

IN THE SUPREME COURT OF MISSOURI

ELLEN WALLINGSFORD)	
)	Supreme Court No. SC 89862
Appellant,)	
)	Court of Appeals No. ED90952
v.)	Court of Appeals, Eastern District
)	
CITY OF MAPLEWOOD)	Circuit Court No. 06CC-1286
)	Circuit Court for St. Louis County
Respondent.)	

SUBSTITUTE BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This action is an appeal by Ellen Wallingsford (“Wallingsford”) from a January 28, 2008 final judgment of the St. Louis County Circuit Court, Twenty First Judicial Circuit, granting summary judgment in favor of the City of Maplewood (“Maplewood”) on Wallingsford’s claims of employment discrimination pursuant to the Missouri Human Rights Act (“MHRA”), Mo. Rev. Stat. § 213.010 *et seq.*, and hence involves the interpretation of a law of this state.

STATEMENT OF FACTS

A. Procedural Posture

Wallingsford filed a five count Petition against Maplewood in which Wallingsford asserted claims under the MHRA including gender discrimination, hostile work environment and retaliation. *See*, Legal File at 8 (hereinafter cited as “L.F. #”). On May 9, 2006, Maplewood filed a Motion to Dismiss Wallingsford’s Petition and Memorandum in Support, asking the Circuit Court to dismiss Wallingsford’s MHRA claims on the grounds that they were untimely in that Wallingsford did not meet the applicable statutory time limitations provided by the MHRA. L.F. 23-46.¹ The parties submitted briefs and the matter was fully briefed on July 28, 2006 after Wallingsford submitted a sur-reply.

On March 29, 2007, the Circuit Court was ready to hear oral arguments on Maplewood’s Motion to Dismiss but before argument, Wallingsford requested that the Court treat Maplewood’s Motion as one for summary judgment because Maplewood had attached documents to its Motion that were not a part of Wallingsford’s Petition. L.F. 184. On June 13, 2007, the Circuit Court ordered that Maplewood’s Motion to Dismiss would be converted into a Motion for Summary Judgment. L.F. 6, 184. In addition, Wallingsford requested additional time to conduct discovery to respond to Maplewood’s Motion, a request the Circuit Court also granted on June 13, 2007. L.F. 184.

¹ Maplewood also moved to dismiss the remaining two counts in Wallingsford’s Petition which are not the subject of this appeal. L.F. 23.

Wallingsford was granted an additional 60 days to submit supporting documents and Maplewood was to file its final reply 60 days thereafter. L.F. 6.

On August 27, 2007, Wallingsford filed Suggestions in Opposition to Maplewood's Motion to Dismiss [converted to a] Motion for Summary Judgment, a Statement of Uncontroverted Material Facts, Exhibits in Support of her Suggestions in Opposition, and her own Affidavit. L.F. 91, 97, 155, 159. Wallingsford's filings, although not required to be, were submitted in conformity with Rule 74.04, the Missouri rule of civil procedure relating to summary judgment. *Id* at 155. On November 15, 2007, Maplewood filed a Reply Memorandum in Support of its Motion to Dismiss Converted to a Motion for Summary Judgment. L.F. 162. The Circuit Court heard oral arguments of the parties on January 4, 2008. L.F. 184. On January 28, 2008, the Circuit Court granted Maplewood's Motion dismissing Wallingsford's action in its entirety, with prejudice, denied Wallingsford's Motion to Strike Maplewood's Motion to Dismiss, and denied Wallingsford's Motion for Leave to File a Supplemental Affidavit. L.F. 183-188, 189. This appeal ensued.

B. Pertinent Facts

Wallingsford was employed as a police officer by the City of Maplewood from August 26, 1986 though August 29, 2004.² L.F. 11. During her employment, on

² Wallingsford has used both August 29, 2004 and August 30, 2004 as the last day of her employment. Wallingsford uses August 29, 2004 in her appeal, and thus for clarity, Maplewood will also use August 29, 2004 as the last day of Wallingsford's employment.

