

[Cite as *Stevens v. Ohio Dept. of Mental Health*, 2013-Ohio-3014.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert Stevens, II,	:	
Plaintiff-Appellant,	:	
v.	:	No. 12AP-1015 (Ct. of Cl. No. 2010-09256)
Ohio Department of Mental Health,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on July 11, 2013

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*William C. Wilkinson*, for appellant.

*Michael DeWine*, Attorney General, *Emily Simmons*, and  
*Lee Ann Rabe*, for appellee.

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APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶ 1} Plaintiff-appellant, Robert Stevens, II, appeals from a judgment of the Court of Claims of Ohio granting the summary judgment motion of defendant-appellee, Ohio Department of Mental Health. For the following reasons, we affirm.

**I. BACKGROUND**

{¶ 2} Appellee previously employed appellant as a Therapeutic Program Worker at one of its mental health facilities. On July 9, 2008, appellant was notified that he was being removed from his employment, effective July 11, 2008, for failing to meet performance expectations by "sitting behind the desk" instead of "interacting with patients." (Appellant's Memorandum in Opposition to Motion for Summary Judgment, Exh. A.)

{¶ 3} On April 27, 2009, appellant filed a charge of discrimination against appellee under Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12101 et seq., with the Equal Employment Opportunity Commission ("EEOC"). Appellant contended that he was unlawfully discharged for having a disability that prevented him from being able to stand on the job. On November 13, 2009, the EEOC notified appellant that it was dismissing the charge of discrimination. The EEOC also informed appellant of his right to sue appellee and stated, "[y]ou may file a lawsuit \* \* \* under federal law \* \* \* in federal or state court. Your lawsuit must be filed WITHIN 90 DAYS of your receipt of this notice; or your right to sue \* \* \* will be lost." (Emphasis sic.) (Appellant's Memorandum in Opposition to Motion for Summary Judgment, Exh. G.)

{¶ 4} On February 11, 2010, appellant filed a lawsuit against appellee in the United States District Court for the Northern District of Ohio and alleged a claim of discrimination under Title I of the ADA. Pursuant to Fed.R.Civ.P. 12(b)(1), appellee filed a motion to dismiss, stating that claims against the state of Ohio under Title I of the ADA are barred by sovereign immunity. Appellant filed an amended complaint, alleging a claim of discrimination under Title II of the ADA, 42 U.S.C. 12132. Pursuant to Fed.R.Civ.P. 41(a)(1), appellant later voluntarily dismissed his federal complaint without prejudice.

{¶ 5} On July 19, 2010, appellant filed a complaint in the Court of Claims of Ohio alleging a claim of discrimination under Title II of the ADA. Pursuant to Civ.R. 12(B)(6), appellee filed a motion to dismiss the complaint as barred by the statute of limitations, and on September 9, 2010, appellant filed an amended complaint, restating his claim of discrimination under Title II of the ADA and alleging disability discrimination claims under Section 504 of the Rehabilitation Act of 1973, 28 U.S.C. 794, and R.C. 4112.02. Pursuant to Civ.R. 12(B)(1) and (6), appellee filed a motion to dismiss the amended complaint as barred by the statute of limitations, and the trial court granted the motion.

{¶ 6} In *Stevens v. Ohio Dept. of Mental Health*, 10th Dist. No. 11AP-255, 2011-Ohio-4930, ¶ 7, this court reversed the trial court's decision, stating "[t]he decision from

the Ohio Court of Claims makes it clear that the court considered a number of issues outside the four corners of the complaint filed in that court. Where the trial court is going to consider factual issues outside the four corners of the complaint, that consideration should come in the context of a motion for summary judgment, not a motion to dismiss."

