

IN THE SUPREME COURT OF OHIO

06-2208

NANCY J. McNEELY,

Case No.

Appellant,

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate
District

v.

(Decided October 17, 2006)

Court of Appeals
Case No. 06 AP 03-280

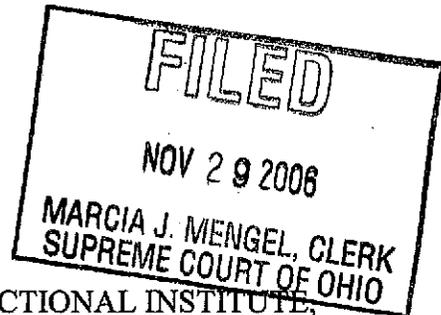
ROSS CORRECTIONAL
INSTITUTE,

Appellee.

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT NANCY J. McNEELY

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TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....	3
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW.....	6
<u>Proposition of Law No. I:</u> The Trial Court and Appellate Court violated the Appellee's due process pursuant to the Fourteenth Amendment of the U.S. Constitution when it failed to address the conflict with the Federal Rules and state rule for age discrimination that should have gone to a trial on its merits.....	
	6
<u>Proposition of Law No. II:</u> The trial court and appellate court abused their discretion and violated Appellant's right to due process by concluding that the Appellant's state law claims were barred by R.C. 4112.08 statutory election of remedies.....	
	8
CONCLUSION.....	11
PROOF OF SERVICE.....	12
APPENDIX	<u>Appx. Page</u>
Opinion of the Franklin County Court of Appeals (October 17, 2006).....	
	1
Judgment Entry of the Franklin County Court of Appeals (October 17, 2006).....	
	2

**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GENERAL INTEREST AND INVOLVES
A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case presents an issue of great public and general interest and involves a substantial constitutional question concerning age discrimination. Age discrimination is an issue that touches and concerns all United States citizens due to the fact that becoming elderly is an inevitable stage in the human cycle of life.

In the case at bar, the lower courts have failed to protect the rights of the Appellant. The Appellant, Nancy J. McNeely, was denied a promotion she applied for based upon her age. At the time in question she was fifty four (54) years old. On or about August of 2001 Ms. McNeely applied for a promotion to Personnel Officer III at the Ross Correctional Institute and was denied the promotion to Personnel Officer III at the Ross Correctional Institute despite being more qualified than Sandy Van Buskirk. The Appellant had been a Personnel Officer III from February, 1998 until October, 1999 before taking a voluntary demotion to Personnel Officer II in order to change locations of work from Orient Reception Center to Ross County Correctional Center to take care of her sick father.

In response, Ms. McNeely filed a charge of age discrimination on October 17, 2002, with both the Ohio Civil Rights Commission ("OCRC") and the Equal Employment Opportunity Commission ("EEOC"). On September 15, 2003, the EEOC issued the Appellant a notice of her right to sue, informing Appellant she had 90 days, or until December 17, 2003, to file an action in court. Pursuant to the notice, on December 15, 2003, Appellant timely filed a complaint in the United States District Court for the Southern District of Ohio. Because the Federal Court lacked jurisdiction over Ross Correctional Institute, a state actor, Appellant voluntarily dismissed the action on March 17, 2004. Approximately four months later, on July 22, 2004, Appellant re-filed her complaint in the Ohio Court of Claims, alleging a violation of Revised Code 4112.02(N), 4112.99, and the federal Age Discrimination in Employment Act ("ADEA"). To allow a state agency, such as Ross Correctional Institute, to discriminate based on age is a great concern to society.

