

favor. ***" See, also, *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing, *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 4} Plaintiff alleges 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 plaintiff's complaint is that she was wrongfully denied equal terms and conditions of employment and a promotional opportunity because of her age. Plaintiff timely filed charges with the Ohio Civil Rights Commission (OCRC) and the Equal Employment Opportunity Commission (EEOC). Plaintiff then filed an action in the federal court on December 15, 2003, which she voluntarily dismissed. She subsequently filed her action in this court on July 22, 2004.

{¶ 5} Defendant raises two arguments in support of its motion for summary judgment. First, defendant argues that plaintiff failed to timely file her claims within the applicable statute of limitations. Second, defendant asserts that because plaintiff elected to pursue her administrative remedy she is now barred by R.C. 4112.08 from filing this action.

{¶ 6} R.C. 4112.02(N) provides in relevant part 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 ***." Plaintiff states that she was denied a promotional opportunity because of her age on September 27, 2002. As such, plaintiff had to file her claim under R.C. 4112.02(N) on or before March 27, 2003. Plaintiff did not file her complaint in federal district court until December 15, 2003; she did not file her claim in this court until July 22, 2004. Clearly, plaintiff's claims

under R.C. 4112.02(N) were filed outside the 180-day limitation period.

{¶ 7} With regard to plaintiff's claims under ADEA, plaintiff was issued a right-to-sue letter by the EEOC on September 15, 2003.

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 90 days in which to file a civil action.

The right-to-sue letter issued to plaintiff 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." As such, plaintiff's ADEA claim had to be filed on or before December 15, 2003.

{¶ 8} Although plaintiff filed her ADEA claim in federal court within the prescribed time limitation, she dismissed that claim voluntarily. Plaintiff argues that the instant complaint was timely because she filed her complaint within one year of the date she dismissed her case in the federal court. Defendant contends that R.C. 2305.19, Ohio's "savings statute," does not preserve claims predicated upon federal statutes that contain a specific limitations period. The court agrees.

{¶ 9} The United States District Court for the Southern District of Ohio tackled this very issue in *Parrish v. HBO & Co.* (1999), 85 F.Supp.2d 792, 797. Parrish sued a former employer for age discrimination both under the ADEA and the Ohio Revised Code. As in this case, Parrish voluntarily dismissed his case and refiled it outside the 90-day limitation period set by the ADEA. The court dismissed the claim as being time-barred.

{¶ 10} The *Parrish* court stated that "[i]t is well-established that a state saving statute cannot 'save' a federal claim that is governed by its own statute of limitations" and that "the United

States Supreme Court expressly rejected the use of Ohio Rev. Code §2305.19 to 'save' an untimely claim under the Federal Employers' Liability Act, which, like the ADEA, contains its own statute of limitations." Citing *Burnett v. New York Central R.R. Co.* (1965), 380 U.S. 424. Additionally, the court noted that the Sixth Circuit has "repeatedly refused to apply a state saving statute to revive an untimely federal claim, when the federal statute under which the plaintiff has sued contains its own limitations period." Citing *Johnson v. Railway Express Agency, Inc.* (1973), 489 F.2d 525; *Ester v. Amoco Oil Co.* (1995), 65 F.3d 168.

{¶ 11} Based upon the foregoing, the court concludes that plaintiff's ADEA claim is barred by the 90-day limitation period.

{¶ 12} As an additional basis for dismissal of plaintiff's state law claim, defendant argues that those claims are barred by the statutory election of remedies. R.C. 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.*" (Emphasis added.) Consequently, once 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. See *Vinson v. Diamond Triumph Auto Glass, Inc.*, 149 Ohio App.3d 605, 2002-Ohio-5596.

{¶ 13} Based on the above analysis, the court finds that defendant is entitled to judgment as a matter of law as to plaintiff's claims under the ADEA and R.C. 4112.02. Therefore, defendant's motion for summary judgment shall be granted.

IN THE COURT OF CLAIMS OF OHIO

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NANCY J. MCNEELY :
 Plaintiff : CASE NO. 2004-07590
 v. : Judge J. Craig Wright
 : JUDGMENT ENTRY
 ROSS CORRECTIONAL INSTITUTE :
 Defendant :
 :

A non-oral hearing was conducted in this case upon defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT
 Judge

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[Cite as *McNeeley v. Ross Correctional Inst.*, 2006-Ohio-1798.]

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