

IN THE SUPREME COURT OF MISSOURI

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

Appeal from the Circuit Court of St. Louis County

Honorable James R. Hartenbach
Circuit Judge

SUBSTITUTE REPLY BRIEF OF APPELLANT
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Table of Contents

Table of Contents.	1
Table of Cases and Other Authorities.	2
Argument.	4
Conclusion.	20
Certificate of Compliance.	21
Certificate of Service.	22

Table of Cases and Other Authorities

<u>Cases</u>	<u>Page</u>
<i>Abrams v. Baylor College of Medicine</i> , 805 F.2d 528 (5 th Cir. 1986)	8, 9
<i>Accord Wineteer v. Vietnam Helicopter Pilots Ass’n</i> , 121 S.W.3d 277 (Mo.App. W.D. 2003)	17
<i>Bosch v. St. Louis Healthcare Network</i> , 41 S.W.3d 462 (Mo. 2001)	18
<i>Bramon v. U-Haul, Inc.</i> , 945 S.W.2d 676 (Mo.App. E.D.1997).	16
<i>Bush v. Liberty Life Ins. Co.</i> , 12 F.Supp.2d 1251 (M.D. Ala. 1998)	9, 10
<i>Daugherty v. City of Maryland Heights</i> , 231 S.W.3d 814 (Mo. 2007)	19
<i>Dial v. Lathrop R-II School Dist.</i> , 871 S.W.2d 444 (Mo. 1994)	19
<i>Dring v. McDonnell Douglas Corp.</i> , 58 F3d 1323 (8 th Cir. 1995)	12, 13
<i>Gibson v. KAS Snack Time Co.</i> , 171 F.3d 574 (8 th Cir. 1999)	4
<i>Gilliland v. Missouri Athletic Club</i> , 273 S.W.3d 516 (Mo. 2009)	7, 8
<i>Gladis v. Rooney</i> , 999 S.W.2d 288 (Mo.App. E.D.1999)	17
<i>Hill v. St. Louis University</i> , 123 F.3d 1114, 1118 (8 th Cir. 1997)	15
<i>J.B. Allen Inc. v. Pearson</i> , 31 S.W.3d 529 (Mo.App. E.D.2000)	16, 17
<i>Jacobs v. Corley</i> , 793 S.W.2d 512 (Mo.App. E.D.1990)	15
<i>Joliet v. Pitoniak</i> , 475 Mich. 30, 715 N.W.2d 60 (2006)	11, 12
<i>National R.R. Passenger Corp. v. Morgan</i> , 536 U.S. 101 (2002)	5
<i>Pollock v. Wetterau Food Distrib. Group</i> , 11 S.W.3d 754 (Mo.App. E.D.1999)	4, 5, 6, 15

<u>Cases</u>	<u>Page</u>
<i>Rowe v. Hussman Corp.</i> , 381 F.3d 775 (8 th Cir. 2004)	15
<i>Southwestern Bell Telephone Co. v. Missouri Commission on Human Rights</i> , 863 S.W.2d 682 (Mo.App. E.D.1993)	15
<i>Turner Engineering, Inc. v. 149/155 Weldon Parkway, L.L.C.</i> , 40 S.W.3d 406 (Mo.App. E.D.2001)	17
<i>WEA Crestwood Plaza, L.L.C. v. Flamers Charburgers, Inc.</i> , 24 S.W.3d 1 (Mo.App. E.D.2000)	19
<i>Young v. National Center for Health and Services Research</i> , 828 F.2d 235 (4 th Cir. 1987)	10-11
<u>Statutes and Other Authorities</u>	<u>Page</u>
Mo. Rev. Stat. § 213.075	4, 12, 14
Supreme Court Rule 55.27.	14-18
Supreme Court Rule 74.04.	14-19

ARGUMENT

I. Appellant Offered Competent And Unrebutted Evidence That The Gender Discrimination And Hostile Work Environment To Which Appellant Was Subjected Continued Through And Including August 29, 2004, The Date Of Appellant's Constructive Discharge.¹

Respondent City of Maplewood (hereinafter “the City”) persists in its failure to comprehend that Ms. Wallingsford is not required to identify a “specific and discrete discriminatory act” because her claim is for hostile work environment gender harassment that is in the nature of a continuing violation. *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 763 (Mo.App. E.D.1999). As such, Appellant need only prove that the *continuing violation* continued into the 180 day limitation period set forth in Mo. Rev. Stat. § 213.075. *Id.* (citing *Gibson v. KAS Snack Time Co.*, 171 F.3d 574, 579 (8th Cir. 1999)). Under Missouri law, there is no requirement that Ms. Wallingsford demonstrate that any *discrete act* of discrimination occurred within the filing period.