This case also entails several important constitutional issues. First, The U.S. Constitution under the Fourteenth Amendment to the United States Constitution requires that, before the government can divest an individual of a right, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The Trial Court and Appellate Court violated the Appellant's due process pursuant to the Fourteenth Amendment of the U.S. Constitution when the lower Courts abused its discretion by ruling in favor of the Appellees' Motion for Summary Judgment when there were genuine issues of material fact that should have gone to a trial on its merits. The Appellant was not afforded the opportunity to have her case heard in a court of law. In the case at bar, the Court of Claims granted summary judgment to Ross Correctional Institute, determining Appellant's federal ADEA claim was untimely filed, and that the applicable statute of limitation and the election of remedies barred her state law claim. This dismissal has resulted in the loss of Appellant's employment potential. Under the U.S. Supreme decision in *Mathews* the Appellant has a right to have her case decided on its merits as required by the due process clause of the U.S. Constitution.

The lower courts failure to address the Appellant's claims will lead to many more elderly American loosing their right to file discrimination suit under federal and state law and will continue to cause more confusion about the conflicts in state and federal law.. Therefore, this case raises a substantial constitutional question and is one of public or great general interest, and this court should clarify the inconsistencies of state law and federal law.

STATEMENT OF THE CASE AND FACTS

The Appellant, Nancy McNeely alleged 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 the Appellant's Complaint was that she was wrongfully denied equal terms and conditions of employment and a promotional opportunity because of her age. From February 1, 1998 until October 1999 the Appellant served in the capacity of a Personnel Officer III with the Appellee.

The Appellant took a voluntary demotion to Personnel Officer II so that she could move from Orient Correctional Facility to Ross County Correctional Institute. In order to allow Ms. McNeely to transfer, the Appellee, the Defendant had to allow Sandy Van Buskirk, Personnel Officer II, to move from Ross Correctional Institute to a Personnel Officer III contingent upon her working toward her Bachelor's degree. Van Buskirk originally took the promotion; however, she shortly thereafter declined the promotion due to her reluctance to work toward her degree by taking on extra course work.

In August, 2002 the position of Personnel Officer III become available at Ross Correctional Institute. Ms. McNeely applied for the position along with Sandy Van Buskirk and Ms. Buskirk was selected for the position despite the fact that Ms. McNeely has held the position in question for over a year at Orient Correction Reception Center.

Thereafter, Ms. McNeely timely filed charges with the Ohio Civil Rights Commission (OCRC) and the Equal Employment Opportunity Commission (EEOC). The Plaintiff then filed an action in the U.S. District Court, Southern District of Ohio, Eastern Division on December 15, 2003. This action was voluntarily dismissed based on the fact that the Court of Claims of Ohio was found to be the proper Court to file against Ross Correctional Institute. The Appellant then subsequently filed her complaint in the Court of Appeals on July 22, 2004. On October 20, 2005, the Appellee filed its Motion for Summary Judgment that raised two (2) arguments. First, the Appellee argued that Appellant failed to timely file her claims within the applicable statute of limitations. Second, the Appellee asserted that because the Ms. McNeely elected to pursue her administrative remedy, she is now barred by Ohio Revised Code 4112.08 from filing this action. The Court of Claims of Ohio ruled in favor of summary judgment for the Appellee on these two issues. The Court of Appeals of Ohio affirmed the judgment of the Court of Claims of Ohio. It is this decision by the Court of Appeals, Tenth District of Ohio, that Ms. McNeely that now appeals.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

I. Proposition of Law No. I: The Trial Court and Appellate Court violated the Appellant's due process pursuant to the Fourteenth Amendment of the U.S. Constitution when the lower courts abused its discretion by failing to address the conflict with the Federal Rules and State Rules for age discrimination.

The Fourteenth Amendment of the United States Constitution states in pertinent part, "...nor shall any state deprive any person of life, liberty, or property, without due process of law. Here, the trial court and the appellate court improperly ruled that the Appellant did not file her ADEA Complaint within the 90 days upon receipt of her right to sue letter, thereby barring her by statute of limitations. 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 ninety (90) days in which to file a civil action. The right to sue letter issued to the Appellant stated 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." The EEOC issued its Notice of Right to Sue to Ms. McNeely on September 15, 2003. The Appellant did not receive this notice until September 18, 2003. Therefore, the Appellant was well within the ninety (90) days to satisfy the statute of limitations when she filed her Complaint in U.S. District Court on December 15, 2003.