{¶ 7} On remand, appellee filed a motion for summary judgment, again alleging that appellant's complaint is barred by the statute of limitations, and appellant moved to file a second amended complaint in order to support a claim of equitable tolling of the statute of limitations based on the EEOC's right to sue letter indicating that he may file a lawsuit in federal or state court and to assert the relation back of his claims, filed under R.C. 4112.02 and the Rehabilitation Act pursuant to Civ.R. 15(C). The trial court granted appellant's motion to amend and denied appellee's motion for summary judgment as moot. After appellant filed the second amended complaint, appellee filed another motion for summary judgment, and the trial court granted the motion. The trial court concluded that appellant's ADA claim was barred by the statute of limitations and that Ohio's savings statute, R.C. 2305.19, did not apply to save the claim. The court also concluded that appellant's claims under the Rehabilitation Act and R.C. 4112.02 were barred by the statute of limitations. The court declined to apply equitable tolling and did not address the relation back doctrine under Civ.R. 15(C).

## **II. ASSIGNMENTS OF ERROR**

{¶ 8} Appellant filed a timely notice of appeal and assigns the following as error:

1. The trial court erred when it granted summary judgment on Appellant's claim under the Americans with Disabilities Act, 42 U.S.C. §12132.
2. The trial court erred when it granted summary judgment on Appellant's claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.
3. The trial court erred when it granted summary judgment on Appellant's state law claim under R.C. 4112.02.

4. The trial court failed to apply federal law in connection with its decision on equitable tolling.

### III. DISCUSSION

{¶ 9} Because they concern similar issues, we address appellant's four assignments of error together. In those assignments of error, appellant argues that the trial court erred by granting summary judgment in favor of appellee. We disagree.

{¶ 10} We review a summary judgment motion de novo. *Cashlink, LLC v. Mosin, Inc.*, 10th Dist. No. 12AP-395, 2012-Ohio-5906, ¶ 14. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Id.* We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Id.*

{¶ 11} Pursuant to Civ.R. 56(C), 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." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978).

{¶ 12} Appellant contends that summary judgment in favor of appellee cannot stand because the statute of limitations did not bar his claims under the ADA, Rehabilitation Act, and R.C. 4112.02. Appellant initially filed a charge of employment discrimination under the ADA with the EEOC on April 27, 2009. As such, the EEOC retained exclusive jurisdiction of the discrimination claim until it determined that the charge should be dismissed. *Moore v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-732, 2011-Ohio-1607, ¶ 10. Section 626(e), Title 29, U.S. Code provides that, once

the EEOC dismisses a claim 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 in court, he must do so within 90 days of receipt of the notice. *Id.* The 90-day requirement acts in the nature of a statute of limitations. *Lewis v. Fairview Hosp.*, 156 Ohio App.3d 387, 2004-Ohio-1108, ¶ 5 (8th Dist.).

{¶ 13} The parties do not dispute that appellant initially filed his ADA claim in federal court within the 90-day period. Appellant voluntarily dismissed the federal action without prejudice and re-filed the complaint in the Court of Claims on July 19, 2010. The trial court concluded that the ADA claim filed in the Court of Claims was not filed within the statute of limitations and that Ohio's savings statute did not apply to save the claim.

{¶ 14} This case is analogous to our previous decision in *McNeely v. Ross Corr. Inst.*, 10th Dist. No. 06AP-280, 2006-Ohio-5414. The plaintiff in *McNeely* filed in federal court a discrimination claim based on the Age Discrimination Employment Act ("ADEA") of 1967 and did so within 90 days of her receipt of the EEOC's right to sue notice. 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 was beyond the 90-day provision set forth in 29 U.S.C. 626(e). The court next determined whether the savings statute operated to save the subsequent filing in the Court of Claims.

{¶ 15} R.C. 2305.19(A) provides, in relevant part, "in 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." This court held in *McNeely* that, even if the federal ADEA claim in that case failed otherwise than upon the merits, because it was dismissed without prejudice, the savings statute remains inapplicable because "[a] state savings statute cannot save a federal claim that contains a specific limitations period." *Id.* at ¶ 9, citing *Parrish v. HBO & Co.*, 85 F.Supp.2d 792 (S.D. Ohio 1999), citing *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424 (1965). Because appellant's federal ADA claim is governed

by the 90-day limitations period in 29 U.S.C. 626(e), operation of R.C. 2305.19 cannot rescue it.

