

**IN THE
SUPREME COURT OF MISSOURI**

Supreme Court No. SC92793

Eastern District Appeal No. ED96532

MADONNA FARROW

Plaintiff / Appellant,

v.

SAINT FRANCIS MEDICAL CENTER and CEDRIC C. STRANGE

Defendants / Respondents.

**On Transfer from the Missouri Court of Appeals
For the
Eastern District of Missouri**

APPELLANT'S SUBSTITUTE REPLY BRIEF

RIEZMAN BERGER, P.C.

**Charles S. Kramer, #34416
Joseph D. Schneider, #57484
7700 Bonhomme Avenue, 7th Floor
St. Louis, MO 63105
(314) 727-0101
(314) 727-6458 (fax)**

ATTORNEYS FOR APPELLANT

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ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT I OF HER AMENDED PETITION ALLEGING EMPLOYMENT DISCRIMINATION IN VIOLATION OF THE MISSOURI HUMAN RIGHTS ACT.

A. Appellant Satisfied the Prerequisites for Filing a Lawsuit under the MHRA, and the Webb Holding Mandates Removing Any Judicial Bar

Respondents' arguments in Point's I-A and I-B of their Responsive Brief do not address, let alone refute, the point raised by Farrow in her brief that a timely filing with the MHCR is no longer a prerequisite to judicial action in light of JCW ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009) ("Webb") and its progeny. As previously noted, this is the case because the statutory framework's only prerequisite is that a filing with the MCHR be made, that the MCHR issue a right to sue letter, and that suit be filed within a certain time period from that issuance. The timeliness of the filing with the agency is a question to be brought to the agency and if the agency determines the filing to be untimely (or a finding of timeliness is reversed on appeal) then no right to sue letter can issue. This would stop a later judicial action. However, the question of timeliness before the agency is not a prerequisite to the filing of the later judicial action – only the issuance of a right to sue letter is required. Thus a "late filing" to the agency is not a defense to a state court action if the agency takes the matter and proceeds to issue the right to sue letter anyway. Further, even if the matter were one which was relevant to the

state court action, it could not be properly raised in court later, if it had not been raised before the agency.

In an attempt to avoid the end result, Respondents cling to the pre-Webb case law that allowed matters pertaining to agency jurisdiction and procedure to be raised in the later civil action because such matters were seen as prerequisites to the courts having jurisdiction at the outset. Because Webb recognized that this “jurisdictional exception” no longer applied to statutorily created preconditions to relief, Respondents only hope is to find some argument that the exception still applies despite the lack of its jurisdictional underpinning. In an attempt to do so, Respondents cite to a footnote in a Court of Appeals case, Alhalabi v Mo. Dept of Natural Resources, in which that court admitted the body of its opinion spoke in terms of jurisdictional barriers, and that the issuance of Webb made that analysis wrong, but claimed that Webb was merely a change in language and that “the end result is the same” in that case. 300 S.W.3d 518, 524 (Mo. Ct. App. 2009). However, a review of the timing of the issuance of the Alhalabi opinion as compared to that of Webb reveals that the Court of Appeals had decided Alhalabi based on pre-Webb law. Upon learning of the Webb opinion the Court merely added a footnote recognizing the Webb opinion but not rewriting its own. This approach appears to reflect a lack of true analysis as to the effect of Webb, presumably because the Court did not see an effect on the particular case before it. However, although Respondents ignore the plethora of other opinions analyzing and applying Webb in all contexts, the other courts that have now applied its analysis have universally noted that the distinction recognized in Webb is **not** merely one of nomenclature, but rather is one with real consequences.

First, as discussed in Farrow’s initial brief, in light of Webb and its progeny, a previously constructed “JUDICIAL” prerequisite to legislatively created relief no longer survives. Webb at 244-245. In the discrimination context, the statute only requires a filing with the MCHR and the issuance by that agency of a right to sue letter. The ability to look back at whether the filing with the agency was TIMELY and to use an argument of untimely agency filing as a defense to a judicial action was a JUDICIALY established barrier not found in the statutory language. The statute does not require a timely filing with the agency before a case can be brought – just a right to sue letter. Secondly, as also discussed in Farrow’s initial brief, if any such requirement were found to exist, because the requirement would not be jurisdictional the issue would have to be raised at the first available instance – before the agency – and would not be able to be raised “at any time” (i.e. it would not be able to be raised in a later judicial action). The question of whether a complaint to the MHRC is timely filed with that agency is a matter for agency determination, subject to appeal through the Missouri Administrative Procedure Act. See App. Brief, pg. 27-28. Respondents did not follow this tact, and are precluded from raising the matters as defenses in the Court case.