In *Pollock*, the defendant argued that the only incidents of harassment set forth by the plaintiff within the 180 day period were “too vague to constitute an actionable hostile environment.” *Id.* at 763. However, the Missouri Court of Appeals disagreed:

¹ This section responds to the argument contained in the Substitute Brief of Respondent, Section 1(A).

If there is sufficient evidence that a perpetrator committed very similar acts of harassment on a daily basis, Plaintiff's claim should not fail for lack of specific details about each incident.

Id. at 764 (internal citations omitted). The Court further stated that because the defendant's harassment continued unabated until the date of her resignation, she had "sufficiently demonstrated that the **violation** continued into the statutory period." *Id.* (emphasis added). Once again, in a hostile work environment claim based upon a continuing violation theory, there is no requirement that the plaintiff identify any **discrete act** of discrimination within the filing period.²

The City's failure to understand the distinction between a **discrete act** and a **hostile work environment** is puzzling. In *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), a case cited by the City its Substitute Brief, the United States Supreme Court clearly explained the distinction. In that regard the Court stated:

Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct the **unlawful employment practice** therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in

² The City mistakenly states that Ms. Wallingsford is asking this Court to overturn a well-established body of law and to invalidate the MHRA's statute of limitation. Nothing could be further from the truth. Rather, Ms. Wallingsford is asking this Court to **apply** the well-established body of law that originated with the *Pollock* case.

direct contrast to discrete acts, a single act of harassment may not be actionable on its own.

Id. at 115 (internal citations omitted) (emphasis added). With regard to the relationship between a hostile work environment claim and the timely filing of a charge of discrimination, the Supreme Court stated:

A hostile work environment claim is comprised of a series of separate acts that collectively constitute one *unlawful employment practice*. The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the *unlawful practice* happened.

Id. at 117 (internal citations omitted) (emphasis added).³ Ms. Wallingsford was not required to plead or prove any *discrete act* of discrimination to sustain her hostile work environment claim. Rather, it is sufficient that Ms. Wallingsford set forth a series of separate acts of gender harassment and discrimination that collectively add up to an *unlawful employment practice* that continued into the filing period. In this regard, Ms. Wallingsford clearly met her burden. *See* Substitute Brief of Appellant at 7-11.

Finally, the City's argument that a constructive discharge is a discrete act and cannot be used to invoke the continuing violation doctrine is simply incomprehensible. Ms. Wallingsford maintains that her constructive discharge was the last of a long series

³ In deciding cases brought under the MHRA, this Court may look to applicable federal employment law decisions. *Pollock*, 11 S.W.3d at 762-763.

of closely inter-related acts of gender harassment and discrimination perpetrated by the City. In *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516 (Mo. 2009), this Court discussed, but did not rule upon, the issue of whether a constructive discharge based on a hostile work environment constitutes an adverse employment action under the MHRA.⁴ While not deciding the issue, this Court strongly suggested that the answer to the question posed by Ms. Wallingsford in the instant case would be yes. In that regard, this Court stated:

As with demotions, firing, and other forms of “adverse employment action,” constructive discharge based on a hostile work environment merits relief under the act only if the plaintiff can establish a discriminatory motive for the constructive discharge. . . .

But in order to prevail, the plaintiff must show that the constructive discharge or other adverse employment decision was motivated by discrimination against a category protected by the anti-discrimination statute at issue

⁴ This Court did not reach the issue because the jury instruction submitted in the trial court with regard to constructive discharge did not mention any category protected by the MHRA. Further, the validity of the plaintiff’s constructive discharge claim under common law was not before the court, because the defendant paid the judgment and did not appeal. 273 S.W.3d at 521.

Id. at 521. In its discussion of this issue, this Court did not remotely suggest that a constructive discharge might not qualify as an adverse employment decision because it was a discrete act.⁵

II. 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.⁶

The City's argument as to why Ms. Wallingsford's constructive discharge does not constitute an act of discrimination is wrong both as a matter of policy and of law.

First, the cases cited by the City are inapposite because they do not deal with a claim of hostile work environment. In *Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986), the court affirmed the district court's judgment that the plaintiffs' claims were timely filed and that the actions of the defendant college constituted

⁵ The City's position on this issue is completely disingenuous. First, the City argues that Ms. Wallingsford cannot sustain her discrimination claim because she has cited no discrete discriminatory act within the 180 day filing period. Then, the City argues that even if this Court concludes that a constructive discharge based on a hostile work environment merits relief under the MHRA, her constructive discharge is a discrete act that cannot be used to invoke the continuing violation doctrine. In *Gilliland*, this Court suggested no such result. 273 S.W.3d at 521-22.

