

SUPREME COURT OF MISSOURI

ELLEN WALLINGSFORD,            )  
  )  
          Appellant,                )  
  )     Appeal No.: SC 89862  
  )  
vs.                                    )  
  )  
CITY OF MAPLEWOOD,            )  
  )  
          Respondent.             )

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**Appeal from the Circuit Court of St. Louis County**

**Honorable James R. Hartenbach  
Circuit Judge**

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**SUBSTITUTE BRIEF OF APPELLANT  
ELLEN WALLINGSFORD**

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### **Jurisdictional Statement**

This is a civil action for money damages brought by Ellen Wallingsford against her former employer, the City of Maplewood (hereinafter “the City” or “Maplewood”). On January 28, 2008, the Honorable James R. Hartenbach, Circuit Judge, granted the City’s Motion for Summary Judgment.

Ms. Wallingsford appealed to the Court of Appeals from the judgment granting summary judgment in favor of the City. As provided in Article V, Sections 3 and 15, of the Missouri Constitution, as amended, the Missouri Court of Appeals, Eastern District, was vested with initial jurisdiction of this appeal. On October 28, 2008, the Court of Appeals affirmed the judgment in a per curiam order opinion pursuant to Rule 84.16. On November 12, 2008, Ms. Wallingsford filed a motion for rehearing or, in the alternative, application for transfer, which the Court of Appeals denied on December 18, 2008. On January 2, 2009, Ms. Wallingsford filed an application for transfer in this Court. This Court granted the application on February 24, 2009.

## STATEMENT OF FACTS

### **A. Factual Background**

Ellen Wallingsford was employed as a police officer by the City of Maplewood from August 26, 1986 through August 29, 2004.<sup>1</sup> L.F. 11, Petition ¶ 9. On August 29, 2004, Ms. Wallingsford submitted a letter of resignation which reads as follows:

During my employment with the Maplewood Police Department, I have been subjected to a continuing pattern of gender, as well as other forms of harassment. The continuing pattern of such discrimination has made the working conditions intolerable, and as such, I am resigning from the Maplewood Police Department.

L.F. 137. Prior to her resignation, Ms. Wallingsford had clearly articulated to the City of Maplewood her belief that she had been a victim of gender discrimination since 2002.<sup>2</sup>

On or about March 1, 2003 Ms. Wallingsford submitted a twelve page letter to Martin Corcoran, city manager of Maplewood, outlining in detail her claims of gender discrimination. L.F. 99-111. When no action was taken by Maplewood, Ms. Wallingsford filed a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”) and the Missouri Commission on Human Rights (“MCHR”).

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<sup>1</sup> Throughout the pleadings in the trial court, Ms. Wallingsford’s last date of employment is stated as either August 29, 2004 or August 30, 2004. For purposes of this Appeal, Ms. Wallingsford will use the date of August 29, 2004, the date she tendered her resignation.

<sup>2</sup> Ms. Wallingsford was employed by the City of Maplewood in its Police Department.

L.F. 112-113. Ms. Wallingsford subsequently timely filed a lawsuit in the United States District Court, Eastern District, Missouri alleging gender discrimination by Maplewood.

L.F. 114-119. The District Court, through the Honorable Thomas C. Mummert, Magistrate, granted a Motion to Strike all of Ms. Wallingsford's allegations of gender discrimination that occurred after December 18, 2002. L.F. 120-127. The aforesaid dismissal was based upon Ms. Wallingsford's failure to check the "continuing violation" box in her charge of discrimination filed with the EEOC. L.F. 124. Ms. Wallingsford voluntarily dismissed her remaining claims in the federal court without prejudice.

Ms. Wallingsford's allegations of gender discrimination in the federal case included a suspension that took place on December 18, 2002. L.F. 116, Complaint ¶ 13. Ostensibly, Ms. Wallingsford was suspended for failing to write up a fellow male officer for taking evidence (a knife) for personal use. L.F. 116, Complaint ¶ 14. Ms. Wallingsford believed that she was suspended due to her gender for a number of reasons including the following: (1) Ms. Wallingsford was not the supervisor of the aforesaid male officer; (2) Ms. Wallingsford had informed the officer's male supervisor that he had taken the knife; (3) The male supervisor was not disciplined for failing to write up the officer; and (4) Ms. Wallingsford was aware of other male officers who were not suspended for similar behavior. L.F. 116, Complaint ¶ 15. Ms. Wallingsford was subsequently reinstated.

Following her reinstatement, Ms. Wallingsford believed and alleged that the continuing pattern of gender discrimination and the hostile work environment continued as follows:

- (1) During her employment, she was subjected to one or more CBSA voice stress analyzer tests and one lie detector test. L.F. 85, Petition ¶ 23(a)<sup>3</sup>; L.F. 160, Affidavit ¶ 14.
- (2) When Ms. Wallingsford received evaluations stating that she needed improvement, neither the evaluations, nor Ms. Wallingsford's follow up requests, provided Ms. Wallingsford with any specifics about what aspects of her work needed improvement. L.F. 85, Petition ¶ 23(b).
- (3) When Ms. Wallingsford would write up fellow male officers for various reasons, including subordination, she would be subjected to complaints by such male officers alleging gender harassment. L.F. 85, Petition ¶ 23(c).
- (4) Ms. Wallingsford was yelled at and treated at times in a generally abusive manner by male police officers and supervisors. L.F. 85, Petition ¶ 23(d).
- (5) When Ms. Wallingsford complained about low scores on her evaluations, and asked for guidance in improving her scores, her supervisor would change the scores and make them even lower than they were before. L.F. 85, Petition ¶ 23(e).
- (6) Although Ms. Wallingsford was repeatedly told that she was

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<sup>3</sup> All references are to Ms. Wallingsford's First Amended Petition filed on April 3, 2007.

eligible for promotion, she was routinely passed over for promotion to lieutenant or captain. L.F. 85, Petition ¶ 23(f).

- (7) Ms. Wallingsford was subjected to one or more internal investigations without any basis for the investigations, and was accused of driving a police vehicle while intoxicated, and was accused of removing evidence from the evidence locker, when there was no basis for such accusations. L.F. 85, Petition ¶ 23(g)(h)(i).
- (8) Ms. Wallingsford was intentionally watched and felt like she was “under a microscope at all times.” L.F. 85, Petition ¶ 23(j).
- (9) Ms. Wallingsford observed and believed that male officers were not treated in a similar fashion. L.F. 85, Petition ¶ 23(l).

