

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Loria Moore,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 10AP-732
v.	:	(C.C. No. 2009-05218)
	:	
Department of Rehabilitation and	:	(REGULAR CALENDAR)
Correction,	:	
	:	
Defendant-Appellee.	:	
	:	

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D E C I S I O N

Rendered on March 31, 2011

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*The Isaac Firm L.L.C.*, and *Kendall D. Isaac*, for appellant.

*Michael DeWine*, Attorney General, *Susan M. Sullivan*, and  
*Velda K. Hofacker*, for appellee.

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APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶1} Plaintiff-appellant, Loria Moore, appeals from the judgment of the Court of Claims of Ohio granting judgment as a matter of law in favor of defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"), pursuant to ODRC's motion seeking summary judgment on the basis that appellant's claims are time-barred.

{¶2} The underlying facts giving rise to this litigation are essentially undisputed. Appellant was employed as a corrections officer for ODRC's Corrections Medical Center. At the time appellant was hired on October 26, 2006, appellant was 51 years old and subject to a probationary period as were other new employees. On December 20, 2006, appellant left a set of handcuffs in a public restroom while guarding inmates at The Ohio State University Medical Center. Because this incident occurred during her probationary period, appellant's employment with ODRC was terminated on January 9, 2007.

{¶3} The record establishes that on January 11, 2007, appellant filed a discrimination charge based on the Age Discrimination Employment Act of 1967 ("ADEA"), which prohibits discrimination on the basis of age, with both the Ohio Civil Rights Commission ("OCRC") and the Equal Employment Opportunity Commission ("EEOC"). On November 12, 2008, the EEOC mailed appellant a right to sue notice informing her that under the ADEA a lawsuit must be filed in federal or state court within 90 days of her receipt of the notice. Appellant withdrew her case from the OCRC, and on February 10, 2009, filed a complaint in the United States District Court for the Southern District of Ohio.<sup>1</sup> Subsequently, appellant voluntarily dismissed her federal case without prejudice on May 26, 2009, and re-filed the complaint in the court of claims on May 28, 2009.

{¶4} In her complaint, appellant asserted that termination of her employment constituted discrimination on the basis of age and race in violation of both state and federal law, i.e., R.C. 4112.02, 4112.99, the ADEA, and Title VII of the Civil Rights Act of

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<sup>1</sup> We note, as did ODRC, that the record does not contain any evidence of the date in which a complaint was filed in federal court. In her brief, appellant states she commenced the action on February 10, 2009, therefore, we utilize this date in our summary of this matter's procedural history.

1964 ("Title VII"). On May 3, 2010, ODRC filed a motion for summary judgment on the basis that all of appellant's claims were barred by their applicable statutes of limitations. By decision rendered July 20, 2010, the trial court agreed with ODRC and granted its motion for summary judgment. Specifically, the trial court found that appellant's ADEA claim was time-barred because it was not filed within 90 days of her receipt of the right to sue notice issued by the EEOC. With respect to appellant's claim of age discrimination, pursuant to R.C. 4112.02 and 4112.99, the trial court found said claim was barred by both the election of remedies doctrine and its applicable 180-day statute of limitations. Lastly, the trial court concluded appellant's claims for racial discrimination were barred by the statute of limitations contained in R.C. 2743.16(A).

{¶5} This appeal followed, and appellant brings the following two assignments of error for our review:

1. Judge erred in dismissing ORC 4112.02 race discrimination claim and ADEA claim as barred by the statute of limitations.
2. Judge erred in dismissing and failing to rule on the Title VII claim.

{¶6} We review the trial court's grant of summary judgment de novo. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is 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, when the evidence is construed

in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 1997-Ohio-221.

{¶7} Under summary judgment motion practice, the moving party bears an initial burden to inform the trial court of the basis for its motion, and to point to portions of the record that indicate that there are no genuine issues of material fact on a material element of the non-moving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107. Once the moving party has met its initial burden, the non-moving party must produce competent evidence establishing the existence of a genuine issue for trial. *Id.*

{¶8} On appeal, appellant does not challenge the trial court's granting judgment as a matter of law on her claim of age discrimination brought pursuant to R.C. 4112.02 and 4112.99. Therefore, with respect to her claim of age discrimination, our analysis will focus on the ADEA.