December 18, 2002, Wallingsford was suspended. L.F. 12. She believed her suspension was the product of gender discrimination by Maplewood. L.F. 112.

Years later, in 2004, Wallingsford was the subject of an Internal Affairs investigation relating to damage cause to a police vehicle. L.F. 150. During the investigation, Wallingsford was interviewed and took a lie detector test. L.F. 150. The investigation revealed that Wallingsford, while responding to a non-emergency call, operated a police vehicle in a reckless manner by passing another vehicle on the right, striking and running over a concrete island. L.F. 150. The investigation also revealed that Wallingsford was deceptive before and during the investigation and that she lied in written form when questioned about the incident and lied during her polygraph examination. L.F. 150. The internal investigation concluded on June 25, 2004. L.F. 150-151. As a result of the investigation, Maplewood informed Wallingsford and her counsel that it was inevitable that she would be discharged. L.F. 45. The day after she was so informed, she sent a letter to Maplewood reiterating her continued assertion that Maplewood was discriminating against her, and stating that the internal investigation and inevitable discharge were pretext for and actual discrimination. L.F. 46.

Wallingsford attempted to negotiate the end of her employment with Maplewood but the parties never came to resolution. L.F. 45-46. Knowing that her discharge was inevitable, Wallingsford decided to resign on August 16, 2004. L.F. 137. When she resigned, she gave Maplewood two weeks notice and stated that her resignation would not be effective until August 29, 2004. L.F. 137.

Wallingsford waited to file a charge of discrimination until January 20, 2005. L.F. 42-44. Her charge of discrimination did not allege any discrete act of discrimination occurring during the Missouri Human Rights Act's 180-day filing period. The Missouri Commission on Human Rights issued Wallingsford a Right to Sue on January 9, 2006. L.F. 21. On March 29, 2006, Wallingsford filed a lawsuit in the Circuit Court of St. Louis County based on the MHRA. L.F. 8. In her pleading and in all documents submitted to the Circuit Court, Wallingsford alleged she was subjected only to the following discrete acts of discrimination by Maplewood: (1) being suspended on December 18, 2002; (2) being subjected to an internal investigation regarding her driving and subsequent dishonesty, which investigation was completed by June 25, 2004; (3) being required to submit to a lie detector test related to that investigation, which test was completed prior to June 25, 2004; and being subjected to repeated harassing interviews surrounding a flat tire that occurred while she was driving a police vehicle, which was the subject of the above internal investigation that was completed by June 25, 2004. L.F. 184-185.

POINTS RELIED ON

- I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO MAPLEWOOD, BECAUSE THE COURT LACKED JURISDICTION DUE TO HER FAILURE TO FILE A TIMELY ADMINISTRATIVE CHARGE

- II. THE CIRCUIT COURT DID NOT ERR IN DENYING WALLINGSFORD'S MOTION TO STRIKE BECAUSE MAPLEWOOD WAS NOT REQUIRED TO CONFORM ITS MOTION TO RULE 74.04 AND BECAUSE WALLINGSFORD WAS FULLY APPRISED OF THE BASIS UPON WHICH MAPLEWOOD MOVED FOR DISMISSAL OR SUMMARY JUDGMENT

- III. THE CIRCUIT COURT DID NOT ERR IN DENYING WALLINGSFORD'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL AFFIDAVIT BECAUSE MAPLEWOOD DID NOT MAKE ANY NEW ARGUMENTS IN ITS REPLY MEMORANDUM

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO MAPLEWOOD, BECAUSE THE COURT LACKED JURISDICTION DUE TO HER FAILURE TO FILE A TIMELY ADMINISTRATIVE CHARGE.

The standard of review on appeal of a grant of summary judgment is essentially *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993) (*en banc*). Summary judgment is to be upheld on appeal if there is no genuine dispute of material fact, and the movant is entitled to judgment as a matter of law. *Id.* The grant of summary judgment should be upheld if there is any appropriate ground to support the order. *See Shores v. Express Lending Services, Inc.*, 998 S.W.2d 122, 125 (Mo. Ct. App. 1999). This Court should uphold the Circuit Court's grant of summary judgment in favor of Maplewood because there is no genuine issue of material fact and Maplewood is entitled to judgment as a matter of law.