During her last two months of working as an officer at the Maplewood Police Department (July and August 2004), Ms. Wallingsford believed and alleged that her working conditions deteriorated even further as follows:

- (1) Ms. Wallingsford was continually questioned about a flat tire on a police vehicle that occurred while she was driving and about the back door of the police station being left open. L.F. 174-175, Supplemental Affidavit of Ellen Wallingsford ¶ 5 (hereinafter “Supp. Aff.”).
- (2) Ms. Wallingsford was told by a male police officer that Maplewood officers were told to report any actions of hers that

- they thought might be questionable. L.F. 175, Supp. Aff. ¶ 6.
- (3) Two male police officers organized a department police association during this time, but Ms. Wallingsford was told nothing about this. L.F. 175, Supp. Aff. ¶ 7.
  - (4) Another officer told Ms. Wallingsford that all of the officers and supervisors were calling her derogatory names behind her back. L.F. 175, Supp. Aff. ¶ 8.
  - (5) During her last two months, Ms. Wallingsford was excluded from all information that was going on in the Maplewood Police Department. L.F. 175, Supp. Aff. ¶ 9.
  - (6) Other officers would not talk to Ms. Wallingsford during this period of time without recording the conversation. L.F. 175, Supp. Aff. ¶ 11.
  - (7) Ms. Wallingsford was told that the pending internal investigations against her were completed and that she would be getting a letter that she had been cleared. However, Ms. Wallingsford never received the letter. L.F. 175-176, Supp. Aff. ¶ 13.
  - (8) When Ms. Wallingsford checked her personnel file, she could not find any record of the pending investigations, nor any evidence that she had been cleared. L.F. 175-176, Supp. Aff. ¶ 13.

- (9) During her last two months as a police officer for the City of Maplewood, Ms. Wallingsford was miserable, scared, and afraid. L.F. 176, Supp. Aff. ¶ 15.
- (10) Ms. Wallingsford was even concerned that if she needed backup in the field, she would not get it. L.F. 176, Supp. Aff. ¶ 15.
- (11) During her entire career as an officer for the City of Maplewood, Ms. Wallingsford had never seen any male employee subjected to conditions similar to these. L.F. 175, Supp. Aff. ¶ 17.

On January 20, 2005, 144 days following her resignation, Ms. Wallingsford filed a second charge of gender discrimination with the EEOC and the MCHR. L.F. 128-135. She received her Notice of Right to Sue letter from the MCHR on January 11, 2006. L.F. 136. On March 29, 2006, seventy-six days after receiving the Notice of Right to Sue letter, Ms. Wallingsford filed the instant lawsuit against the City of Maplewood in the Circuit Court, St. Louis County, Missouri. L.F. 8.

**B. Procedural History**

In her original Petition, Ms. Wallingsford set forth claims of Gender Discrimination (Count I), Hostile Work Environment (Count II), Retaliation (Count III), Intentional Infliction of Emotional Distress (Count IV), and Wrongful Termination (Count V). L.F. 10-22. On July 28, 2006 Ms. Wallingsford voluntarily dismissed her Wrongful Termination (Count V) claim without prejudice. L.F. 80. Ms. Wallingsford subsequently filed a Motion for Leave to File First Amended Petition which was granted by the Court on March 30, 2007. L.F. 81-90. The First Amended Petition was filed on

April 13, 2007 and also contained claims of Gender Discrimination (Count I), Hostile Work Environment (Count II), Retaliation (Count III), and Intentional Infliction of Emotional Distress (Count IV). L.F. 81-90. Ms. Wallingsford did not reinstate her claim for wrongful discharge.

On May 9, 2006, the City filed a Motion to Dismiss the Petition. L.F. 23- 46. Ms. Wallingsford filed a Reply to the City's Motion to Dismiss on June 27, 2006. L.F. 47-65. Thereafter, on July 10, 2006, the City filed a Reply Memorandum in Support of its Motion to Dismiss Ms. Wallingsford's Petition. L.F. 66-73. On July 28, 2006, Ms. Wallingsford filed a Sur-Reply to the City's Motion to Dismiss. L.F. 74-80.

On March 29, 2007, the Court requested briefs on whether the City's Motion to Dismiss should be treated as a Motion for Summary Judgment. L.F. 6. On June 13, 2007, the Court stated that it intended to treat the Motion to Dismiss as a Motion for Summary Judgment. L.F. 6. On August 27, 2007, Ms. Wallingsford filed Plaintiff's Suggestions in Opposition to Defendant's Motion to Dismiss and/or Motion for Summary Judgment, Plaintiff's Statement of Uncontroverted Material Facts, Plaintiff's Exhibits in Support of Plaintiff's Suggestions and Opposition, and the Affidavit of Ellen Wallingsford. L.F. 91-161. All of Ms. Wallingsford's pleadings were submitted in conformity with Rule 74.04(c)(2).

On November 15, 2007, the City filed its Reply Memorandum in Support of Motion to Dismiss Plaintiff's Petition Converted to a Motion for Summary Judgment. L.F. 162-171. The Reply Memorandum did not comply with the requirements of Rule 74.04(c)(3). On January 2, 2008, Ms. Wallingsford filed a Motion for Leave to File

Supplemental Affidavit and the Supplemental Affidavit of Ellen Wallingsford. L.F. 172-177. The Court denied Ms. Wallingsford's Motion for Leave to File Supplemental Affidavit. L.F. 189-190. On January 4, 2008, Ms. Wallingsford filed Plaintiff's Motion to Strike Defendant's Motion to Dismiss Converted to Motion for Summary Judgment and Motion to Reconsider for failure to comply with Rule 74.04. L.F. 178-182. On January 28, 2008, the Court denied Plaintiff's Motion to Strike and Motion to Reconsider and granted the City's Motion for Summary Judgment. L.F. 183-190; App. at A1-A8. Ms. Wallingsford timely filed her Notice of Appeal on February 7, 2008. L.F. 191-192.

Throughout these proceedings, Ms. Wallingsford consistently urged the Court to treat Defendant's Motion to Dismiss as a Motion for Summary Judgment and to require the parties to conform to Rule 74.04. On June 29, 2006, counsel argued (orally) that the City's Motion be converted to a Motion for Summary Judgment. L.F. 74. On July 28, 2006, Ms. Wallingsford raised the issue, in writing, in its Sur-Reply to Defendant's Motion to Dismiss. L.F. 74-75. On June 13, 2007, counsel for Ms. Wallingsford again argued orally that the Court should require all parties to comply with the requirements of Rule 74.04. L.F. 6. Counsel for the City did not agree and elected to stand on its Motion to Dismiss as filed with the Court on May 9, 2006. L.F. 162-171. The Court ordered Ms. Wallingsford to respond to Defendant's original Motion to Dismiss. L.F. 6. Ms. Wallingsford complied and filed pleadings and documents in opposition to Defendant's Motion to Dismiss and/or for Summary Judgment on August 27, 2007. L.F. 91-161.

In her Suggestions in Opposition, Ms. Wallingsford again stated, in writing, that she believed that the requirements of Rule 74.04 must apply when a motion to dismiss is

converted into a motion for summary judgment. L.F. 91-92. Accordingly, Ms. Wallingsford submitted her pleadings on August 27, 2007 in conformity with the requirements of Rule 74.04(c)(2). L.F. 91-161.

