

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|-----------------------------------|---|---------------------------------------|
| Robert Stevens, II, | : | |
| Plaintiff-Appellant, | : | |
| v. | : | No. 11AP-255 (C.C. No. 2010-09256) |
| Ohio Department of Mental Health, | : | |
| Defendant-Appellee. | : | (ACCELERATED CALENDAR) |

D E C I S I O N

Rendered on September 27, 2011

Percy Squire, for appellant.

Michael DeWine, Attorney General, and *Jennifer Anne Adair*,
for appellee.

APPEAL from the Ohio Court of Claims

TYACK, J.

{¶1} Robert Stevens, II, is appealing from the granting of a motion to dismiss his case in the Ohio Court of Claims. He assigns a single error for our consideration:

The trial court erred when it granted the Ohio Department of Mental Health's motion to dismiss the Amended Complaint.

{¶2} Counsel for Stevens argues that the doctrine of equitable tolling should have allowed his lawsuit to continue, even though it was not filed within the time permitted by the applicable statute of limitations.

{¶3} Stevens alleges that he has a disability which prevents him from standing for prolonged periods of time, when he was disciplined for sitting at his desk, rather than standing.

{¶4} On April 15, 2009, his counsel contacted the United States Equal Employment Opportunity Commission, commonly called the EEOC, to formally complain.

{¶5} On November 13, 2009, the EEOC issued a notice that counsel could file a lawsuit alleging disability discrimination. A lawsuit was filed in federal court, but later dismissed.

{¶6} A second lawsuit was filed in the Ohio Court of Claims. Counsel for the Ohio Department of Mental Health has responded with an allegation that all of the claims alleged are barred by the applicable statute or statutes of limitations. The trial court agreed with the Ohio Department of Mental Health's position, finding:

Moreover, plaintiff's right to sue letter, which was attached to his original complaint, states, in relevant part: "**Title VII, the Americans with Disabilities Act * * ***: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed WITHIN 90 DAYS of your receipt of this notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)" (Emphasis in original.) R.C. 2305.19 "cannot save a federal claim that contains a specific limitations period." *McNeely v. Ross Correctional Inst.*, Franklin App. No. 06AP-280, 2006-Ohio-5414, ¶9.

With regard to the doctrine of equitable tolling, the Tenth District Court of Appeals has stated: "The following five factors are relevant to a determination of whether tolling should be allowed: (1) lack of notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement." *Brown v. Ohio Dept. of Job & Family Servs.*, Franklin App. No. 08AP-239, 2008-Ohio-6523, ¶14. (Internal citations omitted.) Plaintiff has not alleged any facts in his complaint to support an inference that the doctrine of equitable tolling should apply to his claims for relief.

{¶7} The decision from the Ohio Court of Claims makes it clear that the court considered a number of issues outside the four corners of the complaints 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 under Crim.R. 12(B)(6). A motion for summary judgment allows for a more detailed development of facts, especially on issues related to statutes of limitation. A motion to dismiss can be converted to a motion for summary judgment.

{¶8} Traditionally, the defense that the applicable statutes of limitation had lapsed was raised as an affirmative defense in the answer filed on behalf of a defendant. In situations where the lapsing of one or more statutes of limitations is a legitimate issue, the issue has been brought forward through use of a motion for summary judgment filed early in the litigation process. We view this as the preferred method of asserting the issue.

{¶9} As a matter of pleading, a plaintiff does not have to plead the past litigation history in his or her complaint. Ohio is still a notice pleading state and complaints are to be short and to the point for most theories of liability.

{¶10} The trial court judge who dismissed the complaint and amended complaint filed on behalf of Robert Stevens, II, did not convert the motion to dismiss to a motion for summary judgment. This failure to convert the motion was an error in and of itself. The failure to convert the motion also deprives us of a complete record to use in addressing the correctness of the trial court's ruling on the motion to dismiss.

{¶11} Further, the doctrine of equitable tolling involves consideration of a number of issues not set forth in a typical complaint or amended complaint. Consideration of this legal issue in particular is not best done in the context of a Civ.R. 12(B)(6) motion to dismiss.

{¶12} We cannot, based upon the record before us, make a definitive decision about what, if any, claims should remain. We, therefore, sustain the single assignment of error and vacate the trial court's dismissal of the case. We remand the case to the Ohio Court of Claims for further appropriate proceedings.

*Case vacated and remanded
for further proceedings.*

BROWN and CONNOR, JJ., concur.