A. None of Maplewood's Actions About Which Wallingsford Complains Occurred Within 180 Days of her Charge³

1. Each Alleged Act Occurred Outside the 180-Day Window

The MHRA requires that a plaintiff file a charge of discrimination within 180 days of the discriminatory act. *See* Mo. Rev. Stat § 213.075.1. Untimely filing is more than a

³ This subsection A responds to Appellant's Points I and II. The following subsection B responds to Appellant's Point III.

procedural issue; it is a jurisdictional issue. Failure to file a charge within 180 days of the last discriminatory act deprives the court of jurisdiction over the claim. See *Daffron v. McDonnell Douglas Corp.*, 874 S.W.2d 482 (Mo. Ct. App. 1994); *Southwestern Bell Tel. Co. v. Missouri Com'n on Human Rights*, 863 S.W.2d 682, 684 (Mo. Ct. App. 1993); *State ex rel. St. Louis County v. Com'n on Human Rights*, 693 S.W.2d 173 (Mo. Ct. App. 1985).

The Circuit Court properly dismissed Wallingsford's Petition because she failed to comply with the statute of limitations in the MHRA and file her charge within 180 days of the last alleged act of discrimination. One Hundred Eighty days prior to January 20, 2005, the day Wallingsford filed her charge, is July 24, 2004. Therefore, any acts of discrimination occurring prior to July 24, 2004 were time-barred. In order for the Circuit Court to have had jurisdiction over Wallingsford's MHRA claims, she must have alleged some discrete discriminatory act occurring after July 24, 2004. This she did not do. Despite numerous opportunities, Wallingsford never alleged that any discriminatory act occurred after July 24, 2004. In her affidavit (specifically drafted to address this argument) and First Amended Petition, Plaintiff alleges only the following specific discriminatory acts by Maplewood:

- She was suspended on **December 18, 2002** (L.F. 112);
- She was subjected to an internal investigation that was completed by **June 25, 2004**; (L.F. 150-151)
- She was required to submit to a lie detector test related to the investigation that was completed by **June 25, 2004** (L.F. 150-151); and

- She was subjected to repeated harassing interviews surrounding a flat tire that occurred while she was driving a police vehicle – the subject of the above internal investigation that was completed by **June 25, 2004** (L.F. 150-151).⁴

Not a single one of the acts alleged as discriminatory by Wallingsford occurred after July 24, 2004. Her suspension occurred in 2002 – years before the 180-day period. Every other act of which Wallingsford complains relates to her investigation, and Maplewood completed that investigation by June 25, 2004 – a month before the 180-day filing period. Thus, Wallingsford has not pointed to a discrete discriminatory act that occurred within the 180-day filing period, as required by the MHRA, and therefore, her claims are time-barred.

2. Because Each Act Occurred Outside the 180-day Window, the Continuing Violation Doctrine is Inapplicable

Wallingsford attempts to resurrect her untimely claim by using the “continuing violation” doctrine. But Wallingsford’s argument fails because even in the context of continuing discrimination, she still must point to some act of discrimination by Maplewood within the 180 days. Here, all of Maplewood’s actions about which she complained fell outside that 180-day window.

⁴ Wallingsford’s characterization of this internal investigation as one merely relating to a “flat tire” is misleading. The internal investigation related to Wallingsford’s reckless driving, her endangerment of civilians, and her lies about her actions. L.F. 150-151.

A synopsis of the “continuing violation” doctrine is as follows: Because of the strict 180-day statute of limitations, any act of discrimination occurring outside the 180-day period is considered “merely an unfortunate event in history which has no present legal consequences.” *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557 (1977). However, the requirements for timely filing are subject to the principles of waiver, estoppel and equitable tolling. *Pollock v. Wetterau Food Distrib. Group*, 11 S.W.3d 754, 763 (Mo. Ct. App. 1999) (citing *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 754 (3rd Cir.1995)). One such equitable exception is the continuing violation doctrine, under which a 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.* In *Pollock*, this Court states:

“A plaintiff must establish two things to take advantage of the continuing violation theory. *Id.* **First, she must demonstrate that at least one act occurred within the filing period.** *Id.* Further, she must establish that the harassment is a series of interrelated events, rather than isolated or sporadic acts of intentional discrimination.”