Similarly, in Point I-C of their responsive brief, Respondents’ contention that there is no Missouri statute or caselaw which holds that Respondents are precluded from raising their agency defenses later, in court, is simply wrong. The cases cited by Respondents are all from pre-Webb case law and were premised on the erroneous belief that the defenses went to judicial jurisdiction. Further, although there are not yet cases in the employment setting that recite the longstanding general principal that arguments

relating to an agency's power or procedures which do not affect a court's later jurisdiction are waived if not raised to the agency, this is simply because agency matters were previously thought to be tied to the later court's jurisdiction. In light of Webb's recognition that this belief was error, the general agency law requirement that matters be raised before the agency or they are waived, a point made in Appellants' initial brief, now apply. See App. Brief. Pg. 29-30.

In this case, Respondents acknowledge they did not raise the question of timeliness of the agency charge before the agency. Respondents claim they could not do because there was no MCHR investigation or process conducted and because the MCHR's work was done for them by the EEOC. However, the actions of the EEOC were the actions of the MCHR. The legal import of the dual investigation agreement between the agencies is that the investigation is taken by and on behalf of both agencies if the dual submission box is checked, as it was in this case. L.F. 42-44; See §213.030(12); §213.075. Respondent's continued arguments that there was no MCHR investigation, and that there was no MCHR processing or decision is disingenuous and ignores the real world mutually agreed responsibilities of the EEOC and the MHRC whereby the entity that receives the complaint investigates on behalf of both entities. Respondents would have the Court believe that a right to sue letter is automatic, and that there is no finding or decision made by the MCHR. This stance is contrary to law and fact.

Farrow also noted in her initial brief that Respondents neither appealed administratively nor sought a writ with respect to the agency's exercise and finding of jurisdiction. After the MCHR issued its right to sue letter, thus implicitly finding a

timely filing and jurisdiction, Respondents did not attempt to appeal that ruling. Respondents do not challenge these facts. In fact, their only argument as to why they shouldn't be barred now for not having raised the issue with the MCHR, and then by not appealing the finding of a timely filing, is that the right to sue letter was not a ruling by the MCHR subject to appeal. Once again, however, this is simply wrong. Applicable regulations clearly indicate that the issuance of a right to sue letter is a form of determination by the agency, which is subject to appeal. See 8 C.S.R. 60-2.025(7)(B).

Finally, Appellant has also noted in her initial Brief that Respondents did not even have to wait until the Right to Sue letter was issued, as they could also have taken a writ of prohibition if they believed the agency filing was untimely – but again chose not to do so. In response to this point, Respondents spend several pages arguing that they could not seek a writ of prohibition AFTER the MCHR issued its right to sue letter. They are obviously correct about that – that's when a standard appeal would come into play. However, Appellant never argued otherwise. Appellant's point is that there exists a mechanism to challenge the timeliness of the agency filing prior to the issuance of the right to sue letter - via writ - but Defendants did not do this either.

B. Respondents are “Employers” Under the MHRA

St. Francis and Strange additionally claim that Farrow's claim of discrimination against them fails because they are not employers under the MHRA, relying on the exclusion from the definition of employer for religious/sectarian groups contained in Section 213.010(7). However, that exclusion is implemented by regulation and St. Francis does not meet the requirements of the exclusion. 8 C.S.R. 60-3.010(9). To avoid

this conclusion, Respondents claim the regulations' requirements are not properly considered because there is no prior court opinion applying the regulation. This is an unsupportable argument. Regulations are valid and enforceable until and unless held otherwise. They do not need any "validating" case to render them effective. Mo. Rev. Stat. §536.021.