On November 15, 2007, the City filed its Reply Memorandum in Support of its Motion to Dismiss Plaintiff's Petition Converted to a Motion for Summary Judgment. L.F. 162-171. In this pleading, the City argued for the first time that Counts I, II, III, and IV of Plaintiff's First Amended Petition (all of Plaintiff's remaining claims) must be dismissed because Ms. Wallingsford had failed to provide sufficient factual evidence of any specific discriminatory action taken during July and August, 2004 (the last two months of her employment). L.F. 165-169. In response, Ms. Wallingsford filed Plaintiff's Motion for Leave to File Supplemental Affidavit and the Supplemental Affidavit of Plaintiff Ellen Wallingsford. L.F. 172-177. In her Supplemental Affidavit, Ms. Wallingsford set forth 18 additional paragraphs of allegedly discriminatory and/or harassing actions taken by the City during July and August, 2004. L.F. 174-177. The Court denied Plaintiff's Motion for Leave to File Supplemental Affidavit. L.F. 189-190.

On January 4, 2008, the Court heard oral argument on the City's Motion to Dismiss and/or Motion for Summary Judgment and on Ms. Wallingsford's Motion to Strike and Motion to Reconsider. As previously stated, on January 28, 2008, the Court granted the City's Motion to Dismiss and/or Motion for Summary Judgment and denied Ms. Wallingsford's Motion to Strike and Motion to Reconsider. L.F. 183-190; App. at A1-A8. The instant Appeal followed.

**POINTS RELIED ON**

**I.**

**The Trial Court Erred In Granting The City's Motion For Summary Judgment Because Ms. Wallingsford's Charge Of Discrimination Was Timely Filed Pursuant To Mo. Rev. Stat. § 213.075 In That Her Charge Of Discrimination Was Filed With the MCHR Within 180 Days Of The Last Alleged Act Of Discrimination.**

Mo. Rev. Stat. § 213.075

## II.

**The Trial Court Erred In Granting The City's Motion For Summary Judgment Because Ms. Wallingsford's Charge Of Discrimination Was Timely Filed Pursuant To Mo. Rev. Stat. § 213.075 In That Ms. Wallingsford Offered Competent And Unrebutted Evidence That The Gender Discrimination And Hostile Work Environment To Which Ms. Wallingsford Was Subjected Continued Through And Including August 29, 2004, The Date Of Ms. Wallingsford's Constructive Discharge.**

*Pollock v. Wetterau Food Distribution Group,*

11 S.W.3d 754 (Mo.App. E.D. 1999)

Mo. Rev. Stat. § 213.075

### III.

**The Trial Court Erred In Granting The City's Motion For Summary Judgment Because Ms. Wallingsford's Charge Of Discrimination Was Timely Filed Pursuant To Mo. Rev. Stat. § 213.075 In That Ms. Wallingsford's Constructive Discharge On August 29, 2004 Constitutes An Adverse Employment Action Which Occurred Within 180 Days Of The Date She Filed Her Complaint With The MHRC.**

*Bean v. Wisconsin Bell, Inc.*, 366 F.3d 451 (7<sup>th</sup> Cir. 2004)

*Bell v. Dynamite Foods*, 969 S.W.2d 847, 853 (Mo.App. E.D.1998)

*Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851 (8<sup>th</sup> Cir. 1998)

*Gamber v. Missouri Department of Health and Senior Services*,

225 S.W.3d 470 (Mo.App. W.D. 2007)

#### IV.

**The Trial Court Erred In Denying Ms. Wallingsford's Motion To Strike Defendant's Motion To Dismiss Converted To Motion For Summary Judgment And In Entering Summary Judgment In Favor Of The City Because The City Failed To File Summary Judgment Pleadings In Conformity With Rule 74.04 And Ms. Wallingsford Was Prejudiced Thereby In That The Court's Failure To Require Compliance With Rule 74.04 Resulted In Ms. Wallingsford Not Learning Of An Additional Ground Upon Which The City Claimed It Was Entitled To Summary Judgment And Upon Which The Trial Court Relied In Entering Judgment Until The City Asserted That Ground In Its Reply Memorandum And Briefing Was Closed.**

*Snelling v. Bleckman*, 891 S.W.2d 572 (Mo.App. E.D. 1995)

*Moss v. City of St. Louis*, 883 S.W.2d 568 (Mo.App. E.D.1994)

*Midwest Precision Casting Co. v. Microdyne, Inc.*,

965 S.W.2d 393 (Mo.App. E.D.1998)

Supreme Court Rule 74.04

V.

**The Trial Court Abused Its Discretion In Denying Ms. Wallingsford's Motion For Leave To File A Supplemental Affidavit Because The Ruling Deprived Ms. Wallingsford Of The Opportunity To Respond To New Arguments Raised For The First Time In The City's Reply Memorandum In Support Of Its Motion To Dismiss Converted To Motion For Summary Judgment In That The City Did Not Claim In Its Original Motion To Dismiss That Ms. Wallingsford Failed To Prove Discriminatory Acts Occurred Within 180 Days Before She Filed Her MHRC Complaint.**

*Call v. Heard*, 925 S.W.2d 840 (Mo. 1996)

*Ronollo v. Jacobs*, 775 S.W.2d 121 (Mo. 1989)

*City of Riverside v. Progressive Investment Club of Kansas-City, Inc.*,

45 S.W.3d 905 (Mo.App. W.D.2001)

Supreme Court Rule 74.04

## ARGUMENT

### Standard Of Review

Appellate review of the granting of a summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). Summary judgment is only appropriate where the moving party demonstrates that there is no genuine dispute as to any material fact and that such party has a right to judgment as a matter of law. *Id.* The court must review the record in the light most favorable to the party against whom summary judgment was granted. *Id.*

This Court has recently stated: “Summary judgment should seldom be used in employment discrimination cases, because such cases are inherently fact-based and often depend on inferences rather than on direct evidence.” *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. 2007) (internal citations omitted). Summary judgment should not be granted in these cases unless the evidence could not support any reasonable inference for the non-moving party. *Id.*

Points I, II, III, and IV claim the trial court erred in entering summary judgment and, therefore, the standard of review is *de novo*. Point V concerns the propriety of the trial court’s order denying Ms. Wallingsford leave to file a supplemental affidavit. With regard to this issue, appellate review is for abuse of discretion. *See Ronollo v. Jacobs*, 775 S.W.2d 121, 125-26 (Mo. 1989); *Call v. Heard*, 925 S.W.2d 840, 854 (Mo. 1996); *Missouri Highway & Transportation Comm’n v. Rockhill Development Corp.*, 865 S.W.2d 765, 770 (Mo.App. W.D.1993).

I.

**The Trial Court Erred In Granting The City’s Motion For Summary Judgment Because Ms. Wallingsford’s Charge Of Discrimination Was Timely Filed Pursuant To Mo. Rev. Stat. § 213.075 In That Her Charge Of Discrimination Was Filed With the MCHR Within 180 Days Of The Last Alleged Act Of Discrimination.**

The Missouri Human Rights Act (“MHRA”) contains its own statute of limitations. Section 213.075 states in pertinent part as follows:

Any person claiming to be aggrieved by an unlawful discriminatory practice may make, sign and file with the Commission a verified Complaint in writing, within 180 days of the **alleged act** of discrimination . . .

