

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION**

PAUL A. PARKER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 2:04-CV-33 PS
	)	
HORSESHOE HAMMOND, INC. d/b/a	)	
JACK BINION’S HORSESHOE CASINO,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION AND ORDER**

Paul A. Parker filed this action on January 29, 2004, alleging that his former employer, Horseshoe Hammond, Inc. d/b/a Jack Binion’s Horshoe Casino (“Horseshoe”), violated the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 621 *et seq.*, when it discharged him on November 4, 2002. Horseshoe moved to dismiss the complaint on the ground that Parker’s action was untimely. (*See* [Doc. 7].) On April 28, 2004, the court converted the motion to dismiss to one for summary judgment and ordered the parties to file supplemental briefing, if they so desired, in support of their positions. (*See* [Doc. 12].) Horseshoe filed a supplemental brief, but no additional information was provided by the Plaintiff. Because Parker failed to file a charge of discrimination with the EEOC within one hundred eighty (180) days of his alleged discriminatory discharge, his suit is time-barred.

**BACKGROUND**

Paul Parker was employed as a dealer by Horseshoe from June 10, 1996 until November 4, 2002. At the time of his discharge, Parker was sixty-two years old. Parker was informed by Boat Operation Manager, Fred Compton, that he was terminated due to a procedural violation. (Compl. ¶ 6.) Parker maintains that he did not violate any procedure, and that a few weeks

before his termination, Compton asked Parker if he wanted to retire, noting that Parker was being paid more money than younger dealers. (*Id.* ¶ 7.) Parker maintains that his work performance was up to par and that his attendance record was almost perfect. (*Id.* ¶8.) In addition, Parker claims that younger dealers who had write-ups for procedural violations were not terminated. (*Id.* ¶ 9.)

On March 11, 2003, Parker consulted with attorney Terry Boesch about an unemployment compensation appeal. (Plaintiff's Declaration ¶ 3.) At that time, Boesch informed Parker (wrongly as we'll see later) that he had three hundred (300) days to file a charge with the EEOC. As a result, Parker asserts that he thought he had until August 31, 2003 to file a charge with the EEOC. (*Id.*)

On August 21, 2003, Parker went to the Gary Human Relations Commission office and filed a charge of discrimination based on age. (Defendant's Ex. A.) At the office, Parker was also told by Carol Williams that he had 300 days from the date of his termination to file the charge. (Plaintiff's Declaration ¶ 4.) The charge was stamped received by the EEOC on September 8, 2003. (Defendant's Ex. A.)

Defendant Horseshoe has filed the affidavit of Abigail Mendoza, Horseshoe's Employee Relations Manager, in support of its motion. Mendoza has been employed by Horseshoe since October, 2000. Mendoza attests that during the time of her employment, Horseshoe has always displayed a poster that includes a notice called "Equal Employment Opportunity is the Law" on a secure bulletin board at the employee entrance to the casino. (Mendoza Affidavit ¶¶ 4, 6.) A photograph showing the bulletin board with the posting was attached to her affidavit. Employees walk by this bulletin board every day when they enter and leave work. (*Id.* ¶ 6.)

Interestingly enough, the poster does not tell employees how long they have to file a complaint with the EEOC.

Horseshoe has also supplied the affidavit of Carroll R. Reynolds, a senior security officer with Horseshoe who has been employed since May, 1999. (Reynolds Affidavit ¶ 2.) Reynolds states that throughout her employment with Horseshoe, the “Equal Employment Opportunity is the Law” poster has been posted on the bulletin board near the employee entrance and she has seen it every day as she enters and leaves the building. (*Id.* ¶¶ 4-5.)

Plaintiff Parker maintains that he never saw a notice that informed employees of their rights under the ADEA while he was employed at Horseshoe. (Plaintiff’s Declaration ¶ 2.)

## **DISCUSSION**

### **Standard of Review**

Summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Court must look at the evidence as a jury might, construing the record in the light most favorable to the nonmovant and avoiding the temptation to decide which party’s version of the facts is more likely true. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003).

The nonmovant cannot rest on the pleadings alone or upon conclusory allegations in affidavits, but must identify specific facts, *see Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993), that raise more than a scintilla of evidence to show a genuine triable issue of material fact. *See Murphy v. ITT Educ. Servs., Inc.*, 176 F.3d 934, 936

(7th Cir. 1999) (citation omitted). Summary judgment must be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden at trial.” *Tatalovich v. City of Superior*, 904 F.2d 1135, 1139 (7th Cir. 1990) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

### **Application to the Issues**

It is undisputed that Parker filed his claim with the Gary Human Relations Commission on or about August 21, 2003, some 290 days after his discharge.<sup>1</sup> The only issues presented are (1) whether Parker’s filing with the EEOC was timely, and (2) if not, whether equitable tolling should apply.

#### **A. 180 day filing limit**

An age discrimination suit may not be filed in district court unless the plaintiff filed a charge with the EEOC within 180 days after the alleged discriminatory act occurred. 29 U.S.C. § 626(d)(1); *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 410 (7th Cir. 1984). In deferral states, which have state agencies authorized to remedy age discrimination, a 300 day filing limit prescribed by Title 29, United States Code, Section 626(d)(2) applies and claimants are required to file with the appropriate state agency before turning to the EEOC. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1980).