Pollock at 763 (quoting *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 755 (3rd Cir. 1995)) (emphasis added). Once the plaintiff has alleged sufficient facts to support the use of the continuing violation doctrine (i.e. alleged that at least one act occurred within the filing period), she may then offer evidence of the entire continuing violation including acts occurring outside the 180-day period. *Id.* See also *Thompson v. Western-Southern Life*, 82 S.W.2d 203, 207 (Mo. Ct. App. 2003).

Wallingsford argues, misleadingly, that under the continuing violation doctrine the victim of discrimination may pursue a claim for an act occurring prior to the statutory

period as long as she can demonstrate the act is part of an ongoing practice or pattern of discrimination by her employer. But the law is crystal clear on this point – “pattern or practice” is not the standard for use of the continuing violation theory. *Pollack* at 763. In order to avail herself of the theory, Wallingsford must have demonstrated that at least one act occurred within the filing period – an obstacle she did not overcome. *Id.* (“Plaintiff must also prove the violation continued into the limitation period.”) As explained above, all of the unlawful conduct about which Wallingsford complains occurred prior to the filing period – not within the filing period. Thus, the Circuit Court did not have jurisdiction over her MHRA claims and properly dismissed them.

Wallingsford next argues that she should not have to identify a specific and discrete discriminatory act taken by Maplewood within the 180-day filing period because “it is often impossible to isolate a single discriminatory act on the part of the employer” and because this Court has recognized harassment’s “cumulative affect” [sic] in that regard. *See*, Wallingsford appeal at 25. Wallingsford concludes that the Circuit Court’s insistence that she identify a discrete discriminatory act within the 180-day filing period is wrong as a matter of law. But if a plaintiff need not identify an act occurring within the 180-day filing period, the 180-day filing period becomes useless. Essentially, Wallingsford is asking this Court to overturn a well-established body of law and invalidate the MHRA’s statute of limitations – a request to which this Court should not pay credence. And aside from quoting *Pollack*, a case that completely contradicts her argument, Wallingsford does not point to any other point of law to support this absurd

contention.⁵

3. The Continuing Violation Doctrine is Also Inapplicable Because Constructive Discharge is a Discrete Act and Discrete Acts Cannot be Used to Invoke the Continuing Violation Doctrine

Wallingsford's alleged constructive discharge is a discrete act, and the continuing violation doctrine does not apply to discrete acts. *Young v. National Ctr. For Health Serv. Research*, 828 F.3d 235, 237-38 (4th Cir. 1987) (constructive discharge is a discrete discriminatory act); *High v. Univ. of Minn.*, 236 F.3d 909, 909 (8th Cir. 2000) (“the continuing violation doctrine has never been applied to a discrete act...”). The United States Supreme Court has made clear that the continuing violation does not save untimely claims of discrete acts. *See Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114, 122 S.Ct. 2061 (2002) (at most, discrete acts may only be used as evidence to support timely claims). Therefore, even assuming Wallingsford was constructively discharged, which she was not, she cannot use the constructive discharge to invoke the continuing violation doctrine.

⁵ Even though *Pollock* recognizes harassment can have a cumulative effect, it still requires that a plaintiff identify a discrete discriminatory act within the 180-day filing period. *Pollock* at 763 (“Plaintiff must also prove that the violation continued into the limitation period.”).

**B. Her Resignation Does Not Constitute an Act of Discrimination by
Maplewood**

Wallingsford's resignation, the sole act alleged within the 180-day filing period, is not an adverse employment action taken by Maplewood, and therefore, cannot resurrect Wallingsford's claims.