Mo. Rev. Stat. § 213.075 (emphasis added). In her Petition, Ms. Wallingsford alleged that she was subjected to gender discrimination and a hostile work environment based upon her gender, which behavior continued throughout her employment and which, as such, constituted a continuing violation. L.F. 82, Petition ¶ 9. Ms. Wallingsford further provided a list of specific incidents and examples of gender harassment, all of which taken together constitute a continuing violation, in that the discrimination was part of an ongoing practice or pattern by the City. L.F. 85-86, Petition ¶¶ 23 & 24. Further, Ms. Wallingsford plead that such behavior on the part of the City “continued throughout her

employment through and including her constructive discharge on August 30, 2004.”<sup>4</sup>

L.F. 85, Petition ¶ 22. Thus, the last **alleged act** of discriminatory behavior plead by Ms. Wallingsford took place on August 29, 2004.

Further, and more importantly, in her charge of discrimination filed with the MCHR, Ms. Wallingsford clearly and unmistakably alleged that the most recent date of harm was the date of her resignation. L.F. 129 and 133. The charge of discrimination was filed on January 20, 2005, which is 144 days from and after the date of Ms. Wallingsford’s resignation. The charge was filed well within the 180 days set forth in Mo. Rev. Stat. § 213.075, which is absolutely clear and unambiguous on its face that the statute of limitations begins to run on the date of the last **alleged act** of discrimination. In this case, Ms. Wallingsford alleged, both in her MCHR charge of discrimination and in her Petition, that the pattern of gender harassment and the hostile work environment of Maplewood continued through and including her last date of employment. Ms. Wallingsford’s charge of discrimination was timely filed. Accordingly, the trial court’s entry of summary judgment should be reversed.

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<sup>4</sup> Although Ms. Wallingsford’s Petition references the date of her resignation as August 30, 2004, her actual letter of resignation was tendered to Maplewood on August 29, 2004.

## II.

### **The Trial Court Erred In Granting The City's Motion For Summary Judgment Because Ms. Wallingsford's Charge Of Discrimination Was Timely Filed Pursuant To Mo. Rev. Stat. § 213.075 In That Ms. Wallingsford Offered Competent And Unrebutted Evidence That The Gender Discrimination And Hostile Work Environment To Which Ms. Wallingsford Was Subjected Continued Through And Including August 29, 2004, The Date Of Ms. Wallingsford's Constructive Discharge.**

Ms. Wallingsford both plead and provided Affidavits evidencing a continuing pattern of gender discrimination and a hostile work environment at Maplewood. Ms. Wallingsford's allegations began with a wrongful and discriminatory suspension in December, 2002. Ms. Wallingsford's allegations of discriminatory behavior and a hostile work environment continuing through August 29, 2004 included voice stress analyzer and lie detector tests, sham evaluations, yelling and generally abusive behavior by male police officers, failures to promote, and baseless internal investigations. During her last two months as a police officer at Maplewood, Ms. Wallingsford believed and alleged that the discriminatory behavior worsened, with male officers continually questioning her about a flat tire on a police vehicle, cataloging and reporting all of her actions to male supervisors, calling her derogatory names behind her back, excluding her from information about what was going on in the Department, insisting upon recording conversations with Ms. Wallingsford, failing to complete pending internal investigations, and generally causing Ms. Wallingsford to be miserable, scared, and afraid that, if needed, she may not receive backup in the field. All of Ms. Wallingsford's allegations

constitute a continuing pattern of gender discrimination a hostile work environment at Maplewood.<sup>5</sup>

In *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754 (Mo.App. E.D.1999), this Court explicitly stated that “under [the continuing violation theory] the victim of discrimination may pursue a claim for an act occurring prior to the statutory period, if she can demonstrate the act is part of an ongoing practice or pattern of discrimination by her employer.” *Id.* at 763. Ms. Wallingsford has alleged and provided specific examples showing that both *before* and *after* her suspension in December, 2002, she was subjected to a hostile work environment based upon her gender, which behavior continued throughout her employment and which, as such, constitutes a “continuing violation.” Moreover, in *Pollock*, this Court recognized that “in most claims of hostile work environment harassment, the discriminatory acts [are] not always of a nature that could be identified individually as significant events; instead, the day-to-day harassment [is] primarily significant, both as a legal and as a practical matter, in its cumulative affect.” *Id.* at 763. In the instant case, as in *Pollock*, Ms. Wallingsford’s claim of a hostile work environment is based upon a series of closely-related, similar events that occurred within the same general time period and stemmed from the same source.

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<sup>5</sup> The Court must note that because Rule 74.04 was not followed at any point in these proceedings by the City, Ms. Wallingsford’s allegations contained in her Statement of Facts and Affidavit and Supplemental Affidavit are un rebutted and must be deemed admitted by the City. Rule 74.04(c)(2)§(3).

Accordingly, the events recited by Ms. Wallingsford constitute a continuing violation.

*Id.* In granting summary judgment to the City, the trial court simply failed to recognize the existence and the import of Ms. Wallingsford's hostile work environment claim.

The trial court apparently believed that in order to sustain her hostile work environment claim, Ms. Wallingsford was required to identify a specific and discrete discriminatory action on the part of the City that occurred within 180 days of Ms. Wallingsford's filing her MCHR charge. L.F. 187; App. at A5. As this Court has recognized, in hostile work environment cases, it is often impossible to isolate a single discriminatory act on the part of the employer. *Pollock*, 11 S.W.3d at 763. The significance of this type of harassment has been correctly identified by this Court as being "its cumulative affect." Thus, the trial court's insistence that Ms. Wallingsford identify one discrete discriminatory act within the 180 day period prior to filing her MCHR claim is simply wrong as a matter of law. Rather than citing to one discriminatory act, Ms. Wallingsford plead and provided specific examples of a long series of interrelated actions which, when taken together, constitute a hostile work environment. Ms. Wallingsford's allegations of wrongful behavior on the part of Maplewood, all of which occurred on a continuing basis through and including August 29, 2004, demonstrate a continuing pattern and practice of discrimination which satisfies the last "alleged act" requirement of Section 213.075. Because Ms. Wallingsford plead and provided evidence of continuing discriminatory acts and a hostile work environment that extended both before and during the 180 day filing period, the trial court's granting of summary judgment for the City should be reversed.