On March 17, 2004, the Appellant voluntarily dismissed her Complaint in U.S. District court due to a pending motion to dismiss because the proper venue to bring the Appellant's claims against a state actor was the Court of Claims of Ohio. The trial court cited Parrish v. HBO & Co. (1999), 85 F.Supp.2d 792,797, in support of its ruling that the R.C. 2305.19, Ohio "savings statute," does not preserve claims predicated upon federal statutes that contain a specific limitations period. However, the Parish case is clearly distinguishable from the Plaintiff's case. Parrish sued a former employer for age discrimination both under the ADEA and the Ohio Revised Code. Parrish filed his case in state court, voluntarily dismissed his case, and refiled it in Federal Court outside the 90-day limitation period set by the ADEA. Parish only

addressed a case that was filed in state court and then voluntarily dismissed and refiled in Federal Court.

The trial court and the Appellate court failed to address the Appellant's claim that an Ohio savings statute can occur when a case has been timely filed in Federal Court and then voluntarily dismissed, and refiled in state court. Therefore, the trial court improperly applied Parish to the facts in the Plaintiff's case. In addition, the lower courts failed to address the fact that equitable tolling principals apply in the refilling of the Plaintiff's claims. The United States Sixth Circuit court of Appeals has held that time periods are jurisdictional in the sense that the phrase is used in relation to statutes of limitations and equitable principles should apply in circumstances which warrant their application. Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979). Furthermore, the Sixth Circuit has held that the filing requirements in Section 626(d) of the ADEA are subject to equitable tolling. Abbott v. More Business Forms, Inc. (D.N.H. 1977), 439 F.Supp. 643, 646. The facts in this case justify the application of equitable principles of tolling. The trial court and the Appellate court also failed to address that the Sixth Circuit has also held that equitable tolling is appropriate, even in the absence of any misleading conduct by the employer, when the employee files a timely Title VII action in court and there exists a legal theory for invoking the jurisdiction of the court. Id. Therefore, the lower courts should have applied the equitable tolling principles of the Federal Statute.

The United States Supreme Court has held that the statute of limitations be tolled during the pendency of an event or condition which satisfied the underlying purposes of the particular statute of limitations. Johanson v. Railway Express Agency, 421 U.S. 454, 475, 95 S.Ct. 1727. The Appellant's reason for dismissing and refiling her ADEA claim was based upon the premise that the Court of Claims of Ohio was the proper venue to sue a state agency. The Eleventh Amendment of the United States Constitution states that "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The United States Supreme Court has addressed the fact that there were conflicting court decisions in regards to whether the states Eleventh Amendment rights

were abrogated by the ADEA statute. The U.S. Supreme Court decided the ADEA amendment did not abrogate the states Eleventh Amendment rights in the Federal Court. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631 (2000).

Therefore, the Appellant voluntarily dismissed her complaint in Federal court because it lacked jurisdiction. The Sixth Circuit has clearly recognized that when an original court lacks jurisdiction and the same Complaint is re-filed in a court of proper jurisdiction, equitable tolling applies. *Fox v. Eaton*, 615 F.2d 716, 717-718 (1980). As stated above, the Appellant had satisfied the statute of limitations requirement through equitable tolling.

II. Proposition of Law No. II: The trial court and appellate court abused their discretion and violated Appellant's right to due process by concluding that the Appellant's state law claims were barred by R.C. 4112.08 statutory election of remedies.