St. Francis and Strange also rely principally on dicta in St. Louis Christian Home v. Mo. Comm'n on Human Rights, 634 S.W.2d 508 (Mo. Ct. App. 1982), a case involving claims and facts which accrued PRIOR to the regulation at issue being in force. The Christian Home Court recognized the regulation was not before it and did not apply, but gave its advisory thoughts as to whether or not the regulation would be valid – and in so doing erred. This dicta and the problems with it are addressed by Farrow in footnote 4 of her Substitute Brief and Respondents' do not in any manner refute the points made in that footnote. See App. Brief, pg. 32-33. The regulation is valid and applicable.

Additionally, the evidence in that case was totally different. In St. Louis Christian Home, there was evidence that the it was owned, operated, and supervised daily by a religious organization, and in addition, the annual budget was approved by the organization, the Homes' funds were invested and disbursed by the organization, and the organization determined policy and procedure for the funds, the nature and quality of treatment and care services, admissions standards, and accounting functions for the Home. St. Louis Christian Home, 634 S.W.2d at 511. The case does not support Respondents argument.

Respondents next seek to rely on old MHRC letters finding “no agency jurisdiction” in prior proceedings involving St. Francis. L.F. 52-56. Reliance upon letters issued by the MCHR were not and are not precedential on the issues that were before the trial court and are not binding on Farrow as she was not a party to those proceedings. Resp. Br. pg. 5. Those letters concern facts, circumstances, evidence and parties that were not before the trial court, and contain determinations from other contexts and are of no value. Since the exclusion of organizations from being an employer requires a finding of how and by whom they are “owned and operated,” any finding is limited to the time at which the inquiry is made, and is not conclusive with respect to later circumstances. By asserting those letters from other proceedings, Respondents conveniently forget the MHRC also issued a ruling *in this case* with respect to the claims actually here in issue and that, in THIS circumstance, the agency did NOT issue a finding that the exemption applied. Rather the MHRC issued a right to sue letter, which is an alternative finding that precludes the other. It is a holding by the agency that it has jurisdiction and the exemption does not apply. The right to sue letter issued by MCHR is a ruling, which expressly found that jurisdiction existed as it was not dismissed for lack of jurisdiction or challenged by the Respondents for lack of jurisdiction. 8 C.S.R. 60-2.025. The Agency decision of jurisdiction was to be appealed via the Administrative Procedure Act, if at all, which it was not, but instead collaterally attacked while defending a later discrimination suit. See Mo. Rev. Stat. §213.085; 8 C.S.R. 60-2.025(7)(E). Section 213.085, and the applicable regulation, 8 C.S.R. 60-2.025(7)(B)(3), further confirm this, as they provide that the agency determines its own jurisdiction. Id.

St. Francis additionally cites to its Articles of Incorporation, By-Laws and its tax exempt status as a not-for-profit corporation in support of its claims that it meets the exclusionary language of the statute despite not meeting the regulation. Even ignoring the regulation, however, a question of fact would remain on whether this exclusion would apply because St. Francis' own By-Laws state it is "operated" by its President and Chief Executive Officer, not any religious group. L.F. 101. Further, how corporate documents say an organization should be run, is not proof of how it is actually operated. The determination of the tax exempt status is also irrelevant, as it is under other regulations, in a separate context, concerning evidence not here before the trial court.

Finally, Respondents assert Farrow's claims against Strange would also fail if St Francis were to be exempt from being an employer. However, even if the exclusion applied to St Francis, the policy for allowing a religious group to discriminate in employment matters against persons not of their faith or orientation would not extend to persons who do so for their other, sectarian, personal reasons, even while acting in the interest of the employer. Although the question of whether a corporate entity that is not directly a charitable or religious organization should be considered an employer is a matter of first impression to the Court, logic would not extend any exemption to Strange. See Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 244 (Mo. Ct. App. 2006). Further, St. Francis is an employer "except for" the exception to the rule, and thus individual liability can exist. *Id.*

For all the reasons set forth above, as well as the factual reasons set forth in Point VI below establishing that questions of material fact exists and equitable principles apply,

the trial court erred in granting summary judgment in favor of St. Francis and Strange on Count I of Farrow's Amended Petition and the ruling should be overturned and the matter remanded.

POINT II

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT II OF HER AMENDED PETITION ALLEGING UNLAWFUL RETALIATION IN VIOLATION OF THE MISSOURI HUMAN RIGHTS ACT.