### III.

**The Trial Court Erred In Granting The City's Motion For Summary Judgment Because Ms. Wallingsford's Charge Of Discrimination Was Timely Filed Pursuant To Mo. Rev. Stat. § 213.075 In That Ms. Wallingsford's Constructive Discharge On August 29, 2004 Constitutes An Adverse Employment Action Which Occurred Within 180 Days Of The Date She Filed Her Complaint With The MHRC.**

On August 29, 2004 Ms. Wallingsford tendered her resignation to Maplewood. In her letter of resignation, Ms. Wallingsford clearly stated that she was resigning because “the continuing pattern of [gender] discrimination has made the working conditions intolerable.” L.F. 137. In her Petition, Ms. Wallingsford alleged that the working conditions at Maplewood were such that no reasonable person would have tolerated them and, as a result of such intolerable conditions, Ms. Wallingsford resigned. L.F. 82, Petition ¶ 10. Not only did the pattern and practice of gender discrimination by Maplewood continue through and including Ms. Wallingsford's last date of employment, August 29, 2004, Ms. Wallingsford submits that her constructive discharge in and of itself constitutes an act of gender discrimination.

Ms. Wallingsford has found no Missouri cases dealing directly with the issue of whether a constructive discharge constitutes an adverse employment action by an employer under the MHRA. However, Ms. Wallingsford respectfully states that no other interpretation is consistent with the theory of constructive discharge. Once a plaintiff has demonstrated that her working conditions were so intolerable that no reasonable person could have stayed on the job, a constructive discharge occurs. *Pollock v. Wetterau Food*

*Distribution Group*, 11 S.W.3d at 764. In either case, it is the **employer's actions** that have caused the victim to lose a job that she would ordinarily keep. Under Missouri law, a constructive discharge occurs when an employer "deliberately renders an employee's working conditions intolerable and thus forces [him] to quit." *Bell v. Dynamite Foods*, 969 S.W.2d 847, 853 (Mo.App. E.D.1989) (internal citation omitted). Because the employer's bad acts in either case result in the employee losing her job, it would be totally inconsistent for discharge initiated by the employer to constitute a discriminatory act, and for a constructive discharge caused by the same employer to not constitute a discriminatory act. Ms. Wallingsford respectfully states to this Court that a constructive discharge and an employer-initiated discharge are, for both legal and practical purposes, one and the same.

In *Gamber v. Missouri Department of Health and Senior Services*, 225 S.W.3d 470 (Mo.App. W.D.2007), the Western District apparently assumed, without deciding, that a constructive discharge would constitute an adverse employment action by the employer under the MHRA. *Id.* at 477. Numerous courts have held that a constructive discharge is an adverse employment action. In *Parrish v. Immanuel Medical Center*, 92 F.3d 727 (8<sup>th</sup> Cir. 1996), the court held that the plaintiff had presented sufficient evidence from which a reasonable jury could conclude that she was constructively discharged and, accordingly, that the plaintiff met her burden of demonstrating an adverse employment decision under both the Age Discrimination in Employment Act ("ADEA") and the Nebraska Fair Employment Practice Act ("NFEPA"). *Id.* at 732. In *Fischer v. Andersen Corp.*, 2006 U.S. Dist. LEXIS 17086 (D.Minn.) the court held that an adverse

employment action includes constructive discharge under the Minnesota Human Rights Act and, in *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 858 (8<sup>th</sup> Cir. 1998), the court held that a constructive discharge satisfied the “employer discharge” element of a prima facie case under both the Minnesota Human Rights Act and Title VII.

In *Bean v. Wisconsin Bell, Inc.*, 366 F.3d 451(7<sup>th</sup> Cir. 2004), the court explained that the word *constructive*, when used in the phrase *constructive discharge*, “performs its usual function in the law of indicating that something will for reasons of policy be treated as if it were something else. *Id.* at 453. Accordingly, the term constructive discharge “refers to the situation in which an employer precipitates an employee’s resignation by making the employee’s working conditions unbearable.” *Id.* at 454. (internal citations omitted). The Court explained the philosophy behind the concept of constructive discharge as follows:

It is treated as discharge rather than resignation, consistent with the general principal of contract law that you cannot prevent the other party from performing his duties under the contract and then turn around and accuse him of breach of contract; you precipitated the breach and are therefore responsible for it.

*Id.* (internal citations omitted). In other words, an employer may not create conditions so intolerable that an employee is forced to resign and then, having caused the employee’s resignation, accuse that same employee of resigning in an effort to avoid legal liability. Clearly, and for good reason, the majority of courts that have dealt with this issue have concluded that a constructive discharge is in itself an adverse employment action.

Numerous cases are in accord. *See, e.g., Owens v. Louisiana State Department of Health and Hospitals*, 2007 U.S. Dist. LEXIS 92007 (M.D.La.) (defendant concedes that constructive discharge constitutes adverse employment action); *Coffey v. Cushman & Wakefield, Inc.*, 2002 U.S. Dist. LEXIS 13227 (S.D.N.Y.) (constructive discharge is itself an adverse employment action); *Dooner v. Keefe, Bruyette & Woods, Inc.*, 157 F.Supp.2d 265 (S.D.N.Y.) (constructive discharge constitutes material adverse change to terms and conditions of employment); *Johnson v. Food Lion, LLC.*, 2003 U.S. Dist. LEXIS 20894 (M.D.N.C.) (constructive discharge evidence of adverse employment action); *Gavin v. Arthur Andersen & Co.*, 1999 U.S. Dist. LEXIS 17177 (N.D.Ill.) (constructive discharge is ultimate adverse employment action); *Jordan v. Clark*, 847 F.2d 1368 (9<sup>th</sup> Cir. 1988) (constructive discharge if proven constitutes adverse employment action); *Glisson v. Interim Healthcare, Inc.*, 2000 U.S. Dist. LEXIS 12792 (M.D.Fla.) (constructive discharge fictional mechanism to prevent employer's avoidance of liability for discharge); *Swanson v. Northwestern Human Services, Inc.*, 2006 U.S. Dist. LEXIS 83846 (E.D.Pa.) (constructive discharge may constitute adverse employment action under Title VII and Pennsylvania Human Relations Act ("PHRA")); and *Fernandez v. San Antonio Housing Authority*, 2006 U.S. Dist. LEXIS 45069 (W.D.Tex.) (constructive discharge is adverse employment action under Texas Whistle Blower Act).

Accordingly, Ms. Wallingsford states that her constructive discharge in this case on August 29, 2004, was an adverse employment action and, as such, was the last alleged act of discrimination for purposes of Section 213.075. Accordingly, the summary judgment granted by the trial court against Ms. Wallingsford should be reversed.



#### IV.

**The Trial Court Erred In Denying Ms. Wallingsford's Motion To Strike Defendant's Motion To Dismiss Converted To Motion For Summary Judgment And In Entering Summary Judgment In Favor Of The City Because The City Failed To File Summary Judgment Pleadings In Conformity With Rule 74.04 And Ms. Wallingsford Was Prejudiced Thereby In That The Court's Failure To Require Compliance With Rule 74.04 Resulted In Ms. Wallingsford Not Learning Of An Additional Ground Upon Which The City Claimed It Was Entitled To Summary Judgment And Upon Which The Trial Court Relied In Entering Judgment Until The City Asserted That Ground In Its Reply Memorandum And Briefing Was Closed.**

The City raised two issues in its motion to dismiss pertinent to this appeal. First, the City sought to dismiss Ms. Wallingsford's claim that she was wrongfully suspended in December 2002 by arguing that the suspension was a "discrete act" that was outside the 180 day filing period. L.F. 24, 66-67. Ms. Wallingsford argued that the suspension was part of a "continuing pattern of discrimination." L.F. 48-49, 75-76. With regard to the second issue, the City contended the 180-day filing period began to run on July 15, 2004, the date on which the City allegedly advised Ms. Wallingsford "she was going to be discharged as the result of an internal investigation." L.F. 26; *see also* L.F. 68-70.<sup>6</sup> In response, Ms. Wallingsford claimed the 180-day period did not begin to run until the last

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<sup>6</sup> The pertinent text of the letter dated July 15, 2004 is: "[I]t appears that discharge of Ms. Wallingsford from the City of Maplewood is inevitable." L.F. 45.