The trial court and the Appellate court abused its discretion when it ruled that the Appellant's state law claims were barred by the statutory election of remedies therefore preventing the Appellant from being heard in a court of law. Revised Code 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." Revised Code 4112.02(N) provides in relevant part that "...an 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 (180) days after the alleged unlawful discriminatory practice occurred. The trial court stated that since Ms. McNeely was denied a promotional opportunity because of her age on September 27, 2002, that she had to file her claim under Revised Code 4112.02(N) on or before March 27, 2003. The trial court further stated that the Plaintiff did not file her claim in federal district court until December 15, 2003 and that she did not file her claim in state court until July 22, 2004. Therefore, the trial court ruled that the Plaintiff's claim under 4112.02(N) was filed outside the 180 day limitation period and granted the Defendant summary judgment on the Plaintiff's state

claims. The trial court clearly failed to apply the equitable tolling doctrine to Appellant's claims. Appellant was patiently waiting on her right to sue letter from the EEOC. The Appellee was aware of her filing her complaint with the EEOC and she could not bring an action until she had a right to sue.

The trial court ruled that once the 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 and cited Vinson v. Diamond Triumph Auto Glass, Inc., (2002), 149 Ohio App.3d 605. Ohio case law does not provide for an exception that allows plaintiffs to get around the general rule that once a plaintiff files a charge with the ORC pursuant to Revised Code 4112.05 that the plaintiff can institute a civil action under Revised Code 4112.14. Fowler v. Hudson Foods (1998), 96 Ohio Misc.2d 19, 708 N.E.2d 792, 795. The Appellant's sole purpose of filing with the EEOC was to perfect her ADEA claim. Therefore, the trial court failed to address the fact that the Appellant had presented genuine issues of material fact that she had a civil remedy instead of an administrative remedy.

The trial court failed to address that the Appellant first filed a complaint with the EEOC. The court misapplied the rules of statutory construction when it held that the filing of a claim with the EEOC constitutes a filing with the Ohio Civil Rights Commission. Schwartz v. Comcorp., Inc. (1993), 91 Ohio App.3d 639. All statutes which relate to the same general subject matter must be read construing them together with the proper force and effect to each. State v. Conger, 97 Ohio App.3d 91, 646 N.E.2d 238. Therefore, both statutes that the Plaintiff brings an action should be read together and each of them should have the same force and effect in which none of them state that filing with the EEOC is the same as filing with the Ohio Civil Rights Commission. The filing of an EEOC complaint is not written in the Ohio Revised Code §§§4112.14, 4112.05, and 4112.02(N). The Ohio General Assembly would have expressed the "EEOC" wording in the statute if it had intended that the OCRC was to mean the same thing as the EEOC. Therefore, the Appellant was not barred from bringing a civil action. Furthermore, the provisions of Revised Code 4112.99 creates an independent civil action separate from R.C. 4112.02(N). Bellian v. Bicon Corp., 69 Ohio St.3d 517, 519; 634 N.E.2d 608. Therefore, the 180-day rule does not apply to

the Appellant's state claims. The Appellant clearly presented genuine issues of fact to warrant the case to proceed to trial on its merits.

Federal courts have acknowledged that Ohio statutes addressing age discrimination remedies provided by R.C. 4101.17, 4112.02(N) and 4112.05, by their own language, are mutually exclusive Oscar Mayer & Co. v. Evans, 441 U.S. 750, 764, 99 S. Ct. 2066 1230-31. The Court also noted that the Ohio Statutes, in particular, to elect to pursue an administrative remedy under section 4112.05 forecloses judicial remedies under sections 4101.17 and 4112.02(N). This places the Ohio statutes at odds with the Federal requirement that in order to have a judicial remedy in the District Courts, he or she must first file with the OCRC under section 4112.05. Id. The Oscar Court stated that barring pendent state claims just to satisfy the federal filing requirement would be at odds with the enforcement scheme mandated by federal employment law. Id. See also New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 64, 100 S. Ct. 2024, 2031. This issue was further addressed by the Ohio Supreme Court in Morris v. Kaiser Engineers, Inc., 14 Ohio St.3d 45, 46, 471 N.E.2d 471 (1984). In Morris, the plaintiffs first filed suit asserting a claim under Revised Code 4101.17. Subsequent to his filing his lawsuit, the plaintiff filed a charge with the Ohio Civil Rights Commission to comply with the ADEA. Id. The defendant raised the same issues as the Defendant in the above named case; that claiming that the filing with the OCRC involved an election of remedies barring state judicial claims. Id.