**1. Wallingsford's Resignation was her Voluntary Act, Not a
Constructive Discharge**

Wallingsford's resignation was her own decision – an act taken solely by her – not Maplewood. Indeed, if Wallingsford were permitted to rely solely upon the timing of an action she decided to take rather than the timing of Maplewood's actions, the statute of limitations under the MHRA would be meaningless. *See, e.g., Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986) (stating “[t]his theory of continuing violation has to be guardedly employed because within it are the seeds of the destruction of statutes of limitation in Title VII cases.”); *see also Bush v. Liberty Nat. Life Ins. Co.*, 12 F.Supp.2d 1251, 1260 (M.D. Ala. 1998) (holding “even if the court believed there was sufficient evidence to make out a claim of constructive discharge, it is doubtful that the court could allow this evidence to be used to relieve the plaintiffs of their obligation to comply with the 180-day filing period” as doing so “effectively wipes out the requirement of the filing period, which is an important prerequisite to a lawsuit that was required by Congress. Under these circumstances, the court could not allow the filing period to be destroyed.”). Because Wallingsford's resignation is not an unlawful act

taken by Maplewood during the filing period, the Circuit Court was correct in dismissing her claims as untimely.

2. Even Assuming Arguendo That Her Resignation was a Consequence of Alleged Discrimination, the Consequences of Alleged Discrimination Do Not Extend the Deadline

As explained above, this Court is tasked with identifying the precise unlawful employment practice upon which Wallingsford complains. Because she cannot point to any other unlawful employment practice occurring within the 180-day period, Wallingsford insists that her resignation, the consequence of the alleged discrimination, qualifies as Maplewood's unlawful practice. But the statute of limitations is not tolled merely because the consequences of the discrimination persist. *See, Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 979 (5th Cir. 1983) (“[Plaintiff]’s may not employ the continuing violation theory to resurrect claims about discrimination concluded in the past, even though its effects persist.”). Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. *Delaware State College v. Ricks*, 449 U.S. 250, 257, 101 St. Ct. 498 (1980); *see also United Air Lines, Inc. v. Evans*, 431 U.S. at 558. The proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.” *Ricks* at 257 (citing *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979). Indeed, at least one high court in another state agrees with this federal precedent. In 2006, the Michigan Supreme Court held that a constructive discharge that occurred after the alleged discriminatory acts does not extend the period of limitations for

discriminatory acts committed before the termination. *Joliet v. Pitoniak*, 475 Mich. 30, 32 (Mich. 2006).

Here, Wallingsford claims that her resignation was the culmination of a host of discriminatory acts, none of which occurred during the 180-day filing period. Essentially, she argues that her resignation “gives present effect to the past illegal act(s) and therefore perpetuates the consequences of forbidden discrimination.” *United Air Lines, Inc. v. Evans*, 431 U.S. at 558. That argument, however, is flawed and insufficient to sustain her claim. The emphasis is not upon the effects of earlier employment decisions; rather, it “is [upon] whether any present *violation* exists.” *Id.* (emphasis in original). Thus, Wallingsford’s resignation, a present effect of past alleged illegal acts, cannot qualify as an act occurring within the 180-day filing period, and the Circuit Court was correct in dismissing Wallingsford’s claims for lack of jurisdiction.

3. Wallingsford Learned of Her Inevitable Discharge No Later Than July 16, Which is When the Statute Began to Run

Even if this Court believes a jury could find that she was constructively discharged, and even if this Court believes the constructive discharge should be considered a discriminatory act by Maplewood, the constructive discharge still falls outside of the 180-day time period because the statute of limitations on that claim was triggered and began to run no later than July 16, 2004.