The Respondents raise the same arguments with respect to Count II of Farrow's Amended Petition as those raised with respect to Count I. For the reasons set forth in pages 1 through 9 above, Respondents arguments also fail with respect to the trial court's ruling on Count II. The ruling of the trial court with respect to Count II should also be overturned and the matter remanded for trial.

POINT III

III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT III OF HER AMENDED PETITION ALLEGING RETALIATORY DISCHARGE IN VIOLATION OF THE MISSOURI HUMAN RIGHTS ACT.

Again with respect to the trial court's ruling on Count III of Farrow's Amended Petition, each of the Respondents' arguments are duplicative of points made with respect

to prior arguments, and thus for the reasons set forth in pages 1 through 9 above, Respondents arguments also fail with respect to the trial court's ruling on Count III.

However, it is also important to note that Respondents ignore the holding of Keeney v. Hereford Concrete Prods., inasmuch as that case specifically held that discrimination can occur post termination. 911 S.W.2d 622, 625 (Mo. 1995). Moreover, the continuing violations doctrine applies to acts of harassment, discrimination and retaliation through the grievance process. See Wallingsford v. City of Maplewood, 287 S.W.3d 682, 685 (Mo. banc 2009). While it is convenient to pick the date that a claimant is discharged to state that it is the "final" act of discrimination, such a maxim is inappropriate for every circumstance. Thus, Respondents arguments fail with respect to the trial court's ruling on Count III. Accordingly, for the reasons set out above, as well as for all the reasons previously discussed, the Respondents' arguments do not change the result. The trial court is properly overturned and this Count is also properly remanded for trial.

COUNT IV

IV. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF RESPONDENTS ON FARROW'S PUBLIC POLICY EXCEPTION WRONGFUL DISCHARGE CLAIM.

In attempting to support the trial court's rejection of Farrow's wrongful termination claim, St. Francis relies heavily on Margiotta v. Christian Hospital Northeast Northwest, 315 S.W. 3d 342 (Mo. banc 2010), asserting the claim wasn't plead with

required particularity. St. Francis' argument requires, however, the court to ignore the statutes and regulations which were pled, and which were neither vague nor general. (L.F. 27-31, 310), and the fact that the only facts of record on the issue support the claim.

Respondents claim the court fails due to a failure to reference Section 335.017 by name. However, the Nursing Practices Act was specifically alleged in the Amended Petition. (L.F. 27-31) The entire statutory scheme, referenced as Section 335.011 et seq., was discussed in the responsive briefs at summary judgment (L.F. 310) and in fact the law governing injection of intravenous fluids was implicated as noted. Id. Section 335.017 is a part of that statutory scheme and encompassed by that reference. More importantly, to the extent the omission of Section 335.017 in the Amended Petition was a "flaw," Farrow requested, alternatively, for leave to further amend and demonstrated the facts to support such an amendment. Missouri Court Rules 55.33(a) and 67.06 each mandated leave to amend be granted, not dismissal. Mo. R. Civ. P. 55.33(a); Mo. R. Civ. P. 67.06.

St. Francis also asserts, for the first time on appeal, that Farrow's termination was not contrary to public policy because §334.735, et seq., allow PICC procedures to be done by a physician assistant. That affirmative defense was not plead and was not before the trial court, and moreover is untrue. First, Section 335.017 states specifically that nurses are authorized to handle the PICC procedures, implying that no other assistant or staff may do so. Secondly, under §334.735, a physician assistant can only do enumerated activities, and the insertion of PICC lines is not included. St. Francis relies on the general

catchall provision of §334.735.3(9). However, that section specifies that the physician assistant cannot be delegated actions prohibited by law, (See Resp. App. 68-69) and moreover, it is subject to §334.735.4 which prohibits physician assistants from prescribing or dispensing any drug, medicine, device or therapy unless pursuant to a physician supervision agreement in accordance with the law. Mo. Rev. Stat. §334.735.4. A physician supervision agreement is defined in §334.735.7, and there is no evidence of record of any such agreement. There is at least a question of fact as to whether the use of physician assistants about which Farrow complained, and for which she was, in part, terminated, was permissible.