The Ohio Supreme court made it clear that the goal in Oscar Mayer was to preserve the ADEA action and protects it from failure on the basis of state law. "Any other result would essentially prevent Ohio plaintiffs from joining claims under the ADEA with either of the judicial remedies provided by the Ohio Revised Code." Morris v. Kaiser Engineers, Inc., 14 Ohio St.3d 45, 46, 471 N.E.2d 471 (1984).

Ms. McNeely's case is nearly identical to the facts set forth in Morris and Oscar Mayer. She filed with the OCRC to satisfy her ADEA claim. She also filed her ADEA claim and state claims in Federal court. The trial court and the Appellate court have erred in the decision that Ms. McNeely's state claims are barred by the election of remedies. The Ohio Supreme Court and the Federal Court cited above have already addressed these similar issues in favor of the Appellants. Therefore, Ms. McNeely's

state claims are not barred by the election of remedies and her state claims are not barred by the statute of limitations.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellant request that this court grant jurisdiction and allow this case to be presented so that the important issues in this case will be reviewed on its merits.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing "Memorandum in Support of Jurisdiction" was sent to the following: Counsel for Appellee Assistant Attorneys General Lisa M. Eschbacher, Esq.; Jana M. Brown, Esq., at 150 East Gay Street, 23rd Floor, Columbus, Ohio 43215 by ordinary U.S. mail this 29 day of November 2006.



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FILED
COURT OF APPEALS
FRANKLIN CO. OHIO

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Nancy J. McNeely,

Plaintiff-Appellant,

v.

Ross Correctional Institute,

Defendant-Appellee.

No. 06AP-280

(C.C. No. 2004-07590)

(REGULAR CALENDAR)

OPINION

Rendered on October 17, 2006

Byron L. Potts and Eric L. LaFayette, for appellant.

Jim Petro, Attorney General, Lisa M. Eschbacher and Jana M. Brown, for appellee.

APPEAL from the Ohio Court of Claims.

BRYANT, J.

{¶1} Plaintiff-appellant, Nancy J. McNeely, appeals from a judgment of the Ohio Court of Claims granting the summary judgment motion of defendant-appellee, Ross Correctional Institution ("RCI"). Because the trial court properly granted summary judgment to RCI, we affirm.

{¶2} The pertinent facts are undisputed. In August 2002, plaintiff applied for the position of Personnel Officer 3 at RCI; on September 27, 2002, plaintiff was notified she did not get the position. In response, plaintiff filed a charge of age discrimination on

October 17, 2002, with both the Ohio Civil Rights Commission ("OCRC") and the Equal Employment Opportunity Commission ("EEOC"). See Complaint, at ¶3, 5.

¶3 On September 15, 2003, the EEOC issued plaintiff a notice of her right to sue, informing plaintiff she had 90 days, or until December 17, 2003, to file an action in court. Pursuant to the notice, on December 15, 2003 plaintiff timely filed a complaint in the United States District Court for the Southern District of Ohio. Because the federal court lacked jurisdiction over RCI, a state actor, plaintiff voluntarily dismissed the action on March 17, 2004. Approximately four months later, on July 22, 2004, plaintiff re-filed her complaint in the Ohio Court of Claims, alleging a violation of R.C. 4112.02(N), 4112.99, and the federal Age Discrimination in Employment Act ("ADEA").

¶4 RCI ultimately filed a motion for summary judgment, premised on three issues. RCI argued that: (1) plaintiff's ADEA claim was barred because it was not filed in the proper court within 90 days of notice of her right to sue; (2) plaintiff's state law claims under R.C. 4112.02 and 4112.99 were barred because the claims were not filed within 180 days of the alleged discriminatory act; and (3) plaintiff's state law claims were barred by the election of remedies applicable to age discrimination claims under R.C. 4112.08. The Court of Claims granted summary judgment to RCI, determining plaintiff's federal ADEA claim was untimely filed, and the applicable statute of limitations and plaintiff's election of remedies barred her state law claims. Plaintiff appeals, assigning two errors:

ASSIGNMENT OF ERROR NO. 1:

The trial Court erred by granting the Defendant summary judgment under the Plaintiff's ADEA claims.

