

FILED

2016 JAN 12 P 4: 09

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

CLERK OF COURTS  
CUYAHOGA COUNTY

COLLEEN M. RODGERS,	)	CASE NO. CV 15 850105
	)	
Plaintiff,	)	
	)	JUDGE BRENDAN J. SHEEHAN
v.	)	
	)	
CLEVELAND BUILDING AND	)	
CONSTRUCTION,	)	OPINION AND JUDGMENT
	)	ENTRY
Defendant.	)	

I. FACTS AND ISSUES PRESENTED.

This matter is before the Court on Defendant's Motion to Dismiss pursuant to Civ.R 12(B)(1) and (6). The issues have been fully briefed to the Court.

On April 30, 2014, Plaintiff filed an age discrimination action against Defendant pursuant to R.C. 4112.02(N) and 4112.99, and Ohio public policy. That action was voluntarily dismissed on August 15, 2014.

On August 21, 2015, Plaintiff filed the current age discrimination case against Defendant pursuant to R.C 4112.14 and 4112.99, and Ohio public policy.

Defendant seeks to have the action dismissed on the grounds that Plaintiff's claims are barred by election of remedies, the applicable statute of limitations and by the availability of adequate remedies under law.

## II. LAW AND ANALYSIS.

### A. Plaintiff's Statutory Age Discrimination Claims.

As the Ohio Supreme Court explained:

There are four separate statutes that provide remedies for age discrimination in R.C. Chapter 4112. First, R.C. 4112.02(N) awards "any legal or equitable relief that will effectuate the individual's rights." Second, upon proof of an unlawful discriminatory practice, R.C. 4112.05(G) provides that the Ohio Civil Rights Commission shall issue "an order requiring the respondent to cease and desist from the unlawful discriminatory practice, requiring the respondent to take any further affirmative or other action that will effectuate the purposes of [R.C. Chapter 4112], including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, \* \* \* and requiring the respondent to report to the commission the manner of compliance." Third, R.C. 4112.14(B) provides that if an employer has discriminated against an employee on the basis of age, the court shall order "an appropriate remedy which shall include reimbursement to the applicant or employee for the costs, including reasonable attorney's fees, of the action, or to reinstate the employee in the employee's former position with compensation for lost wages and any lost fringe benefits from the date of the illegal discharge and to reimburse the employee for the costs, including reasonable attorney's fees, of the action." Fourth, R.C. 4112.99 makes violators of R.C. Chapter 4112 "subject to a civil action for damages, injunctive relief, or any other appropriate relief."

*Leininger v. Pioneer Nat'l Latex*, 2007-Ohio-4921, ¶ 29, 115 Ohio St. 3d 311, 317, 875 N.E.2d 36, 43.

Plaintiff's initial claim was brought pursuant to R.C. 4112.02(N) which provides in relevant part: "A person who files a civil action under this division is barred, with respect to the practices complained of, from instituting a civil action under section 4112.14 of the Revised Code and from filing a charge with the commission under section 4112.05 of the Revised Code."

It is undisputed that Plaintiff filed an action under R.C. 4112.02(N). She is therefore barred from subsequently bringing an action under R.C. 4112.14. Defendant's motion is granted as to Plaintiff's R.C. 4112.14 claim.

However, Plaintiff also brought a claim under R.C. 4112.99 in both actions. A plaintiff may bring a claim under either R.C. 4112.02(N) or R.C. 4112.99 but must elect between the two remedies. *Giambrone v. Spalding & Evenflo Co.*, 79 Ohio App. 3d 308, 312, 607 N.E.2d 106, 109 (2nd Dist. 1992), cited with approval in *Neal v. Franklin Plaza Nursing Home*, 8th Dist. No. 91722, 2009-Ohio-2034, ¶ 17.

Plaintiff's first action was dismissed prior to her electing which of the claims she chose to pursue. She has, by default, elected to pursue R.C. 4112.99 by asserting in again in the current case as it is the only viable cause of action stated.

B. Plaintiff's Public Policy Claim.

The elements of a claim of wrongful discharge in violation of public policy are:

1. That clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).
4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

*Painter v. Graley*, 70 Ohio St.3d 377, 384, 1994 Ohio 334, 639 N.E.2d 51, fn.8 (1994).

It is well established that "the jeopardy element necessary to support a common-law claim is not satisfied, because R.C. Chapter 4112 adequately protects the state's policy against

age discrimination in employment through the remedies it offers to aggrieved employees." *Leininger v. Pioneer Nat'l Latex*, 2007-Ohio-4921, ¶ 33, 115 Ohio St. 3d 311, 319, 875 N.E.2d 36, 44.

Accordingly, Defendant's motion to dismiss Plaintiff's public policy claim is granted.

III. CONCLUSION.

**DEFENDANT'S MOTION TO DISMISS IS GRANTED IN PART AND DENIED IN PART. PLAINTIFF'S CLAIMS PURSUANT TO R.C. 4112.14 AND OHIO PUBLIC POLICY ARE DISMISSED. PLAINTIFF'S CLAIM PURSUANT TO R.C. 4112.99 SHALL PROCEED.**

**IT IS SO ORDERED.**

  
JUDGE BRENDAN J. SHEEHAN

Dated: 1/12/16

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 12<sup>th</sup> day of January, 2016:

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