{¶9} In her first assignment of error, appellant contends the trial court erred in finding both the ADEA claim and R.C. 4112.02 race discrimination claim were barred by the statute of limitations. The ADEA prohibits discrimination on the basis of age, and R.C. 4112.02, as is pertinent here, makes it an unlawful discriminatory practice for an employer to discriminate against an employee on the basis of race. R.C. 4112.02(A).

{¶10} Appellant filed a charge of employment discrimination under the ADEA with the EEOC on January 11, 2007. As such, the EEOC retained exclusive jurisdiction of the discrimination claim until it determined that the charge should be dismissed. *Lewis v. Fairview Hosp.*, 156 Ohio App.3d 387, 2004-Ohio-1108, ¶5, citing *EEOC v. Waffle House, Inc.* (2002), 534 U.S. 279, 291, 122 S. Ct. 754, 763. 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, the notice issued to appellant from the EEOC states that "[t]he EEOC is closing your case. Therefore, your lawsuit under the ADEA **must be filed in federal or state court WITHIN 90 DAYS of your receipt of the Notice.** Otherwise, your right to sue based on the above-numbered charge will be lost." (Emphasis sic.)

{¶11} According to appellant, she initially filed a complaint, which included her ADEA claim, in federal court on February 10, 2009, which was within the 90-day period.<sup>2</sup> Because, however, appellant sued a state actor, the federal court lacked jurisdiction to consider the ADEA claim; therefore, on May 26, 2009, appellant voluntarily dismissed the federal action without prejudice and re-filed the complaint in the court of claims on May 28, 2009. Despite the language in the right to sue notice informing appellant that she had 90 days from receipt of the notice to file suit, appellant argues that because her federal action was timely, the Ohio savings statute operates to save the subsequent filing in the court of claims.

{¶12} An analogous argument was raised to this court in *McNeely v. Ross Corr. Inst.*, 10th Dist. No. 06AP-280, 2006-Ohio-5414, discretionary appeal not allowed, 112 Ohio St.3d 1494, 2007-Ohio-724. The plaintiff in *McNeely* filed an ADEA claim in federal court and did so within 90 days of her receipt of the EEOC's right to sue notice. However, due to filing against a state actor, *McNeely* voluntarily dismissed the federal action and re-filed the matter in the court of claims; this filing, however, was beyond the 90-day

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<sup>2</sup> We note again that the record contains no evidence of this, but for the sake of argument we use appellant's statement that the federal action was commenced on February 10, 2009.

provision. Like appellant, McNeely argued the state savings statute operated to save the subsequent filing in the court of claims.

{¶13} R.C. 2305.19, Ohio's savings statute, provides, in relevant part, "[i]n any action that is 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." McNeely argued that because the federal action was dismissed without prejudice, it failed otherwise than on the merits such that R.C. 2305.19 was applicable. This court disagreed, and held that even if we were to assume the federal court action failed otherwise than upon the merits, the savings statute remains inapplicable because "[a] state savings statute cannot save a federal claim that contains a specific limitations period." *McNeely* at ¶9, citing *Parrish v. HBO & Co.* (S.D. Ohio 1999), 85 F.Supp.2d 792, citing *Burnett v. New York Cent. R.R. Co.* (1965), 380 U.S. 424, 85 S.Ct. 1050. Because appellant's ADEA claim is governed by its own limitations period, operation of R.C. 2305.19 cannot rescue it. *Id.* at ¶10. Accordingly, the trial court did not err in determining appellant's ADEA claim was untimely filed.

{¶14} Turning to appellant's claim of discrimination on the basis of race in violation of R.C. 4112.02, appellant contends she had two years from the date she received the right to sue notice from the EEOC to file suit in the court of claims, and appellant relies on *Rafferty v. Ohio Dept. of Transp.* (Dec. 2, 2003), Ct. of Claims No. 2001-11294, in support of her position. Accordingly, because she received her right to sue notice on

November 12, 2008, appellant asserts her May 28, 2009 filing in the court of claims was timely.