Moreover, the facts in Margiotta do not support the argument of the Respondents. In that case, the plaintiff pled a wrongful discharge claim and was claiming an exception to the at-will doctrine as a whistleblower, which is not the case here. 315 S.W.3d at 346-347. The plaintiff pointed to two vague policy provisions (one under federal law and one under Missouri law) as being at issue, and this Court found that the provisions at issue were not applicable to the case. Id. at 347-348. Here, Farrow has plead not only the areas of public policy that are certainly at issue and were violated, but also plead facts concerning her objection and refusal to go along with the practice of removing trained nurses from the insertion of PICC lines and allowing that untrained non-nurses insert and handle PICC insertion and removal. L.F. 28-30. Even the policies at issue proscribe the conduct complained of, even without resorting to the specific allegations which are and were violations of Section 335.017.

The lower court's judgment should be overturned and the matter remanded.

POINT V

V. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT IV OF HER AMENDED PETITION CONCERNING DISCRIMINATION BY AN EMPLOYER IN ITS INTERNAL POST-TERMINATION APPEAL PROCESS.

St. Francis and Strange argue that Count IV of Farrow's Amended Petition fails to state a valid claim. The MHRA makes it unlawful for an employer to discriminate against any individual with respect to ... **privileges of employment** because of such individual's race, color, religion, national origin, sex, ancestry, age or disability. Mo. Rev. Stat. §213.055. The statute further provides it shall be an unlawful discriminatory practice "to retaliate or discriminate in any manner" against a person because such person has opposed any practice prohibited by Chapter 213. Mo. Rev. Stat. §213.070(2). The internal appeal of Farrow's termination was a privilege of employment offered by St. Francis to its employees. As such, any discrimination or retaliation by St. Francis that occurred during the processing of Farrow's internal appeal is actionable under Missouri law. Neither Delaware State College v. Ricks, 449 U.S. 250 (1980) nor Gray v. Int'l Tel. and Tel. Corp., 428 F.Supp. 199 (E.D. Mo. 1997) apply to the facts of this case, as they do not involve claims where the discrimination and/or retaliation occurred during the post-termination grievance process.

Moreover, this Court has expressly held that an employee can base a claim of retaliation on actions taken by an employer after the employment relationship has been

severed. Keeney, 911 S.W.2d at 625 (Mo. 1995). Separate, and new, acts of discrimination occurred during the internal appeal process. Contrary to Respondents suggestion, Appellant does not seek to expand MHRA retaliation protections to claims based on denial of post-discharge grievances, but here, it was a continuation of the discrimination through the appeal process. Although separate acts of discrimination, each act was a continuation of the prior discrimination.

Respondents further argue that Farrow failed to exhaust her administrative remedies with respect to any such claim as she did not file a separate charge of discrimination relative to the appeal process, that the claim is not “like or reasonably related to” Farrow’s original claims, and that the charge includes an end date of December 10, 2008 with no reference to post-discharge retaliation/discrimination or using an internal appeal procedure. This argument fails in that Farrow’s claim is “like or reasonably related to” her original claims. Farrow asserts that during the appeal process, she continued to face retaliation for her complaints about the sexual harassment by Strange. (L.F. 19-20, 209-211) Many of the parties involved in the St. Francis appeal process were persons who were actively involved and/or aware of the complaints and concerns of Farrow about Strange, including but not limited to Linda Schlick, Teri Kreitzer and Steve Bjelich. L.F. 15-16, 18-19, 214-223. Additionally, Farrow has submitted evidence that she provided the information to the investigator who prepared the claim on her behalf, including all of information about the post-termination events. L.F. 20, 211-212. The charge of discrimination encompasses all of her claims stemming from

the initial sexual harassment by Strange, through and including the retaliation she experienced during the internal appeal process.