{¶ 16} We next discuss the trial court's decision to conclude that appellant's claims under R.C. 4112.02 and the Rehabilitation Act were untimely. Pursuant to R.C. 2743.16(A), a two-year statute of limitations applies to a cause of action against the state for disability discrimination under R.C. 4112.02. *Williams v. Bur. of Workers' Comp.*, 10th Dist. No. 09AP-1076, 2010-Ohio-3210, ¶ 15. The two-year statute of limitations also applies to appellant's claim under the Rehabilitation Act. *McCormick v. Miami Univ.*, 693 F.3d 654, 662 (6th Cir.2012). In cases where a plaintiff alleges that an employer's discriminatory act was an unlawful termination, the cause of action accrues on the date the plaintiff's employment ended. *Moore* at ¶ 16. Here, appellant's employment was terminated on July 11, 2008, but he did not file his claims under R.C. 4112.02 or the Rehabilitation Act until he amended his complaint in the Court of Claims on September 9, 2010, which is beyond the two-year statute of limitations. Pursuant to Civ.R. 15(C), appellant contends that the claim relates back to the date he filed his complaint in federal court on February 11, 2010.

{¶ 17} Civ.R. 15(C) states, "[w]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Appellant's claims under R.C. 4112.02 and the Rehabilitation Act would be timely if they related back to the complaint in federal court, but appellant provides no case law establishing that Civ.R. 15(C) allows an amended complaint in the Court of Claims to relate back to a previously filed complaint in federal court. Nevertheless, Civ.R. 15(C) does not apply to relate back to a complaint that had been dismissed on all claims and parties. *Brown v. McCurdy*, 102 Ohio App.3d 703, 706 (3d Dist.1995). Therefore, we decline to apply Civ.R. 15(C) to relate appellant's amended complaint back to the dismissed complaint in federal court.

{¶ 18} Appellant contends that even if the savings statute and Civ.R. 15(C) do not apply to his claims, the doctrine of equitable tolling should be applied to render them

timely. Appellant contends that the trial court failed to apply the doctrine as set forth under federal case law. According to appellant, federal case law applies equitable tolling when an employee is intentionally misled or tricked into missing a filing deadline. *See, e.g., Johnson v. United States Postal Serv.*, 861 F.2d 1475 (10th Cir.1988). Appellant contends that the trial court failed to recognize this principle when concluding that the EEOC's right to sue letter was not misleading and, therefore, did not require application of the equitable tolling doctrine. Although the trial court did not cite to federal case law, the court recognized the principle set forth by appellant and concluded it did not apply here. We now determine whether the trial court correctly concluded that equitable tolling did not apply.

{¶ 19} The doctrine of equitable tolling is to be applied sparingly and in only exceptional circumstances. *Moore* at ¶ 21. As above, the doctrine is generally limited to those circumstances in which an employee is intentionally misled or tricked into missing a filing deadline. *Id.* 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.*

{¶ 20} Appellant contends the EEOC's right to sue letter misled him into believing that he could sue the state for monetary damages in federal court. This court has previously declined to apply equitable tolling in a case where a party initially sued the state in federal court, despite the federal court not having jurisdiction, after the EEOC sent the party a right to sue letter stating that "your lawsuit under the ADEA must be filed in federal or state court WITHIN 90 DAYS of your receipt of this Notice." (Emphasis sic.) *McNeely* at ¶ 6. This court noted, "the circumstances in this case are not so 'exceptional' that they warrant equitable tolling." *Id.* at ¶ 12.

{¶ 21} Nevertheless, appellant argues we should apply equitable tolling because appellee would suffer no prejudice. "Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a

factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine." *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). Here, despite appellant's claim of lack of prejudice, we find, pursuant to *McNeely*, that the EEOC's right to sue letter did not create an exceptional circumstance warranting equitable tolling.

{¶ 22} For all these reasons, we conclude that appellant's claims under the ADA, Rehabilitation Act, and R.C. 4112.02 were barred by the statute of limitations. Accordingly, we hold that the trial court did not err by granting appellee's motion for summary judgment. We overrule appellant's four assignments of error.

#### **IV. CONCLUSION**

{¶ 23} Having overruled appellant's four assignments of error, we affirm the judgment of the Court of Claims of Ohio.

*Judgment affirmed.*

BROWN and CONNOR, JJ., concur.

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