*alleged act* of discrimination, which was August 29, 2004, the final day of Ms. Wallingsford's employment. L.F. 50-53, 76-79.

These were and continued to be the only two potentially dispositive issues before the trial court until the City filed its "Reply Memorandum in Support of Its Motion to Dismiss Converted to a Motion for Summary Judgment." L.F. 162-71. The reply memorandum, which was filed after Ms. Wallingsford had responded to the issues raised in the City's motion to dismiss, was the first instance where the City questioned the sufficiency of Ms. Wallingsford's evidence that she experienced discrimination through the final day of her employment. In the reply memorandum, the City contended for the first time that "Plaintiff has failed to identify any act on the part of Defendant that occurred within the statute of limitations." L.F. 165. The City further argued:

All of the conduct Plaintiff points to which was perpetrated by Defendant occurred more than 180 days before Plaintiff filed her charge of discrimination.

Here, Plaintiff has come forward with only acts by Defendant that occurred outside the statute of limitations. She has not alleged any other facts between July 15, 2004 and her decision to resign on August 30, 2004 .

...

Since Plaintiff has come forward with no additional actions taken by Defendant that occurred within 180 days of the filing [sic] her charge [with the MHRC] (i.e., July 24, 2004), Counts II and III of her First Amended Petition are untimely.

L.F. 166, 169.<sup>7</sup>

Ms. Wallingsford requested leave to file a supplemental affidavit in response to this reply memorandum. Her supplemental affidavit set forth numerous discriminatory acts which occurred between July and August 29, 2004, when she was constructively terminated, to wit:

- “My last two months of working as an officer at the Maplewood Police Department (July and August, 2004) were intolerable.” L.F. 174 (Supp. Aff. ¶ 3).
- I “was constantly being watched by supervisors. I had previously been told by Chief White that: ‘They are watching you and if you even fart wrong they will report it.’ This was constantly on my mind during my last two months of employment.” L.F. 174 (Supp. Aff. ¶ 4).
- “The lieutenants and sergeants in the Maplewood Police Department were constantly watching and waiting for me to make any mistake or to do something they could question. Based on the way I was treated, I believe that they were

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<sup>7</sup> The City criticized Ms. Wallingsford’s response to its motion to dismiss for “fail[ing] to allege a single action taken by Defendant after July 15, 2004 [the date the City claimed it terminated Ms. Wallingsford], which constitutes discrimination.” L.F. 168. There is a good reason Ms. Wallingsford omitted facts regarding such discrimination from her response: The City had not previously claimed the lawsuit should be dismissed on account of the lack of evidence of discriminatory acts occurring after July 15<sup>th</sup>.

- trying to get me in trouble so that they could ruin my career and reputation in the law enforcement community.” L.F. 176 (Supp. Aff. ¶ 16).
- “I was told by Police Officer Williams that all officers were told to report any action of mine that they thought might be questionable.” L.F. 175 (Supp. Aff. ¶ 6).
  - Due to “[t]he working conditions created by the Maplewood Police Department, . . . [d]uring my last two months, I was constantly working under the stress of the pending internal investigation for a flat tire on a police vehicle and was constantly being questioned about this. I was also questioned about a memorandum written to me about the back door of the police station being left open, when I had nothing to do with this.” L.F. 174-75 (Supp. Aff. ¶ 5).
  - Neither Ms. Wallingsford nor the only other female police officer was told that two sergeants had organized a department police association. L.F. 175 (Supp. Aff. ¶ 7).
  - “Police Officer Brown told me that all of the other officers and supervisors were talking bad about me during this period of time and were calling me derogatory names.” L.F. 175 (Supp. Aff. ¶ 8).
  - During July and August, 2004, “I was excluded from all of the information that was going on in the police department, including even social information” and “treated like an outcast.” L.F. 175 (Supp. Aff. ¶ 9).
  - Due to the conditions created by the Maplewood Police Department, “every time that I was called into the station my stomach would hurt and I would have

a panic attack because I knew that they were going to tell me that I was in trouble for something, or that I had done something wrong.” L.F. 175 (Supp. Aff. ¶ 10).

- Sergeants and lieutenants “would not talk to me without recording the conversation.” L.F. 175 (Supp. Aff. ¶ 11).
- Due to the discrimination she had suffered while working for the Maplewood Police Department, she was “concerned about getting backup in the field.” L.F. 176 (Supp. Aff. ¶ 15).
- “During all of my years as an officer for the City of Maplewood I never saw any male employee subjected to the conditions that I was subjected to during my last two months of employment.” L.F. 176 (Supp. Aff. ¶ 17).
- All of “[t]hese conditions were part of a continuing pattern of harassment and discrimination that began in 2001.” L.F. 176 (Supp. Aff. ¶ 18).

L.F. 175-76.

Two days after requesting leave to file the supplemental affidavit, Ms. Wallingsford filed a motion to strike the City’s dispositive motion for failure to comply with Rule 74.04. L.F. 178. Ms. Wallingsford reiterated her prior contention that the court should have required the City to file a motion for summary judgment in compliance with Rule 74.04, and noted the City’s disagreement with this position and its desire to stand on its motion to

dismiss. L.F. 179 (¶ 6).<sup>8</sup> Ms. Wallingsford argued that she “has been severely prejudiced” by the court’s “failure to order Defendant to comply with the requirements of Rule 74.04” because the procedure employed by the trial court allowed the City to raise a new issue in a reply memorandum regarding whether Ms. Wallingsford had presented sufficient evidence of a discriminatory act within the 180-day filing period. L.F. 180 (¶ 10). Ms. Wallingsford stated: “By permitting Defendant to ignore the mandates of Rule 74.04, Defendant was able to raise issues in its Reply Memorandum that it had not raised in its original Motion and that went far beyond the scope of Plaintiff’s Response, essentially blindsiding Plaintiff in a manner that was grossly unfair and prejudicial.” L.F. 181-82 (¶ 17).