Indiana is not a deferral state for purposes of age discrimination claims. *E.E.O.C. v. North Gibson School Corp.*, 266 F.3d 607, 617 (7th Cir. 2001). But Indiana *is* a deferral state for purposes of race and sex claims. *See e.g. Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 445

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<sup>1</sup> The Human Relations Commission forwarded Parker’s charge to the EEOC Indianapolis District Office, where it was stamped received on September 8, 2003.

(7th Cir. 1994); 42 U.S.C. § 2000e-5(e); *see also Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995). It is somewhat surprising that Indiana remains a non-deferral state for ADEA claims. Indeed, since 1979, Indiana has prohibited dismissals from employment solely because of an employee's age where the employee is at least forty years old and not yet seventy years old. *See Ind. Code Ann. § 22-9-2-2* (West 1991). But the Indiana Code Section that creates the Indiana Civil Rights Commission does not give the commission power to investigate claims of age discrimination. *See Ind. Code § 22-9-1-11* (West 1991). Thus, there is a trap for the unwary. Indiana is a deferral state for race and sex claims but is a non-deferral state for age claims.<sup>2</sup>

Plaintiff concedes that Indiana is a non-deferral state, and that as a result Parker's charge of age discrimination had to be filed within 180 days of the allegedly unlawful employment practice. (Plaintiff's Response at 3); *see also North Gibson School Corp.*, 266 F.3d at 617. Clearly, Parker's filing some 290 days after his termination was untimely. The only remaining issue is whether equitable tolling should apply.

### **B. Equitable Tolling**

Like a statute of limitations, the 180-day filing limitations period prescribed by the ADEA is subject to equitable modification. *Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 291 (7th Cir. 1986); *Vaught*, 745 F.2d at 410. Two equitable doctrines are conceivably at play: "(1) equitable tolling, which often focuses on the plaintiff's excusable ignorance of the

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<sup>2</sup> Apparently recognizing this anomaly, last year members of the Indiana state legislature introduced bills to empower the Indiana Civil Rights Commission to investigate charges of age discrimination. During the 113th General Assembly, House Bill 1356 passed, but Senate Bill 0368 did not make it to the floor for a vote.

limitations period and on lack of prejudice to the defendant and (2) equitable estoppel, which usually focuses on the actions of the defendant.” *Mull*, 784 F.2d at 291 (quoting *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981)); *see also Casteel v. Executive Bd. of Local 703*, 272 F.3d 463, 467 (7th Cir. 2001).<sup>3</sup>

The equitable tolling doctrine does not require that the plaintiff show any misconduct on the part of the defendant. *Wheeldon v. Monon Corp.*, 946 F.2d 533, 536 (7th Cir. 1991).

Instead, equitable tolling “permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.” *Id.* (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990)).

Although equitable tolling exists in principle, in practice it appears to be construed in a very narrow way. Courts have circumscribed the sets of facts that allow application of equitable principles to the ADEA’s statutory filing requirements. *See e.g. Burkley v. Martin’s Super Mkts., Inc.*, 741 F. Supp. 161, 163 (N.D. Ind. 1990). For example, the law in the Seventh Circuit is well settled that if an employer conspicuously posts information advising employees of their rights under the ADEA (as required by 29 U.S.C. § 627), equitable tolling does not apply where a charge of discrimination was untimely filed. *See Schroeder v. Copley Newspaper*, 879 F.2d 266, 271 (7th Cir. 1989); *Posey v. Skyline Corp.*, 702 F.2d 102, 104-05 (7th Cir. 1983); *see also Peffley v. Durakool, Inc.*, 669 F. Supp. 1453, 1458 (N.D. Ind. 1987) (finding that plaintiff who filed ADEA charge 7 days late was not entitled to equitable tolling even though the plaintiff’s

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<sup>3</sup> The Plaintiff does not argue that equitable estoppel should apply, and there is no evidence to support it.

affidavit asserted that she had not seen the Equal Employment Opportunity notice because it was not posted by her employer).

Parker argues that he is entitled to equitable tolling because he saw no notice of ADEA rights posted at Horseshoe when he worked there and did not acquire general knowledge of his ADEA rights until a consultation with attorney Boesch in March, 2003. (Plaintiff's Response at 2.) In order to be entitled to equitable tolling, however, "there must exist an issue of fact concerning whether [Horseshoe] conspicuously posted the required notice of ADEA rights." *Posey*, 702 F.2d at 105.

