLOYMENT RELATIONS BOARD ABUSED IT'S [sic] DISCRETION BY DISALLOWING PLAINTIFF-APPELLANT'S CLAIM THAT AFSCME, AFL-CIO, LOCAL 1632, FAILED TO PROPERLY REPRESENT THE APPELLANT IN A MATTER BROUGHT BEFORE THE STATE EMPLOYMENT RELATIONS BOARD.

III. DISCUSSION

{¶ 8} A determination by SERB whether to issue a complaint in an unfair labor practice case is not reviewable by direct appeal. *See Ohio Assn. of Pub. School Emp., Chapter 643, AFSCME/AFL-CIO v. Dayton City School Dist. Bd. of Edn.*, 59 Ohio St.3d 159 (1991), syllabus. Nevertheless, mandamus will issue to correct an abuse of discretion by SERB in dismissing unfair labor practice charges. *State ex rel. Ohio Assn. of Pub. School Emp./AFSCME, AFL-CIO v. State Emp. Relations Bd.*, 64 Ohio St.3d 149, 151-52 (1992). An abuse of discretion connotes an unreasonable, arbitrary or unconscionable attitude. *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996). In addition, courts must defer to SERB's interpretation of R.C. Chapter 4117. *State Emp. Relations Bd. v. Miami Univ.*, 71 Ohio St.3d 351, 353 (1994).

{¶ 9} SERB dismissed appellant's ULP charge because the events giving rise to the charge occurred more than 90 days before appellant filed the charge with SERB and no mitigating circumstances warranted equitable tolling of the statute of limitations. R.C. 4117.12(B) provides that "[t]he board may not issue a notice of hearing based upon any unfair labor practice occurring more than ninety days prior to the filing of the charge with the board." By enacting a 90-day statute of limitations, the General Assembly intended employees to seek redress for unfair labor practices promptly. *State Emp. Relations Bd. v. Ohio State Univ.*, 36 Ohio App.3d 1, 3 (10th Dist.1987). The 90-day time period does not commence until the charging party knew or should have known of the conduct, which constituted the improper conduct, and actual damage ensued. *Fraternal Order of Police, Ohio Labor Council, Inc. v. Hubbard Twp. Trustees*, 68 Ohio App.3d 843, 847 (11th Dist.1990).

{¶ 10} Applying R.C. 4117.12(B) to the present case, to be timely, appellant's ULP charge had to be filed no later than February 2, 2012. Not having filed it until April 17, 2012, appellant's ULP charge was untimely. However, because she alleges she was not

aware of her legal rights or the alleged wrongdoing of her union until she met with counsel on January 31, 2012, appellant contends that the doctrine of equitable tolling is applicable here. Thus, it is appellant's position that utilizing January 31, 2012 for purposes of R.C. 4117.12(B) renders her April 17, 2012 filing timely.

{¶ 11} Appellant asserts she was improperly represented by her union representative at her grievance hearing because the union failed to fight for her job. Appellant further asserts she was unaware that her union representative's actions may have constituted a ULP until she met with counsel on January 31, 2012. These allegations are insufficient to trigger equitable tolling.

{¶ 12} Review of a SERB decision is limited to the facts as they existed at the time SERB made its decision as shown in the SERB record. *State ex rel. Portage Lakes Edn. Assn. v. State Emp. Relations Bd.*, 95 Ohio St.3d 533, 2002-Ohio-2839; *State ex rel. Hall v. State Emp. Relations Bd.*, 122 Ohio St.3d 528, 2009-Ohio-3603. The record here establishes appellant knew *or should have known* of the allegedly improper representation, at the latest, on November 1, 2011, the effective date of her resignation. Waiting to seek legal advice to ascertain whether or not an alleged ULP may have occurred alone is not sufficient to trigger equitable tolling of the requisite 90-day statute of limitations. In general, " 'ignorance of legal rights does not toll a statute of limitations.' " *State ex rel. Scherfling v. State Emp. Relations Bd.*, 152 Ohio App.3d 484, 489, 2003-Ohio-1936 (10th Dist.), quoting *Larson v. Am. Wheel & Brake, Inc.*, 610 F.2d 506, 510 (8th Cir.1979).

{¶ 13} We conclude the record demonstrates appellant knew or should have known of the allegedly improper conduct, or actual damages suffered as a result thereof, by the date she was no longer employed by the city. Also, we conclude the record fails to establish that the doctrine of equitable tolling is required to be applied in this instance. Accordingly, we find no abuse of discretion in SERB's decision to dismiss appellant's ULP charge as untimely. Further, we conclude the trial court did not err in determining appellant was not entitled to mandamus relief.

{¶ 14} For the foregoing reasons, appellant's single assignment of error is overruled.

IV. CONCLUSION

{¶ 15} Having overruled appellant's single assignment of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT, P.J., and McCORMAC, J., concur.

McCORMAC, J., retired, formerly of the Tenth Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).