ASSIGNMENT OF ERROR NO. 2:

The trial Court erred by granting the Defendant summary judgment under the Plaintiff's R.C. 4112.02 claims.

{¶5} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41; *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588. Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could 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 most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181.

I. First Assignment of Error

{¶6} In the first assignment of error, plaintiff contends the Court of Claims erred in dismissing her federal ADEA claim as untimely filed. Section 626(e), Title 29, U.S.Code provides that once the EEOC dismisses a charge of discrimination, the EEOC is to notify the complainant and to issue a notice of the right to sue. If the complainant wishes to file a lawsuit, he or she must do so within 90 days of receipt of the notice. Accordingly, plaintiff's notice 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."

{¶7} The parties do not dispute that plaintiff initially filed her ADEA claim in federal court on December 15, 2003, within the 90-day period. Because plaintiff sued a

state actor, the federal court lacked subject matter jurisdiction to consider plaintiff's ADEA claim. See R.C. 2743.01; R.C. 2743.02(E). Instead, she was required to file the action against RCI in the Ohio Court of Claims. As a result, on March 17, 2004, plaintiff voluntarily dismissed the federal action. Four months later, plaintiff re-filed her complaint in the Ohio Court of Claims.

{¶8} Plaintiff argues that because she originally timely filed in federal court, the Ohio savings statute operates to save the subsequent action filed in the Ohio Court of Claims. R.C. 2305.19, Ohio's savings statute, provides, as relevant here, that "[i]n any action that is commenced or attempted to be commenced, * * * if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of the * * * plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later." Even if we assume that plaintiff's federal court action failed otherwise than upon the merits, the savings statute remains inapplicable to the present case. See *Allen v. McBride*, 105 Ohio St.3d 21, 2004-Ohio-7112 (noting that a plaintiff's dismissal without prejudice is a failure otherwise than upon the merits).

{¶9} A state savings statute cannot save a federal claim that contains a specific limitations period. *Parrish v. HBO & Co.* (S.D. Ohio 1999), 85 F.Supp.2d 792, citing *Burnett v. New York Central R.R. Co.* (1965), 380 U.S. 424. *Parrish* relied on the rationale of *Burnett*, where the United States Supreme Court refused to apply Ohio's savings statute to save an untimely claim under a federal law that, like the ADEA, was governed by its own statute of limitations. Explaining its decision, *Parrish* noted "that incorporation of a state saving statute into a federal statute of limitations 'would produce nonuniform

periods of limitation in the several States. The scope of such statutes and the length of additional time they allow vary considerably from State to State. Moreover, not all States have saving statutes.' " *Parrish*, at 798, quoting *Burnett*, supra. Accordingly, application of Ohio's savings statute would destroy the ADEA's uniform operation and lead to inconsistent and unjust results. *Parrish*, supra.

{¶10} Plaintiff attempts to distinguish *Parrish* because it involved a plaintiff who initially sued a former employer in state court, voluntarily dismissed the case, and then re-filed it in federal court outside the 90-day period. Plaintiff argues that *Parrish* failed to address the present situation, where a claim is timely filed in federal court, voluntarily dismissed, and then re-filed in state court beyond the 90-day period. Although the facts in this case are the reverse of *Parrish*, the principles reiterated in *Parrish* mandate the same result. In determining whether a state savings statute applies to save an untimely claim, the relevant question is whether the actual claim is a federal law claim governed by its own limitations period, not what court was the action initially filed in, as a state savings statute cannot alter a limitations period federal law applies to a federal claim. Because plaintiff's ADEA claim is governed by its own limitations period, operation of R.C. 2305.19 cannot rescue it.

