[Cite as *Jones v. Bd. of Elections*, 2004-Ohio-4750.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 83470

NATHANIEL W. JONES, JR.	:	
	:	
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
	:	
vs.	:	and
	:	
	:	OPINION
	:	
BOARD OF ELECTIONS, ET AL.	:	
	:	
Defendants-Appellees	:	

DATE OF ANNOUNCEMENT
OF DECISION: September 9, 2004

CHARACTER OF PROCEEDING: Civil appeal from
Common Pleas Court
Case No. CV-493532

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: _____

APPEARANCES:

For Plaintiff-Appellant: DANIEL J. RYAN
1370 Ontario Street
Suite 2000
Cleveland, Ohio 44113

For Defendants-Appellees: WILLIAM D. MASON

Cuyahoga County Prosecutor
RENO J. ORADINI, JR., Assistant
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

COLLEEN CONWAY COONEY, J.:

{¶1} Plaintiff-appellant, Nathaniel W. Jones, Jr. ("Jones"), appeals the trial court's order granting defendant-appellee's, Board of Elections (the "Board"), motion to dismiss. Finding no merit to the appeal, we affirm.

{¶2} On February 5, 2003, Jones filed a complaint against various supervisors and the Board alleging that on or about August 11, 2000, he was discriminated against solely because of his age. He alleged that he worked for the Board for over 28 years, during which he complained to the Board about discriminatory practices, such as limiting his advancement and/or pay. He alleged that he was terminated on August 11, 2000 solely because of his age and in retaliation for his complaining to the Board about his alleged age discrimination. Jones alleges that such actions are violations of R.C. 4112 et seq.

{¶3} The Board filed a Civ.R. 12(B) motion to dismiss because the complaint was untimely and failed to state a claim upon which relief could be granted. The trial court granted the Board's motion.

{¶4} In his sole assignment of error, Jones claims that the trial court erred by granting the Board's motion to dismiss.

{¶5} In order to prevail on a Civ.R. 12(B)(6) motion, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recover. A court is confined to the averments set forth in the complaint and cannot consider outside evidentiary materials. *Greeley v. Miami Valley Maintenance Contrs. Inc.* (1990), 49 Ohio St.3d 228; *State ex rel. Plaza Interiors v. City of Warrensville Heights* (May 24, 2001), Cuyahoga App. No. 78267; *Wickliffe Country Place v.*

Kovacs, 146 Ohio App.3d 293, 2001-Ohio-4302; *Frost v. Ford* (July 12, 2001), Franklin App. No. 00AP-1205. Moreover, a court must presume that all factual allegations set forth in the complaint are true and must make all reasonable inferences in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190; *Kennedy v. Heckard*, Cuyahoga App. No. 80234, 2002-Ohio-6805.

{¶6} When reviewing a judgment granting a Civ.R. 12(B)(6) motion, an appellate court must independently review the complaint to determine whether dismissal was appropriate. Decisions on Civ.R. 12(B)(6) motions are not findings of fact, but are rather conclusions of law. *State ex. rel. Drake v. Athens Cty. Bd. of Elections* (1988), 39 Ohio St.3d 40. An appellate court need not defer to the trial court's decision in Civ.R. 12(B)(6) cases. *McGlone v. Grimshaw* (1993), 86 Ohio App.3d 279, citing *Athens Cty. Bd. of Elections*.

{¶7} An action for age discrimination regarding employment can be maintained under three different statutes within R.C. Chapter 4112. R.C. 4112.02 prohibits discrimination in employment on the basis of age, and specifies that a civil action to "enforce the individual's rights" relative to such discrimination must be instituted within 180 days of the alleged unlawful discriminatory practice. See 4112.02(N).

{¶8} R.C. 4112.14, previously codified at R.C. 4101.17, provides a remedy for age-based discrimination in the hiring and termination of employees. Although it does not include a limitations period, the Ohio Supreme Court has determined that the six-year limitations period of R.C. 2305.07 applied to claims based upon R.C. 4101.17. See *Morris v. Kaiser Engineers, Inc.* (1984), 14 Ohio St.3d 45, paragraph two of the syllabus; *Ferraro v. B.F. Goodrich Co.* 149 Ohio App.3d 301, 2002-Ohio-4398 (the statute of limitations period applicable to R.C. 4112.14 age discrimination claims is six years).

{¶9} R.C. 4112.99 provides an independent cause of action for "damages, injunctive relief or any other appropriate relief" to remedy any form of discrimination identified in R.C. Chapter 4112. *Ferraro*, supra, citing *Elek v. Huntington Natl. Bank* (1991), 60 Ohio St.3d 135. The applicable limitations period under this section has been held to be six years. See *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc*. (1993), 70 Ohio St.3d 281.

{¶10} However, in the instant case, Jones failed to specify under which statutory provision in R.C. Chapter 4112 he based his claim. He included a jury demand and sought compensatory, punitive and/or exemplary damages. However, it has been held that a jury demand is unavailable under R.C. 4112.14 because an action for age discrimination did not exist at common law; thus, there is no right to a jury trial. *Hoops v. United Telephone Company of Ohio* (1990), 50 Ohio St.3d 97. Furthermore, R.C. 4112.14 does not include a remedy for the damages Jones sought.