Respondents appear to argue that every detail of discrimination must be included in the administrative complaint. Resp. Brief., pg. 35. However, the statute itself only requires that the complaint “set forth the particulars thereof.” Section 213.075.1. Respondents rely upon several cases, but the facts contained therein are not supportive. By example, in Reed v. McDonald’s Corp., the plaintiff failed to mention that she no longer worked for the defendant or that there were intolerable working conditions causing her to quit, thus depriving the defendant of notice of any claim of constructive discharge. 363 S.W.3d 134, 143-144 (Mo. Ct. App. 2012). Here, the allegations of the post-discharge claim are not so far removed as to have deprived Respondents of notice of the allegations. Moreover, a liberal approach should be taken in interpreting claims of discrimination in the administrative complaint to further the remedial purposes of legislation that prohibits unlawful employment practices. Hill v. Ford Motor Co., 277 S.W.3d 659, 670 (Mo. banc 2009); Tart v. Hill Behan Lumber Co., 31 F.3d 668, 671 (8th Cir. Mo. 1994). The scope of the civil suit may be as broad as the scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination. Alhalabi, 300 S.W.3d at 525. There was a course of conduct by Respondents that culminated with her improper discharge and the delay and discrimination in her attempts to follow the internal appeal procedure.

Notably, this claim is not a result of the failure to obtain the result Appellant sought by undertaking the internal appeal process, contrary to the suggestion of

Respondents. A fair internal review would have resulted in a different outcome, and where the review is biased and stacked against a complainant, without consideration of the facts and refusing to investigate or interview witnesses, the process is improper. To take Respondents argument to its conclusion, there can be no act of discrimination in the appeal process, making the discharge date the final date, regardless of further discrimination, harassment or delays. Such an argument is not supported by Missouri law.

Respondents re-assert their arguments that they are not employers under MHRA as well. As discussed in Point I, *supra*, these arguments fail in that St. Francis does not qualify for the exclusion, or at least a question of fact exists on the issue. Additionally, such an exclusion is inapplicable to Strange. To the extent that the motion by Respondents was a motion to dismiss, Farrow adequately plead a claim under the MHRA for discrimination and/or retaliation she experienced in the internal appeal. It was improper for the trial court to grant summary judgment in their favor on Farrow's Count IV. The ruling of the trial court with respect to Count IV should be overturned.

POINT VI

VI. ASSUMING ARGUENDO THE SUFFICIENCY OF FARROW'S PRESENTATION OF HER CLAIM TO THE MCHR WERE A MATTER FOR THE COURT TO GENERALLY CONSIDER, QUESTIONS OF MATERIAL FACT WOULD HAVE STILL EXISTED AS TO WHETHER FARROW'S FILING WITH THE AGENCY WAS TIMELY AND/OR WHETHER RESPONDENTS WERE ESTOPPED FROM RAISING, HAD WAIVED ANY

RIGHT TO WAIVE, OR WERE OTHERWISE EQUITABLY PRECLUDED FROM RAISING ANY INFIRMITY THAT MIGHT EXIST.

Respondents admit that the MHRA 180-day time limitation is subject to equitable exceptions, but then cite to a 2003 case from the Western District to support their position that, if, despite Webb and its progeny, this Court were to consider the timeliness of the filing before the MHRC, the continuing violations doctrine would not have made Counts I, II and III timely before the agency. Hammond v. Municipal Correction Institute, 117 S.W.3d 130 (Mo. Ct. App. 2003). However, in Wallingsford v. City of Maplewood, 287 S.W.3d 682, 685 (Mo. banc 2009), the Supreme Court confirmed that the filing requirements are subject to the continuing violation exception, which permits a plaintiff to recover for acts of discrimination occurring prior to the 180-day filing period if the discrimination is a series of interrelated events. As long as one of those events occurred during the 180 day period prior to the filing of the charge of discrimination, then the related events included in the charge beyond the 180 days are timely. Id. Farrow included information in her charge relative to a series of discriminatory and retaliatory events that she experienced while employed at St. Francis. The continued discrimination and retaliation that occurred with respect to the internal appeal was “like or reasonably related to” the claims stated in Farrow’s charge of discrimination. Farrow’s petition alleges facts in Counts I, II, III and IV which support a finding of timeliness due to a continuing violation, or at least demonstrate that there is a genuine dispute of material fact with respect to the timeliness of her claims. Farrow’s Complaint to the MCHR *was*

filed within 180 days of the last alleged discriminatory act alleged, i.e., Saint Francis' grievance process-related discriminatory/retaliatory actions which occurred after her termination. L.F. 19-21. It took St. Francis until January 9, 2009 to provide her with documents concerning the appeal process. L.F. 19, ¶ 69. St. Francis continued to discriminate against Farrow during the internal appeal process, including repeat delays, failing to interview witnesses, failing to seek information from Farrow, and not applying their own "progressive discipline" policy. LF 19-20; 26-27; 209-210; see also App. Brief, pg. 53-54. The Amended Petition (and MCHR filing) were timely on their face, and in any event, both were timely under equitable extension principles and as a result of the intentional acts to cause Farrow delay in approaching the agency.