{¶11} Plaintiff argues that even if R.C. 2305.19 does not save her ADEA claim, the doctrine of equitable tolling applies to render it timely. "The doctrine of equitable tolling is to be applied sparingly and only in exceptional circumstances." *Gray v. Allstate Ins. Co.* (S.D. Ohio 2005), 2005 WL 2372845, citing *Wilson v. Grumman Ohio Corp.* (C.A.6, 1987), 815 F.2d 26. It is generally limited to circumstances in which an employee is intentionally misled or tricked into missing the filing deadline. *Id.* To that end, courts do not apply

equitable tolling when employees have failed to pursue their rights diligently. *Id.* Courts consider five factors to determine whether equitable tolling is appropriate in a particular case: (1) lack of actual notice of the filing requirement, (2) lack of constructive notice of the filing requirement, (3) diligence in pursuing one's rights, (4) absence of prejudice to the defendant, and (5) a plaintiff's reasonableness in remaining ignorant of the filing requirements. *Id.*

{¶12} Plaintiff contends that because she timely filed a civil action alleging an ADEA claim in federal court but had to dismiss due to lack of jurisdiction over RCI, the 90-day limitations period should be equitably tolled. Plaintiff fails to demonstrate why she did not originally file in the Ohio Court of Claims, the only court in Ohio with jurisdiction over a state actor in these circumstances. Further, plaintiff fails to explain why it took four months to re-file her complaint in the Ohio Court of Claims after voluntarily dismissing it from federal court. Plaintiff does not claim that she somehow was misled or tricked into originally filing in the wrong court. In the end, the circumstances in this case are not so "exceptional" that they warrant equitable tolling. Accordingly, plaintiff's first assignment of error is overruled.

II. Second Assignment of Error

{¶13} In the second assignment of error, plaintiff maintains the trial court erred in granting summary judgment to RCI on her state law claim of age discrimination under R.C. 4112.02 and 4112.99. The trial court found that plaintiff's state law claims failed because: (1) plaintiff elected to pursue an administrative remedy that precluded her from filing a civil action; and (2) plaintiff did not file her complaint within the 180-day statute of limitations set forth in R.C. 4112.02(N).

{¶14} Under Ohio law, a plaintiff may file a civil action alleging age-based employment discrimination under one of three statutory provisions: R.C. 4112.02(N), 4112.14, and 4112.99. Alternatively, a plaintiff may file a charge administratively with the OCRC under R.C. 4112.05. R.C. 4112.08 provides that "any person filing a charge under division (B)(1) of section 4112.05 of the Revised Code, 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."

{¶15} Under Ohio law, one exception exists to the requirement that an employee elect her remedy for an age discrimination claim: an employee is not barred from bringing a civil lawsuit after filing a charge with the OCRC if the employee expressly indicates in the OCRC charge that the filing is made for purposes of perfecting an ADEA claim and the employee does not seek an OCRC investigation. *Senter v. Hillside Acres Nursing Ctr.* (N.D. Ohio 2004), 335 F.Supp.2d 836. Similarly, an employee who has previously filed a civil action under Ohio law is not barred from filing a subsequent charge with the OCRC in order to satisfy the mandatory requirements to an action under the ADEA, provided the ADEA claim is filed within 90 days from the notice of the right to sue. *Morris v. Kaiser Engineers, Inc.* (1984), 14 Ohio St.3d 45 (noting that although a plaintiff's claim may fail under Ohio law due to procedural defaults, a plaintiff may still file a claim under the ADEA).

{¶16} Here, according to plaintiff's complaint and her brief on appeal, plaintiff filed a charge with the OCRC and the EEOC prior to filing a civil action. Further, nothing in the record suggests the limited exception to election of remedies applies in this case. Because plaintiff chose to pursue a charge with the OCRC, she is barred from bringing a

civil action under R.C. 4112.02(N). *Vinson v. Diamond Triumph Auto Glass* (2002), 149 Ohio App.3d 605; *Balent v. Natl. Revenue Corp.* (1994), 93 Ohio App.3d 419; see, also, *Smith v. Friendship Village of Dublin, Ohio* (2001), 92 Ohio St.3d 503, 506 (stating that "[t]he General Assembly has specifically limited an individual's ability to bring both an administrative and civil proceeding in the context of age discrimination only[.]" but "[i]ts exclusion of other forms of discrimination from this limitation makes clear that it intended that both remedies be available for other forms of discrimination").