{¶11} However, the instant case is analogous to *Ferraro*, supra, because the plaintiff in *Ferraro* also did not specify a specific statutory provision and sought similar relief. Holding that a claim for relief was stated, the court concluded that R.C. Chapter 4112 is remedial in nature and should be construed liberally. See *Giambrone v. Spalding & Evenflo Co.* (1992), 79 Ohio App.3d 308. Therefore, Jones' claim falls within the six-year limitations period of R.C. 4112.14.

{¶12} Absent direct evidence of age discrimination, in order to establish a prima facie case of a violation of R.C. 4112.14(A) in an employment discharge action, the claimant must show that he:

> **"(1) was a member of the statutorily protected class, (2) was discharged, (3) was qualified for the position, and (4) was replaced by, or the discharge permitted the retention of, a person of substantially younger age." *Kohmescher v. Kroger Co.* (1991), 61 Ohio St.3d 501.**

{¶13} The Ohio Supreme Court recently held that:

"A plaintiff may plead a prima facie case of age-based employment discrimination in violation of R.C. 4112.14(A) by pleading a short and plain statement of the claim, which includes an allegation that he was replaced by a person substantially younger than himself." *Coryell v. Bank One Trust Co., N.A.*, 101 Ohio St.3d 175, 2004-Ohio-723.

{¶14} Jones failed to plead a prima facie case of age discrimination because he failed to allege that he was replaced by a younger person. Even though his action for age discrimination is not barred as being untimely, his complaint fails to state a claim upon which relief can be granted. Therefore, the trial court did not err in granting the Board's motion to dismiss pursuant to Civ.R. 12(B)(6) as to his allegation of age discrimination.

{¶15} As to any claim for wrongful discharge/termination, Jones has based this claim on age discrimination and retaliation. Following the reasoning above, he cannot maintain an action for wrongful discharge/termination premised on age discrimination. Jones' retaliation claim under R.C. 4112.02 is also barred because it is outside the applicable statute of limitations. Any action brought under R.C. 4112.02 shall be brought within 180 days after the alleged unlawful discriminatory practice occurred. See R.C. 4112.02(N). Therefore, because Jones filed his complaint nearly two and one-half years after the alleged discriminatory practice occurred, his claim for retaliation is time-barred.

{¶16} Although Jones mentions other causes of action in his complaint, to wit: breach of contract, negligence, and intentional infliction of emotional distress, he has not stated any claim for which relief can be granted under any of those causes of action.

{¶17} Accordingly, the trial court did not err in granting the Board's motion to dismiss.

Judgment affirmed.

It is ordered that appellees recover of appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., J. CONCURS;

PATRICIA ANN BLACKMON, P.J. CONCURS IN PART AND DISSENTS IN PART (SEE SEPARATE OPINION)

JUDGE

COLLEEN CONWAY COONEY

PATRICIA ANN BLACKMON, P.J., CONCURRING IN PART; DISSENTING IN PART:

{¶18} I respectfully dissent in part because I do not believe a 180 day statute of limitations applies to Jones's retaliation claim.

{¶19} The majority classifies Jones's retaliation claim as a claim brought pursuant to R.C. 4112.02(N); however, a retaliation claim under R.C. 4112.02 is brought under R.C. 4112.02(I), not R.C. 4112.02(N). R.C. § 4112.02(I) makes it unlawful:

{¶20} "[F]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code."

{¶21} Although (N), which provides a remedy for plaintiffs who have been discriminated against based on age, expressly sets forth a 180 day statute of limitations, (I), which

provides a remedy to employees who have been retaliated against for opposing discriminatory practices, does not. These are two different claims, requiring different evidence for setting forth a prima facie case. Notably, none of the other provisions in R.C. 4112.02 sets forth a 180 day statute of limitations. The majority's reading of the statute not only applies a 180 day statute of limitation to retaliation claims, but also to claims for sexual, religious, handicap, and race discrimination, which are all contained within R.C. 4112.02. I do not read the statute of limitation provision in provision of R.C 4112.02(N), which applies solely to age discrimination, to apply to every section contained within R.C. 4112.02.

{¶22} In fact, the Ohio Supreme Court held claims brought pursuant to Chapter 4112, under provisions which do not contain their own statute of limitations, have a six-year statute of limitations. *Cosgrove v. Williamsburg of Cincinnati Mgmt. Co.*, 70 Ohio St.3d 281, 1994-Ohio-295. In that case, the court of appeals applied a 180 day statute of limitations to the plaintiff's Chapter 4112 claims. The Supreme Court, in finding a six-year statute of limitations applied, ignored the 180 day statute of limitations set forth in the age discrimination section and instead cited the language set forth in R.C. 4112.99. R.C. 4112.99 states: "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any appropriate relief." The Court held, "R.C. 4112.99 is a remedial statute, and is thus subject to R.C. 2305.07's six-year statute of limitations." Id. at syllabus.

{¶23} Thus, because I find Jones's statutory retaliation claim is subject to a six-year statute of limitations, I would reverse and remand the matter,