Respondents argue that the denial of her grievance is a "discrete allegedly retaliatory act" without support in the record to challenge the allegations and affidavit of the Appellant. Respondents also conveniently ignore the holding of Keeney, inasmuch as that case specifically held that discrimination can occur post termination. 911 S.W.2d 622, 625 (Mo. 1995).

The facts in the record do not support Respondents argument that they did not actively attempt to obstruct and hinder the ability of Farrow to obtain relief. Respondents took nearly three months to issue a determination. The actions consisted of discrete acts all intended, individually and collectively, to obstruct the ability of Farrow to obtain relief.

Further, in light of the holding in Webb, any claims by St. Francis and Strange disputing the timeliness of Farrow's complaint should have been raised before the

MCHR, and since no such defenses were raised, they are now waived. Under these circumstances, the ruling for summary judgment in favor of St. Francis and Strange on Counts I, II, III and IV is in error and should be overturned.

POINT VII

VII. THE MISSOURI PUBLIC POLICY OF ENCOURAGING RESORT TO INTERNAL APPEAL PROCEDURES BEFORE TURNING TO STATE AGENCIES OR COURTS MILITATES IN FAVOR OF A RULE OF LAW TOLLING THE TIME PERIOD FOR REPORTING DISCRIMINATION TO THE MCHR UNTIL AFTER ANY EMPLOYER-PROVIDED INTERNAL APPEAL PROCEDURE IS COMPLETE.

In her brief, Farrow requested that, if for any reason this Court were to find the timeliness of the agency filing to still be a matter for judicial inquiry, were to find Farrow's resort to the agency to have been late with respect to any of her claims, were to find the continuing violation doctrine to not apply, and were to find that current law provides that resorting to an internal appeal of a discriminatory/retaliatory discrimination does not toll the time period in which resort to the MHRC must be initiated, the Court reconsider the tolling question in light of Webb's dictate that the timing is not jurisdictional. In response, Respondents cite pre-Webb case law that denies tolling during grievance and appeal procedures and argue that Farrow does not explain why the Court should revisit the prior law as a result of the decision in Webb. See e.g., St. Louis-San Francisco Ry. Co. v. Mayor's Commn. on Human Rights, 572 S.W.2d 492, 493 (Mo.

Ct. App. 1978). However, Farrow does explain why Webb has changed the landscape and why internal appeal should toll the time period on pages 55-57 of her Substitute Brief. Policy considerations generally cannot sway a jurisdictional bulwark. However, now that the Courts recognize that these time frames are not jurisdictional due to Webb, it is time to revisit the inconsistent policy of requiring the MHRC to begin using its scarce time and resources before knowing if a company will right its own errors through internal appeal.

The factual underpinnings to support such a change are exemplified by the conduct of the Respondents in continually delaying a determination from the internal appeal.

POINT VIII

VIII. THE TRIAL COURT ERRED IN GRANTING MOTION FOR JUDGMENT IN FAVOR OF STRANGE ON FARROW'S DEFAMATION CLAIM.

As noted in Farrow's initial brief, the limitations period for defamation runs from the date of last damage incurred. See Mo. Rev. Stat. §516.100. Respondent Strange does not refute this point, but rather attempts to simply ignore Farrow's claims for damages that she suffered during the two years prior to when her suit was filed, all of which were properly plead. (L.F. 31-33) Further, as discussed supra, under the Missouri Court Rules, even if the trial court deemed Farrow's pleadings to be somehow insufficient, Farrow should have been allowed to amend. The judgment of the trial court should be overturned and the matter remanded.

POINT IX

IX. THE TRIAL COURT ERRED IN GRANTING STRANGE’S MOTION FOR SUMMARY JUDGMENT ON FARROW’S FALSE LIGHT INVASION OF PRIVACY CLAIM.