{¶15} *Rafferty* concerned a state employee that filed an ADEA charge with the EEOC on September 24, 1998, and received a right to sue notice on September 23, 1999. After not being interviewed for a number of vacant positions between November 1999 and December 2000, Rafferty filed another ADEA charge with the EEOC on April 5, 2001, and therein referenced his 1998 discrimination charge. Rafferty received a right to sue letter on August 21, 2001, and filed a complaint in the court of claims on November 11, 2001. The court of claims dismissed as untimely Rafferty's R.C. 4112.02 age discrimination claim that was based on the alleged discriminatory practice that occurred in April 1998. In doing so, the court of claims stated, "[p]laintiff would have had two years from September 23, 1999, to file a lawsuit in this court regarding violations of R.C. Chapter 4112. Plaintiff filed this case more than two years after the cause of action accrued. Therefore, plaintiff's claims of age discrimination [arising out of the 1998 incident] are barred by the statute of limitations and those claims are hereby dismissed." Thus, *Rafferty* recognized the statute of limitations began to run on the date the cause of action accrued. While use of the September 23, 1999 date suggests the court of claims found the cause of action accrued when Rafferty received the EEOC right to sue notice, such a finding is clearly contrary to the long-standing principle recently reiterated by this court that a cause of action accrues and the statute of limitations begins to run at the time a wrongful act is committed. *Williams v. Bur. of Workers' Comp.*, 10th Dist. No. 09AP-1076, 2010-Ohio-3210, discretionary appeal not allowed, 127 Ohio St.3d 1446, 2010-Ohio-5762, ¶21, citing *DiNozzi v. Ohio State Dental Bd.*, 10th Dist. No. 08AP-609, 2009-

Ohio-1376, ¶15. Consequently, assuming *Rafferty* stands for the proposition asserted by appellant, we decline to resurrect its implied holding.

{¶16} In *Williams*, this court held that discrimination claims brought in the court of claims were subject to the statute of limitations contained in R.C. 2743.16(A), which provides, in relevant part, "civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of accrual of the cause of action or within any shorter period that is applicable to similar suits between private parties." Additionally, a claim of discrimination accrues "when the discriminatory act or practice occurs." *Williams* at ¶26, quoting *Tablack v. Wellman*, 7th Dist. No. 04-MA-218, 2006-Ohio-4688, ¶99. If, however, the complaint alleges discrete discriminatory acts, each discrete act can trigger a new limitations period. *Id.* Here, the latest, and only, discriminatory act appellant alleges is her termination from employment, which undisputedly occurred on January 9, 2007. Therefore, because this matter was not filed in the court of claims until May 28, 2009, it was filed outside the two-year statute of limitations.

{¶17} Nonetheless, appellant argues the savings statute operates to salvage this claim. The savings statute is only applicable when "an action was timely commenced, was dismissed without prejudice, and the applicable statute of limitations had expired by the time of such dismissal." *Reese v. The Ohio State Univ. Hosps.* (1983), 6 Ohio St.3d 162, 163. In *Rosendale v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-378, 2008-Ohio-4899, the Ohio Department of Transportation ("ODOT") conducted a bridge demolition project that caused damage to Rosendale's home. Rosendale initially filed suit against ODOT in February 2006 in Stark County, Ohio. Months later, on July 10, 2006, the

matter was dismissed for lack of subject matter jurisdiction. On July 10, 2007, Rosendale re-filed his complaint against ODOT in the court of claims, which ultimately granted ODOT's motion for summary judgment on the basis that Rosendale's claims were time-barred. On appeal, this court determined Rosendale's cause of action accrued on May 15, 2002, and, pursuant to R.C. 2743.16(A), Rosendale had two years from that date to commence litigation against ODOT.

{¶18} Though the complaint filed in the court of claims was clearly untimely, Rosendale, relying on the state savings statute, argued his complaint was not time-barred because it was filed within one year of the dismissal that was otherwise than upon the merits. Disagreeing with Rosendale's contention, this court held that the savings statute of R.C. 2305.19 was not applicable because Rosendale's initial action was not timely commenced in accordance with R.C. 2743.16(A).

{¶19} Likewise, in the matter before us, the savings statute could only operate to save appellant's claims if the initial filing in federal court was timely. In other words, to be considered timely, appellant's initial filing would have needed to occur within two years of when her cause of action accrued on January 9, 2007. Notwithstanding, appellant has provided no evidence of the timely filing in federal court, even using the February 10, 2009 filing date set forth in appellant's brief, the savings statute will not apply to save her claim because appellant's first cause of action was not timely commenced pursuant to R.C. 2743.16(A). *Rosendale; Adams v. Kurz*, 10th Dist. No. 09AP-1081, 2010-Ohio-2776 (because the original complaint was filed outside the statute of limitations, the savings statute did not apply to allow the plaintiff to re-file an otherwise untimely lawsuit).