⁶ This section responds to the argument contained in Section I B(1) & (2) of the Substitute Brief of Respondent.

intentional discrimination on the basis of religion. *Id.* at 530. The court further upheld the district court's finding of a continuing violation where the college obscured the existence of its unlawful policy that discriminated against Jewish physicians. *Id.* at 533.

In that regard the court also stated:

This theory of continuing violation has to be guardedly employed because within it are the seeds of the destruction of statutes of limitations in Title VII cases.

If the mere *existence of a policy* is sufficient to constitute a continuing violation, it is difficult to conceive of a circumstance in which a plaintiff's claim of an unlawful *employment policy* could be untimely.

We hold, instead, that to establish a continuing violation, a plaintiff must show some application of the *illegal policy* to him (or to his class) within the 180 days preceding the filing of his complaint.

Id. at 533 (internal citations omitted)(emphasis added). Thus, *Abrams* deals exclusively with the application of the continuing violation exception to an illegal employment policy, not to the existence of a hostile work environment.

Likewise, *Bush v. Liberty Life Ins. Co.*, 12 F.Supp.2d 1251 (M.D. Ala. 1998) provides no support for the City's argument that Ms. Wallingsford's constructive discharge was not an act of discrimination. In *Bush*, the plaintiff sought to introduce evidence of a constructive discharge that occurred twenty-one months that is, long after the 180 days ran, after filing his EEOC charge. *Id.* at 1259. The plaintiff's EEOC charge

was silent on the question of constructive discharge and the plaintiff's claim of continuing violation was not contained either in the EEOC charge or in his complaint. *Id.* Of critical importance, however, was the court's holding that the plaintiff had not produced sufficient evidence to make out a claim of constructive discharge. *Id.* The district court stated that even if there had been sufficient evidence of a claim of constructive discharge, it was doubtful that the evidence could relieve the plaintiffs of their obligation to comply with the 180 day filing period. The facts in *Bush* are simply not present in the instant case. In her MCHR charge, Ms. Wallingsford clearly attributes the loss of her job to the gender harassment and discrimination she experienced. L.F. 128, 134. In her letter of resignation, Ms. Wallingsford explains the reasons behind her resignation. L.F. 137. Finally, the Petition sets forth Ms. Wallingsford's claim of a continuing violation and her claim of constructive discharge. L.F. 81-90. Further, unlike the plaintiff in *Bush*, Ms. Wallingsford does not seek to introduce evidence of any alleged discrimination following the date of her constructive discharge. Therefore, *Bush v. Liberty National Life Insurance Co.* is simply not applicable.

Ms. Wallingsford has provided this Court with cases from numerous state and federal jurisdictions, including the Eighth Circuit, holding that a constructive discharge is an adverse employment action. *See* Substitute Brief of Appellant at 26-29. One of the cases relied on by the City provides additional support for this proposition. In *Young v. National Center for Health & Services Research*, 828 F.2d 235 (4th Cir. 1987), the Court stated:

Whether an employer’s action is a “discriminatory act” or merely an “inferable consequence” of prior discrimination depends on the particular facts of the case. A resignation is not itself a “discriminatory act” if it is merely the consequence of past discrimination, but if the employer discriminates against an employee and purposefully makes the employee’s job condition so intolerable that a reasonable person would be forced to resign, then the resignation is a constructive discharge – a distinct discriminatory “act” for which there is a distinct cause of action.

Id. at 237-238 (internal citations omitted). Thus, Ms. Wallingsford respectfully requests that this Court add the Fourth Circuit to the list of jurisdictions that have held that a constructive discharge constitutes an adverse employment action.

Finally, the case of *Joliet v. Pitoniak*, 715 N.W.2d 60 (Mich. 2006), cited by City, provides no support for the City’s position. In that case, the plaintiff did not assert a claim of discriminatory constructive discharge. *Id.* at 66. Rather, the plaintiff submitted claims of breach of contract and misrepresentation based on alleged discriminatory conduct that occurred prior to her resignation. Thus, the Michigan Supreme Court held that where a plaintiff *does not assert a claim of constructive discharge*, she may not use such an alleged discharge to extend the statute of limitations under the Michigan Civil Rights Act for discriminatory acts committed prior to her resignation. *Id.* at 63. These facts are not remotely comparable to the facts which exist here. Ms. Wallingsford clearly set forth her claim for constructive discharge. L.F. 81-90. Further, Ms. Wallingsford

explicitly alleged that her constructive discharge was one final discriminatory act on the part of the City that was the culmination of a long history of gender discrimination against her. *Id.* Accordingly, the case of *Joliet v. Pitoniak* is inapplicable.