Missouri law dictates that the statute of limitations begins to run when the plaintiff ascertains she is aggrieved by some unlawful act by the defendant. *Hopmeier v. First Am. Title Ins. Co. of Mid-West*, 856 S.W.2d 387, 389 (Mo. Ct. App. 1993) (holding that a

cause of action accrues when a party could first maintain the action successfully); *Chicago Title Ins. Co. v. Jackson Brouillette, Pohl & Kirley, P.C.*, 930 S.W.2d 22, 24 (Mo. Ct. App. 1996) (holding that the triggering point for a statute of limitations is that some “damages have been sustained, so that the claimants know that they have a claim for some amount.”). Indeed, Missouri is not the only state that interprets the law in this fashion. As noted above, the Michigan Supreme Court ruled in *Pitoniak*, a constructive discharge case directly on point, the date the statute of limitations begins to run is the date of the wrongful act of the employer that causes the employee to resign, not the date when the employee actually resigns. See *Joliet v. Pitoniak* at 32 (explaining that constructive discharge, even when resulting from discriminatory acts of the employer, is the culmination of alleged wrongful actions, and the limitations period begins to run when the discriminatory acts occur, not when the employee quits in response).

Here, July 15, 2004 is the day Wallingsford became aware she would no longer have a job with Maplewood. L.F. 45. It was that day that counsel for Maplewood advised Wallingsford that as a result of the internal affairs investigation completed on June 25, 2004, it was inevitable that she would be discharged L.F. 45. Therefore, Wallingsford knew as of July 15, 2004 that she would no longer have a job, and thus, was aggrieved, triggering the statute. Indeed, she acknowledged that fact the very next day by sending a letter to Maplewood asserting her belief that the decision to terminate her employment was the product of discrimination, harassment and retaliation L.F. 46. As such, the statute of limitations on Wallingsford’s termination of employment began to run on July 15, 2004, or at the very latest, July 16, 2004. Her decision to resign a month later is

not the date upon which she first discovered Maplewood's decision to discharge her, and therefore, that August date is arbitrary and unavailing.⁶

The Eighth Circuit addressed this "trigger" issue in *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323 (8th Cir. 1995). In *Dring*, the plaintiff brought a claim for age discrimination stemming from his termination. *Id.* The plaintiff was advised he would be laid off in approximately nine months. *Id.* at 1326. Thereafter, approximately two months before his termination, the plaintiff was given a formal notice of termination. *Id.* The plaintiff claimed that the statute of limitations did not begin to run when he was first told about the anticipated layoff but the court disagreed and dismissed his claim on summary judgment holding that the statute of limitations was triggered when he was advised nine months earlier of the anticipated layoff, because it was at that point that he

⁶ Incidentally, Wallingsford's attempt to argue that her resignation was really a constructive discharge is disingenuous. No jury could find that Wallingsford was constructively discharged because Maplewood had already decided, as a result of the investigation, to terminate her employment. L.F. 150-151. In fact, Maplewood allowed her to negotiate the terms of her discharge. L.F. 45-46. Moreover, Wallingsford made the decision to resign on August 16, 2004 but gave Maplewood two weeks notice before her resignation was to become effective. L.F. 137. Indeed, there is no way a jury could find that her work conditions were intolerable under those circumstances.

first became aware he had been injured and could successfully maintain a lawsuit. *Id.* at 1328.⁷

Just as the plaintiff in *Dring* was informed that he was going to be laid off in approximately nine months, Wallingsford was told on July 15, 2004 that she would be discharged. Consequently, as in *Dring*, the statute of limitations was triggered on July 15, 2004, the day she became aware of her inevitable discharge. Accordingly, even if this Court believes a jury could find that Wallingsford was constructively discharged, and even if this Court believes her constructive discharge should qualify as a discriminatory act taken by Maplewood, Wallingsford's claim still fails because the statute of limitations was triggered no later than July 16, 2004, making her claims untimely.

⁷ To hold otherwise would create an unjust impediment to the parties that this doctrine was designed to protect. Many injuries are not discovered until months or even years later. To hold that the statute of limitations begins to run only on the date of the official act – and not when the injured party becomes aware of his or her injury – could unjustly preclude these parties from ever obtaining relief.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING WALLINGSFORD'S MOTION TO STRIKE BECAUSE MAPLEWOOD WAS NOT REQUIRED TO CONFORM ITS MOTION TO RULE 74.04 AND BECAUSE WALLINGSFORD WAS FULLY APPRISED OF THE BASIS UPON WHICH MAPLEWOOD MOVED FOR DISMISSAL OR SUMMARY JUDGMENT.