{¶17} Plaintiff's alleging a violation of R.C. 4112.99 is equally unavailing. R.C. 4112.99 provides that "[w]hoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief." In *Balent*, supra, this court specifically held that the election of remedies applied to age discrimination claims brought under R.C. 4112.99. In so concluding, we noted the carefully constructed election requirements set forth in Chapter 4112 of the Revised Code. *Balent*, supra. "If R.C. 4112.99 fails to explicitly perpetuate the scheme set up by prior statutes addressing age discrimination, it is equally lacking in explicit intent to repeal the previously established statutory scheme." *Id.* Rather, the specific and detailed articulation of available remedies for age discrimination claims prevails over the broad terms of R.C. 4112.99. *Id.*

{¶18} Even if we assume plaintiff did not elect an administrative remedy under R.C. 4112.05, her state law claims fail because they were not filed within 180 days of the alleged discriminatory act. R.C. 4112.02(N) provides 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[.]"

{¶19} The Ohio Supreme Court has held that any age discrimination claim, "premised on a violation described in R.C. Chapter 4112, must comply with the one-hundred-eighty-day statute of limitations period set forth in former R.C. 4112.02(N)." *Bellian v. Bicron Corp.* (1994), 69 Ohio St.3d 517, syllabus. Whether an age discrimination claim is premised on R.C. 4112.02 or 4112.99, a plaintiff must file the claim within 180 days of the alleged discriminatory act. *Id.* Here, plaintiff was denied the position on September 27, 2002. Plaintiff did not file her first complaint asserting state law claims until July 22, 2004, beyond the 180-day limitations period. Further, for the reasons stated above, plaintiff's state law claims cannot be saved under the doctrine of equitable tolling. Thus, plaintiff's claims under R.C. 4112.02 and 4112.99 fail.

{¶20} We recognize the difficulty in attempting to comply with Ohio law and preserve a claim under the ADEA under Ohio's statutory scheme applicable to age discrimination claims. Essentially, in order to assert a state law claim and a federal ADEA claim, a plaintiff must file a civil action alleging the state law claim within 180 days of the alleged discriminatory act or practice. If a plaintiff wishes to additionally file an ADEA claim, she can amend the complaint to add the ADEA claim within 90 days after receiving the notice of the right to sue or simply file a separate action asserting the ADEA claim. In order to comply with the ADEA, a plaintiff first must file with the OCRC or EEOC. To avoid the election of remedies obstacle, a plaintiff must file the charge with OCRC after filing the civil action, pursuant to *Morris*, *supra*, or expressly state in the OCRC charge that the plaintiff is filing the charge for purposes of complying with the ADEA only and does not want an OCRC investigation. Because plaintiff did not comply with the statutory scheme, her complaint is barred. Accordingly, plaintiff's second assignment of error is overruled.

{¶21} Having overruled plaintiff's first and second assignments of error, the judgment of the Ohio Court of Claims is affirmed.

Judgment affirmed.

PETREE and BOWMAN, JJ., concur.

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

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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 v. :
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 Defendant-Appellee. :

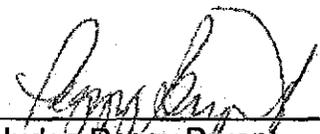
No. 06AP-280
(C.C. No. 2004-07590)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on October 17, 2006, and having overruled plaintiff's first and second assignments of error, it is the judgment and order of this court that the judgment of the Court of Claims of Ohio is affirmed. Costs to plaintiff.

BRYANT, PETREE & BOWMAN, JJ.

By  _____
Judge Peggy Bryant

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

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