{¶20} Appellant has also asserted that this court should consider the date she filed a complaint with the OCRC as the date of her initial filing; however, this argument fares no better for appellant. If we were to consider the OCRC complaint as the initial filing for purposes of the savings statute, appellant's complaint filed in the court of claims would become her third filing. It is axiomatic that the savings statute may be used only once to re-file a case. *Bailey v. Ohio State Dept. of Transp.*, 10th Dist. No. 07AP-849, 2008-Ohio-1513, discretionary appeal not allowed, 119 Ohio St.3d 1446, 2008-Ohio-4487, ¶10, citing *Thomas v. Freeman*, 79 Ohio St.3d 221, 227, 1997-Ohio-395, citing *Hancock v. Kroger Co.* (1995), 103 Ohio App.3d 266. See also *Estate of Carlson v. Tippett* (1997), 122 Ohio App.3d 489; *Triplett v. Beachwood Village, Inc.*, 158 Ohio App.3d 465, 2004-Ohio-4905; *Gruber v. Kopf Builders, Inc.*, 147 Ohio App.3d 305, 2001-Ohio-4361. As such, the trial court did not err in determining appellant's claims of race discrimination were untimely filed.

{¶21} Appellant contends that even if her claims are not saved by R.C. 2305.19, the doctrine of equitable tolling should be applied to render them timely. Though this argument is raised under appellant's second assignment of error, because it would apply to all of appellant's claims we address it here. The doctrine of equitable tolling is to be applied sparingly and in only exceptional circumstances, and is generally limited to those circumstances in which an employee is intentionally misled or tricked into missing the filing deadline. *McNeely* at ¶11, citing *Gray v. Allstate Ins. Co.* (S.D. Ohio 2005), 2005 U.S. Dist. LEXIS 40793. To determine whether equitable tolling is appropriate in a particular case, courts generally consider: (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.*

{¶22} Though even a cursory review of the record reveals a lack of evidentiary support to warrant application of the doctrine of equitable tolling, appellant failed to raise the issue of equitable tolling in the trial court. It is well settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal. *Gentile v. Ristas*, 160 Ohio App. 3d 765, 2005-Ohio-2197, ¶74. Therefore, appellant has waived this issue by failing to raise it before the trial court and may not raise it for the first time on appeal. *Welfley v. Vrandenburg* (Mar. 29, 1996), 10th Dist. No. 95APE11-1409 (failure to raise equitable grounds to toll a statute of limitations in the trial court constituted waiver and the issue could not be raised for the first time on appeal); *Maynard v. Norfolk S. Ry.*, 4th Dist. No. 08CA3267, 2009-Ohio-3143 (employee failed to argue equitable tolling in the trial court, and, therefore, forfeited the right to raise it on appeal); *Davis v. Allen* (Jan. 18, 2002), 1st Dist. No. C-010165 (plaintiff's failure to raise the issue of equitable tolling in the trial court waived the issue for purposes of appeal).

{¶23} Because we have found no error in the trial court's determination that appellant's age discrimination claim premised on the ADEA and appellant's race discrimination claim premised on R.C. 4112.02 are untimely, we overrule appellant's first assignment of error.

{¶24} In her second assignment of error, appellant contends the trial court erred in dismissing in her Title VII claim and in failing to rule upon the same. We recognize the inconsistent nature of this stated assignment of error; however, because the trial court clearly granted judgment as a matter of law in favor of ODRC on appellant's Title VII

claim, we construe this assignment of error as challenging the trial court's decision to do so without explicit analysis.

{¶25} Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin. In contending the trial court erred in dismissing her Title VII claim, appellant advances two arguments: one premised on *Rafferty* and one premised on equitable tolling. *Rafferty*, however, did not concern a discrimination claim based on Title VII, and the portion of *Rafferty* upon which appellant relies pertained to the filing of age discrimination claims based on *state* law, not federal. Regardless, as we found in our disposition of appellant's first assignment of error, appellant's reliance on *Rafferty* is misplaced. With respect to equitable tolling, we have already considered and rejected appellant's arguments regarding this issue. Accordingly, we overrule appellant's second assignment of error.

{¶26} For the forgoing reasons, appellant's two assignments of error are overruled and the judgment of the Court of Claims of Ohio is hereby affirmed.

*Judgment affirmed.*

BRYANT, P.J., and TYACK, J., concur.

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