A. The Circuit Court Was Not Required To Order The Parties To Conform Their Briefs To Rule 74.04

Wallingsford's fourth point on appeal fails because the Circuit Court was not required to order the parties to conform their filings with the summary judgment rule. Indeed, to do so would have been to waste the parties' time and resources.

When a trial court acts under Rule 55.27(a), as the Circuit Court did here, it is not required to order the moving party to re-file the motion so that it complies with Rule 74.04, the summary judgment rule. *J.B. Allen, Inc. v. Pearson*, 31 S.W.3d 526, 528 (Mo. Ct. App. 2000). Nor is it required to order the opposing party to follow those requirements. *Id.* The only requirement placed on the court when treating a motion to dismiss as a motion for summary judgment is to notify the parties first that it is going to do so and give the parties an opportunity to present all materials pertinent to the motion for summary judgment. *Id.*

Here, the Circuit Court did all that it was required to do; it notified the parties that it was going to treat Maplewood's Motion to Dismiss as one for summary judgment and provided the parties an opportunity to present all pertinent materials. L.F. 6. The Circuit

Court considered ordering Maplewood to conform its Motion to Rule 74.04 but believed there was no need for Maplewood to repackage and resubmit its Motion to Dismiss because of the limited jurisdictional issues presented. L.F. 189. Thus, the Circuit Court did not abuse its discretion in denying the Motion because the denial was appropriate under the circumstances.

B. The Circuit Court’s Denial Of The Motion To Strike Did Not Prejudice Wallingsford

Wallingsford’s argument that she has been severely prejudiced by the Circuit Court’s denial of her Motion to Strike and refusal to order Maplewood to comply with the requirements of Rule 74.04 is nothing more than an attempt to put form over substance, and more importantly, is simply untrue.

Specifically, Wallingsford asserts that Maplewood, in its original Motion to Dismiss, raised only two issues, and never asserted until its reply memorandum that Wallingsford failed to identify any act on the part of Maplewood that occurred within the statute of limitations. This assertion is wrong. A synopsis of the briefs is as follows: Maplewood argued in its Motion to Dismiss that Wallingsford’s claims were time-barred because her administrative charge was not filed timely. The exact heading in Maplewood’s brief reads: “Counts I, II, and III are Time-Barred Because Plaintiff Failed to File A Charge Of Discrimination Regarding Counts I, II, and III Within 180 Days of the Alleged Discriminatory Act.” L.F. 25. The body of Maplewood’s brief contained an explanation of the statute of limitations under the MHRA and an analysis of how Wallingsford failed to comply with the statute. L.F. 25-26. Wallingsford’s Suggestions

in Opposition to Maplewood's Motion argued that the Counts in question were not time-barred because Wallingsford was entitled to use the continuing violation doctrine, and because Wallingsford's alleged constructive discharge occurred during the 180-day filing period and should qualify as the last act of discrimination under the MHRA. L.F. 93-95. Maplewood, in responding to Wallingsford's argument, countered that Wallingsford was not entitled to take advantage of the continuing violation doctrine, explained that her resignation could not serve as the last discriminatory act under MHRA, and reiterated that her claims were untimely because she did not identify any discriminatory act that occurred within the statute of limitations. L.F. 165-169.

As set forth above, Maplewood's reply brief did not include a brand new argument. Maplewood merely expanded upon its original argument and responded to, appropriately, and within the parameters of, the points that Wallingsford raised in her Suggestions in Opposition.

And, perhaps most importantly, even if Maplewood had asserted a brand new argument in its reply brief, which it did not do, forcing Maplewood to conform to a procedural rule, which is why Wallingsford filed the Motion to Strike, would not have cured that alleged defect. Thus, the Circuit Court did not abuse its discretion when it denied Wallingsford's Motion to Strike.