Respondent Strange’s “defense” to Farrow’s false light claim is that the facts Farrow relies upon are the same facts supporting her defamation action. This “defense” ignores the allegations of **conduct** by Strange, in addition to his false statements. See App. Brief, pg. 59-60. Farrow plead that Strange persisted in taking **actions** that put her in a false light, despite her best efforts to remove herself from the situation, and such acts were highly offensive. L.F. 33-34. Furthermore, however, even if only the same facts were involved, the ruling would still be properly reversed. The same facts can establish two different causes of action designed to protect two disparate types of rights and interests. State ex rel. Burns v. Whittington, 219 S.W.3d 224, 225 (Mo. banc 2007).

Strange further argues Farrow’s false light claims are time barred because the two year statute of limitations governing defamation claims applies. However, Missouri has a five year statute of limitations for claims that are not otherwise specified – including claims of false light invasion of privacy. Mo. Rev. Stat. 516.120(4). Further, even a defamation limitation period would run from last date of damage and the claim would be timely. See Mo. Rev. Stat. §516.100. Finally, Strange disputed this count of Farrow’s Amended Petition by submission of a motion to dismiss. Farrow requested leave to

amend her petition in the event that the trial court deemed the claim in Count VII to be insufficient. The judgment is properly reversed and the matter remanded.

POINT X

X. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF STRANGE ON FARROW'S TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY CLAIM.

Strange initially asserts that Farrow fails to state a claim for tortious interference because he was an agent of St Francis and not a true third party. However, the record reveals Farrow brought her claims against Strange in his individual capacity and alleged his actions of interference were for his own purposes and not in the course of his agency. L.F. 7-8, 34-35. Thus his actions were taken in his individual capacity. Recognizing this dooms his argument, Strange claims, for the first time, that Farrow's claim fails because she did not designate what conduct Strange took as an individual, on his own behalf, rather than as an agent of the hospital. This pleading issue needed to be addressed in the Court below and any such argument is waived. *See State ex rel. Nixon v. Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 129 (Mo. banc 2001). However, even if considered, the argument fails. Farrow asserted in her petition that Strange retaliated against her for declining his sexual advances and reporting him for that wrongdoing - clearly personally motivated actions. (L.F. 10-13, 17) Further, such an argument is one for a more definite statement, and amendment should be allowed if the Court believes it is not already

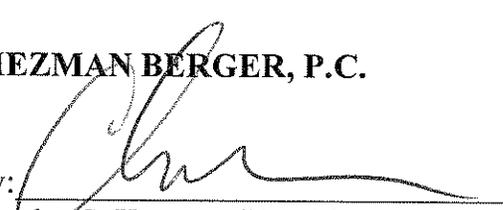
clearly articulated. The trial court's ruling on Count VIII should be overturned and the matter remanded.

CONCLUSION

For the reasons set forth above, this Court should reverse the Trial Court's Order, Judgment and Decree granting summary judgment on all counts in favor of Respondents Saint Francis and Strange, remand the instant matter back to the Trial Court for the same to proceed or, in the alternative, with direction to the Trial Court to allow Farrow to amend her Petition, and grant such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED,

RIEZMAN BERGER, P.C.

By: 

Charles S. Kramer, #34416
Joseph D. Schneider, #57484
7700 Bonhomme Avenue, 7th Floor
St. Louis, MO 63105
(314) 727-0101
(314) 727-6458 (fax)

ATTORNEYS FOR FARROW

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Rule 84.06 of the Missouri Rules of Civil Procedure, and that based on a word and line count under Microsoft Office Word 2007, this brief, including all footnotes, contains 6,431 words and 586 lines.

I also certify that the copy provided to the Court via electronic mail was scanned for viruses and was found to be virus free.

RIEZMAN BERGER, P.C.

By: 
Charles S. Kramer, 34416
Joseph D. Schneider, #57484
7700 Bonhomme Avenue, 7th Floor
St. Louis, MO 63105
(314) 727-0101
(314) 727-6458 (fax)

ATTORNEYS FOR FARROW

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via electronic mail pursuant to applicable court rules, on this 19th day of December, 2012, addressed to:

Thomas O. McCarthy, Esq.
McMahon Berger, P.C.
2730 N. Ballas Road, Suite 200
St. Louis, MO 63131