Horseshoe submitted two affidavits averring that it had in fact conspicuously posted the required ADEA notice of rights during the time that Parker was employed by the casino. The affidavit of Abigail Mendoza, Employee Relations Manager, states in pertinent part that: "[d]uring my employment with Horseshoe, the Company always has posted a multiple part poster that includes a notice called "Equal Employment Opportunity is the Law" to comply with several federal law posting requirements." (Mendoza Affidavit ¶ 4.) Submitted with this affidavit was a "true copy" of the notice posted by Horseshoe, as well as a photograph of the secured bulletin board at the employee entrance to the casino whether the ADEA notice was posted. The Equal Employment Opportunity ("EEO") Poster at Horseshoe is the precise notice required by the Department of Labor for compliance with 29 U.S.C. § 627. *See also* 29 C.F.R. § 1627.10. Carroll R. Reynolds, a senior security officer at Horseshoe also averred that: "[t]hroughout my employment with Horseshoe, the Company has posted various employee notices on the bulletin board near the employee entrance, including the "Equal Employment Opportunity is the Law" poster." (Reynolds Affidavit ¶ 4.)

In response to these affidavits, Parker submitted a declaration in which he personally averred: “I never *saw* a notice that informed employees of their rights under the Age Discrimination in Employment Act (“ADEA”) while I was an employee at Hammond Horseshoe Casino from June 10, 1996 until November 4, 2004 [*sic*], when I was terminated.” (Parker Affidavit ¶ 2, emphasis supplied.) Parker submitted no other evidence suggesting that Horseshoe failed to comply with the notice posting requirement.

It is Parker’s burden to present the court with specific, factual evidence that the EEO notice was not posted at Horseshoe, *see Posey*, 702 F.2d at 105, and he has simply failed to do so. As a matter of law, Parker’s own averment that he never saw a poster outlining his rights under the ADEA at Horseshoe fails to rebut Horseshoe’s unambiguous affidavits. *See e.g.*, *Posey*, 702 F.2d at 106; *Clark v. Runyon*, 116 F.3d 275, 276 at n.3 (7th Cir. 1997) (testimony to the effect that plaintiff and her coworkers “did not see” EEO notices is not by itself sufficient to establish that notice were not, in fact, posted); *Daugherty v. Traylor Bros., Inc.*, 970 F.2d 348, 353 at n.8 (7th Cir. 1997) (plaintiff’s affidavit that claimed he did not recall seeing a notice regarding age discrimination claim procedures was insufficient to avoid entry of summary judgment against him); *Vaught*, 745 F.2d at 412 (same).

Furthermore, because Horseshoe has established it posted the notice of ADEA rights during the course of Parker’s employment, he is attributed with knowledge of that sign’s contents and his rights “regardless of any claims of ignorance which [he] may assert based on [his] own or other parties’ failures to be informed.” *Burkley*, 741 F. Supp. at 164. Therefore, even though attorney Boesch in March, 2003, incorrectly informed Parker that the time limit for filing a charge of age discrimination was 300 days, and even though he relied on this

misinformation to his detriment, it does not entitle him to equitable tolling. While this result seems harsh, especially taking into consideration that the required posted notice makes absolutely no mention of the 180 day filing limitation, *see* (Mendoza Affidavit, Ex. A), Seventh Circuit law compels this result.

Moreover, Parker is also not helped by the fact that Carol Williams from the Gary Human Relations Commission also apparently misinformed him about the filing requirements – stating that he had 300 days to file a claim. While erroneous misrepresentations or misleading conduct made to a plaintiff by the EEOC can be grounds for equitable tolling, *see Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 81 (7th Cir. 1992), a statute of limitations that has already begun to run can only be tolled from the time at which the misinformation was given to the plaintiff. *Id.* Here, even if Carol Williams’ actions were imputed to the EEOC, Parker received the misinformation from her about the filing requirements on August 21, 2003 – some 290 days after his discharge and some 110 days after the filing limitations period had already run. Therefore, unfortunately for Parker, even if the filing period was tolled from this date forward, it is of no help because his filing was already untimely.

Given the poor advice provided to Parker by Attorney Boesch – that ADEA claims must be brought in Indiana within 300 days – this outcome seems to take the “equitable” out of equitable tolling. Yet unrebutted evidence that the defendants conspicuously displayed an EEOC poster in the workplace makes the equitable tolling argument a nonstarter. *Posey*, 702 F.2d at 105. Thus, the 180 day period mandated by 29 U.S.C. § 626(d)(1) began to run on November 4, 2002, the date Parker claims he discovered he had been discharged. Parker’s charge of unlawful discrimination was not filed until August 21, 2003, well beyond the 180 day

limit. This filing obviously failed to satisfy the requirements of Section 626(d)(1). Accordingly, Horseshoe is entitled to summary judgment on Parker's ADEA claim.

### **CONCLUSION**

For the foregoing reasons, the Defendant's Motion to Dismiss (converted to a Motion for Summary Judgment by the court) [Doc. 7] is hereby **GRANTED**; the clerk shall **ENTER FINAL JUDGMENT** in favor of the Defendant Horseshoe Hammond, Inc. d/b/a as Jack Binion's Horseshoe Casino stating that Paul A. Parker is entitled to no relief. The clerk shall treat this civil action as **TERMINATED**. All further settings in this action are hereby **VACATED**.

**SO ORDERED.**

ENTERED: July 15, 2004

s/ Philip P. Simon  
PHILIP P. SIMON, JUDGE  
UNITED STATES DISTRICT COURT