III. THE CIRCUIT COURT DID NOT ERR IN DENYING WALLINGSFORD'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL AFFIDAVIT BECAUSE MAPLEWOOD DID NOT MAKE NEW ARGUMENTS IN ITS REPLY MEMORANDUM.

A. The Circuit Court Correctly Denied Wallingsford's Motion For Leave Because Wallingsford Was Fully Apprised Of The Basis Upon Which Maplewood Moved For Dismissal

The Circuit Court has discretion to grant or deny motions for leave to file supplemental discovery such as affidavits. *Palermo v. Tension Envelope Corp.*, 959 S.W.2d 825, 827 (Mo. Ct. App. 1997).

Wallingsford's fifth argument on appeal is essentially the same argument presented in her fourth point – that she was prejudiced by Maplewood allegedly raising new arguments in its reply brief and not being permitted to submit a supplemental affidavit to rebut the alleged new arguments. Again, Wallingsford grossly mischaracterizes the content of Maplewood's reply brief. As explained above and as seen in the record, Maplewood did not assert brand new arguments in its reply brief, it merely responded to the points Wallingsford made in her Suggestions in Opposition. Wallingsford was fully apprised of the basis upon which Maplewood moved for dismissal. Accordingly, Wallingsford was not prejudiced and the Circuit Court did not

abuse its discretion in refusing to allow Wallingsford leave to file her supplemental affidavit.⁸

B. Wallingsford's Supplemental Affidavit Was Futile

Even if Maplewood offered a brand new argument, which it did not, the Circuit Court did not err in denying Wallingsford leave to submit its supplemental affidavit because the Court “carefully reviewed the record” and determined that the affidavit was futile to her argument. L.F. 189. Wallingsford submits that the Circuit Court denied leave because “briefing was closed.” *See*, Appellant’s Substitute Brief at 44. This is only half true. The Order states, “[the Motion] is DENIED as briefing was closed *and* the granting of Plaintiff’s [Motion] would be futile.” L.F. 189 (emphasis added). In other words, after careful consideration, the Court reasoned that not only was briefing closed, but Wallingsford’s supplemental affidavit was futile because it still did not cure the defects in her pleading (i.e. it still failed to allege a single discriminatory act by Maplewood within the 180-day filing period). As such, the Circuit Court did not abuse its discretion and Wallingsford’s fifth point must be denied.

⁸ Incidentally, Wallingsford’s argument regarding the denial of the affidavit is contradictory to her earlier point on appeal. In one breath, she alleges that constructive discharge alone should qualify as a discriminatory act within the filing period. In the next breath, however, she claims that she was prejudiced by the Court’s refusal to allow her to submit an affidavit that was made, purportedly, to cure the no-discriminatory-act-within-the-filing-period defect in her petition.

CONCLUSION

The Circuit Court correctly granted summary judgment to Maplewood because the Court lacked jurisdiction due to Wallingsford's failure to file a timely administrative charge, in that, none of Maplewood's actions about which Wallingsford complained occurred within 180 days of her charge, and her resignation does not constitute an act of discrimination by Maplewood. The Circuit Court properly denied the Motion to Strike because Maplewood was not required to conform its reply brief to Rule 74.04 and Wallingsford was not prejudiced by a new argument. And lastly, the Circuit Court did not abuse its discretion in denying Wallingsford's Motion for Leave to File a Supplemental Affidavit. Briefing was closed and allowing the affidavit into evidence would have been futile. Accordingly, all five of Wallingsford's points fail, and her appeal should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies, pursuant to Rule 84.06(c), that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 5,788 words, exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Office Word. The undersigned counsel further certifies that the diskette submitted herewith has been scanned and is free of viruses.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing along with one copy on CD-Rom, as required by Missouri Supreme Court Rule 84.06(g), were served upon John E. Toma, Jr. and Melissa M. Zensen, Attorneys for Plaintiff-Appellant, at 34 North Brentwood Blvd., Suite 210, St. Louis, Missouri 63105, via U.S. Mail and James R. Dowd, 34 N. Brentwood Blvd., Suite 209, St. Louis, MO 63105, on this 20th day of April, 2009.