The trial court denied Ms. Wallingsford leave to file her supplemental affidavit. L.F. 189. Doing so would be futile, the court reasoned, because “briefing was closed.” L.F. 189. The court also overruled Ms. Wallingsford’s motion to strike the City’s dispositive motion, noting “it was Plaintiff’s request that this Court convert Defendant’s Motion to Dismiss to a Motion for Summary Judgment.” L.F. 189. In addition, the court saw “no need for Defendant to repackage and resubmit its Motion to conform with [Rule

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<sup>8</sup> Ms. Wallingsford further stated she had “orally requested on numerous occasions that this Court order Defendant to file a new Motion for Summary Judgment in conformity with Rule 74.04.” L.F. 181 (¶ 15). Ms. Wallingsford’s unwavering position in this case has been that the trial court should have ordered the City to file a motion for summary judgment that complied with the requirements of Rule 74.04. *See supra* 12-13.

74.04].” L.F. 189. These rulings effectively prevented Ms. Wallingsford from responding to the City’s argument that she did not present evidence of discriminatory acts occurring within the 180-day statute of limitations.

The trial court then entered summary judgment in favor of the City and dismissed all of Ms. Wallingsford’s claims. L.F. 183. The court adopted the City’s contention that Ms. Wallingsford failed to identify any discriminatory action on the part of the City which occurred within 180 days of Ms. Wallingsford’s filing of her MCHR charge on January 20, 2005. In that respect, the court found “the only action Plaintiff brought before this Court that occurred after July 24, 2005 [sic], was her decision to voluntarily resign from her employment on August 16, 2005 [sic].” L.F. 187; App. at A5. The court did not mention the argument the City made in its motion to dismiss which it claimed warranted the dismissal of Counts I, II, and III—that the July 15, 2004 settlement letter the City sent to Ms. Wallingsford’s attorney triggered the running of the 180-day statute of limitations. L.F. 25-26. The trial court also dismissed all of Ms. Wallingsford’s claims based upon its belief that Ms. Wallingsford’s claim of continuing violation did not lie because “the continuing violation theory does not save untimely claims of discrete acts, such as terminations, failure to promote, denial of transfers, demotions and refusals to hire.” L.F. 186; App. at A4. Finally, the trial court apparently held, as a matter of law, that Ms. Wallingsford’s constructive discharge did not constitute an adverse discriminatory employment action by the City. L.F. 186-87; App. at A4-A5. None of these issues were properly raised by the City in its motion for summary judgment.

The trial court erred in refusing to order the City to file a motion for summary judgment that complied with Rule 74.04 and in entering summary judgment on the City's defective motion. Ms. Wallingsford was greatly prejudiced by the trial court's refusal to require the City to file a motion for summary judgment which satisfied the requirements of Rule 74.04. The court's laxity in demanding compliance with Rule 74.04, coupled with its decision to deny Ms. Wallingsford leave to file her supplemental affidavit, prevented Ms. Wallingsford from responding to alleged evidentiary deficiencies not asserted in the City's initial motion and on which the trial court relied in entering summary judgment.

Rule 74.04 sets forth the requirements of a motion for summary judgment. A motion for summary judgment "shall summarily state the legal basis for the motion." Rule 74.04(c)(1). The movant must attach a statement of uncontroverted material facts to the motion. *Id.* The statement of facts "shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts." *Id.* The City did not remotely comply with Rule 74.04. It did not attach a statement of uncontroverted material facts to its motion to dismiss or file a separate legal memorandum in support of its motion. Even after the court converted the motion to dismiss into a motion for summary judgment, the City did not file a statement of uncontroverted material facts or a separate legal memorandum as required by Rule 74.04. The motion to dismiss also did not allege the same legal basis for dismissal as the court relied upon in entering summary judgment, namely that Ms. Wallingsford's claims should be dismissed because she could not prove she was

discriminated against through her last day of employment on August 29, 2004. Rather, the motion asserted that the last day Ms. Wallingsford could claim a discriminatory act was July 15, 2004, the date she was purportedly informed of her termination.

The clear purpose of Rule 74.04 is to “apprise the opposing party, the trial court, and in turn the Appellate Court of the specific basis on which the movant claims [entitlement] to Summary Judgment.” *Snelling v. Bleckman*, 891 S.W.2d 572 (Mo.App. E.D. 1995). Compliance with Rule 74.04 also assists the non-movant to “prepare a proper response” to the motion as required by Rule 74.04(c)(2). *Id.* Following the procedures mandated by Rule 74.04 also aids in appellate review. *Hanna v. Darr*, 154 S.W.3d 2, 5-6 (Mo.App. E.D. 2004).

In filing her responsive pleadings on August 27, 2007, Ms. Wallingsford rightfully believed that she was responding to the only two potentially dispositive issues raised in the City’s Motion to Dismiss filed on May 9, 2006. The trial court’s failure to order the City to conform to the pleading requirements of Rule 74.04 permitted the City to raise new issues and to make new arguments based on alleged facts that were never presented to the court in any motion filed by the City. This is reversible error.

The “requirements of Rule 74.04(c) are simple and straight forward.” *Moss v. City of St. Louis*, 883 S.W.2d 568, 569 (Mo.App. E.D.1994). And they are **mandatory**. It is well established that a motion that fails to comply with Rule 74.04 is “defective.” *Midwest Precision Casting Co. v. Microdyne, Inc.*, 965 S.W.2d 393, 394-95 (Mo.App. E.D.1998). Granting summary judgment on the basis of a defective motion “furnishes ample grounds for reversal.” *Id.* at 395. *See also Hanna*, 154 S.W.3d at 5-6.

Ms. Wallingsford has found no case upholding summary judgment where the non-moving party requested compliance with Rule 74.04 as Ms. Wallingsford did here. This appears to be an issue of first impression. There is no legitimate reason to permit a party clearly seeking summary judgment to dodge the requirements of Rule 74.04 simply by casting the dispositive motion as a motion to dismiss. Certainly, in some cases the non-moving party may waive compliance with Rule 74.04 (whether through carelessness or indifference). *See, e.g., J.B. Allen, Inc. v. Pearson*, 31 S.W.3d 526, 529 (Mo.App. E.D.2000) (observing that non-moving party expressly waived notice requirement and opportunity to file response to motion); *Osage Water Co. v. City of Osage Beach*, 58 S.W.3d 35, 42 (Mo.App. S.D.2001) (finding that non-moving party acquiesced in the trial court treating a motion to dismiss as a motion for summary judgment where non-moving party never objected to the procedure employed by the trial court or claimed there was a “need to supply the trial court with additional evidence touching the issues”); *Plank v. Union Electric Co.*, 899 S.W.2d 129, 132-33 (Mo.App. E.D.1995) (holding that non-movant could not complain that the motion for summary judgment “did not meet the rigid requirements” of Rule 74.04 because he “made no written or oral objection to the procedural form of UE’s motion for summary judgment”).

This is not such a case of waiver or acquiescence. Ms. Wallingsford informed the court the issues raised in the motion to dismiss had to be resolved through summary judgment and asked the court to order the City to file a motion that satisfied the requirements of Rule 74.04. Ms. Wallingsford’s insistence on compliance with Rule 74.04 turned out to be prescient because the City asserted a new basis for summary judgment in

a reply memorandum after she believed the issues were limited to those identified in the motion to dismiss. When Ms. Wallingsford attempted to respond to the new issue by filing a supplemental affidavit, the trial court refused to accept the affidavit, thereby preventing Ms. Wallingsford from presenting evidence contradicting the new issue raised in the City's reply memorandum.

Ms. Wallingsford has been significantly prejudiced by the trial court's failure to order the City to conform to the requirements of Rule 74.04. The trial court dismissed her claims without affording her an opportunity to respond to an issue raised by the City at the eleventh hour. By entering summary judgment on this newly articulated ground, the trial court violated both the letter and the spirit of Rule 74.04. The judgment should be reversed.

## V.

**The Trial Court Abused Its Discretion In Denying Ms. Wallingsford's Motion For Leave To File A Supplemental Affidavit Because The Ruling Deprived Ms. Wallingsford Of The Opportunity To Respond To New Arguments Raised For The First Time In The City's Reply Memorandum In Support Of Its Motion To Dismiss Converted To Motion For Summary Judgment In That The City Did Not Claim In Its Original Motion To Dismiss That Ms. Wallingsford Failed To Prove Discriminatory Acts Occurred Within 180 Days Before She Filed Her MHRC Complaint.**

In its Reply Memorandum in Support of Motion to Dismiss Plaintiff's Petition Converted to a Motion for Summary Judgment, the City argued that it was entitled to summary judgment because Ms. Wallingsford had failed to allege any discriminatory acts by the City during the 180-day period prior to filing her charge of discrimination with the MCHR. L.F. 187. The reply memorandum also contains numerous factual allegations based on references to documents produced during the litigation and used by Ms. Wallingsford in her Suggestions in Opposition to support her claim of continuing violation.<sup>9</sup> In an effort to respond to the new arguments raised in the reply memorandum

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<sup>9</sup> The City's reply memorandum clearly demonstrates the need for stringent application of Rule 74.04, as it is replete with factual allegations that Ms. Wallingsford has had no opportunity to either admit or deny. For example, the City states that an internal investigation of Ms. Wallingsford was completed prior to June 25, 2004 (L.F.165); that

Ms. Wallingsford sought to file a supplemental affidavit in which she documented discriminatory actions that occurred between July and August 29, 2004. Finding that the “briefing was closed,” the trial court denied Ms. Wallingsford’s leave to file the supplemental affidavit and refused to consider it. L.F. 189. This was an abuse of discretion.

The trial court has discretion to permit supplemental affidavits. Rule 74.04(c)(5). A trial court abuses its discretion if it unreasonably prevents a party from introducing relevant evidence into the summary judgment record. *See Ronollo v. Jacobs*, 775 S.W.2d 121, 125-26 (Mo. 1989). Here, Ms. Wallingsford requested leave to file her supplemental affidavit nearly a month before the court entered summary judgment. The factual matters asserted in the affidavit were highly material. They responded directly to the City’s charge that she failed to establish she had been discriminated against within 180 days of the filing of her MHRC complaint. The trial court’s refusal to accept the affidavit under these circumstances was an abuse of discretion. *Cf. Ronollo*, 775 S.W.2d at 126 (finding no abuse of discretion in trial court’s denial of party’s request for a continuance of summary judgment hearing in order to obtain additional evidence where the party failed to “suggest what additional evidence he might have assembled and presented to the trial court”).

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Ms. Wallingsford “had already been advised that she was to be terminated (L.F.167); and that Ms. Wallingsford had “failed the lie detector test.” (L.F.167). None of these so-called “facts” were presented to the trial court in the format required by Rule 74.04(c).

Ms. Wallingsford's request for leave to file her supplemental affidavit is analogous to a request to reopen the evidence after trial. In fact, the trial court denied leave because "briefing was closed." L.F. 189. Once evidence has closed, trial courts are vested with discretion to grant or deny motions to reopen the evidence. *Call v. Heard*, 925 S.W.2d 840, 854 (Mo. 1996). That discretion is abused when the evidence sought to be admitted "might substantially affect the merits of the case" and allowing its presentation "would not inconvenience the court or unfairly advantage one of the parties." *City of Riverside v. Progressive Investment Club of Kansas-City, Inc.*, 45 S.W.3d 905, 910 (Mo.App. W.D.2001) (quoting *Missouri Highway & Transportation Comm'n v. Rockhill Development Corp.*, 865 S.W.2d 765, 770 (Mo.App. W.D.1993)).

Under this standard, the trial court clearly abused its discretion in not receiving Ms. Wallingsford's supplemental affidavit. The evidence contained in Ms. Wallingsford's affidavit, if considered, would have substantially affected the merits of the case. And allowing its introduction could not have disadvantaged the City, as it was the City's untimely assertion of a new ground for summary judgment that created the need for the affidavit in the first place. Nor is there reason to believe the court would have been inconvenienced by the receipt of the affidavit as the court did not grant summary judgment until almost a month after Ms. Wallingsford requested leave to file her affidavit.

The bottom line is Ms. Wallingsford suffered severe and unnecessary prejudice due to the trial court's refusal to grant her leave to file her supplemental affidavit. In view of the confused procedural posture of the case in the trial court, and because the

City was permitted to make new arguments and factual allegations in its non-conforming reply memorandum at the eleventh hour, at a minimum Ms. Wallingsford should have been permitted to file her supplemental affidavit to rebut the City's claim that she could produce no evidence of discriminatory actions that occurred during the 180-day period prior to filing her charge of discrimination with the MHRC. Had the trial court considered the supplemental affidavit and granted Ms. Wallingsford the benefit of all reasonable inferences therefrom, it would have concluded that Ms. Wallingsford had produced substantial evidence of a continuing pattern of gender discrimination through and including the date of her resignation on August 29, 2004. The trial court's failure to consider the supplemental affidavit, therefore, constitutes an abuse of discretion and requires the reversal of the judgment.

## CONCLUSION

Summary judgment should not have been granted in this case. Ms. Wallingsford timely filed her charge of discrimination within 180 days of the last alleged act of discrimination. Further, Ms. Wallingsford provided un rebutted evidence of a continuing pattern of gender discrimination and hostile work environment through the date of her constructive discharge. Ms. Wallingsford's constructive discharge on August 29, 2004 is in itself an act of discrimination by the City. The trial court also erred by failing to order the City to conform its pleadings to the requirements of Rule 74.04 and by denying Ms. Wallingsford's Motion for Leave To File Supplemental Affidavit. For all of these reasons, the Order and Judgment of the trial court granting summary judgment in favor of the City should be reversed.

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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 9,244 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Word 2003. The undersigned counsel further certifies that the accompanying compact disk has been scanned and was found to be virus free pursuant to Rule 84.06(g).

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I certify that two hard copies of this brief and one copy of the brief on a compact disk filed pursuant to Rule 84.06 were served on counsel identified below via U.S. Mail, postage prepaid, on March 25, 2009:

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# APPENDIX

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