III. The 180 Day Time Period Set Forth In Mo. Rev. Stat. §213.075 Did Not Begin To Run On July 16, 2004.⁷

The City next asserts that the statute of limitations on Ms. Wallingsford's claim was triggered and began to run on July 15, 2004. The City alleges that it had already decided, as a result of its internal investigation, to terminate Ms. Wallingsford's employment, and that Ms. Wallingsford was aware of this fact. The City wrongly construes July 15, 2004 as the date of Appellant's constructive discharge, and, in so doing, completely and improperly ignores the fact that Ms. Wallingsford pled and provided evidence of continuing discriminatory acts and a hostile work environment that extended until August 29, 2004, the true date of Ms. Wallingsford's constructive discharge. Remarkably, the City never explains how July 15, 2004 can be the operative date when Ms. Wallingsford continued to work until August 29, 2004.

The City relies on *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323 (8th Cir. 1995), in which the plaintiff was notified on July 18, 1990 that he was going to be laid off. *Id.* at 1325. The plaintiff was later given a formal notice of his layoff on February 7, 1991, sixty days before his actual termination date of April 7, 1991. *Id.* The plaintiff

⁷ This section responds to the argument contained in the Substitute Brief of Respondent, Section I (B)(3).

filed his EEOC charge on May 23, 1991. *Id.* The Eighth Circuit held that the “accrual date” of the plaintiff’s claim was July 18, 1990, the day he was notified of his layoff, for purposes of the running of the statute of limitations. Ms. Wallingsford’s case is markedly different in two respects. First, the City’s July 15, 2004 letter stating that “it *appears* that discharge of [Appellant] from the City of Maplewood is inevitable” is a far cry from the certainty presented by Plaintiff Dring’s July 18, 1990 notification. L.F. 45 (emphasis added). Second, and perhaps more importantly, the *Dring* court found that the July 18, 1990 termination was the *only discriminatory act* alleged against the defendant and that there were no allegations of subsequent employer conduct that would constitute a continuing violation. *Id.* at 1331. In the instant case, Ms. Wallingsford has pled and offered evidence of a continuing violation, comprised of numerous other incidents and examples of gender harassment that occurred within the filing period, all of which were part of a series of interrelated events. L.F. 81-90. Unlike the plaintiff in *Dring*, Ms. Wallingsford is not alleging that the July 15, 2004 letter is the *only* act of discrimination by the City.

Finally, the City’s argument is untenable on the basis of public policy. By ignoring the actual constructive discharge date of August 29, 2004, and by ignoring the incidents of gender harassment that occurred between July 15, 2004 (the City’s proffered date for purposes of the statute of limitations) and August 29, 2004, the trial court effectively condoned the practice of an employer insulating itself from MHRA claims by providing *open-ended notice* to an employee that she *might* be terminated. If the City’s contention is indeed the standard, an employer could prompt the running of the statute of

limitations on any prospective MHRA claim by simply informing an employee that her position may be eliminated sometime in the future. The City's argument that the July 15, 2004 letter (which was drafted by the City for the purposes of settlement negotiations), and which does nothing more than contemplate and threaten the *possibility* of termination, was automatically the last act of discrimination, finds no support in the statutory language of the MHRA, in case law, or in common sense. The bright line rule established by the MHRA is the *last alleged act* of discrimination, which in this case was August 29, 2004. Mo. Rev. Stat. § 213.075. Consequently, Appellant's 180-day period began to run on August 29, 2004, and her MHRA claims are not time-barred.

IV. The Trial Court Erred In Entering Summary Judgment In Favor Of City After City Filed A Motion To Dismiss and Presented Matters Outside The Pleadings That were not Excluded By The Court And The Court Failed To Dispose of The Motion as "provided by Rule 74.04" As Dictated By 55.27(a) Resulting in Prejudice to Wallingsford In That The Court's Failure Denied Wallingsford The Right to Learn of The Ground Raised For The First time In City's Reply That The Trial Court Relied Upon In Entering Judgment Until After Briefing Was Closed.⁸

⁸ This section responds to the argument contained in the Substitute Brief of Respondent, Sections II & III.

Citing Rule 55.27, the City maintains that the trial court acted properly in treating its motion to dismiss as a motion for summary judgment. But Rule 55.27 does not authorize a deviation from Rule 74.04 in this case. Rule 55.27 authorizes the trial court to convert a motion to dismiss into a motion for summary judgment only when the motion to dismiss asserts the plaintiff has failed to state a claim and matters outside the pleadings are presented to and not excluded by the court. Rule 55.27(a). The City's claim that Ms. Wallingsford's claims should be dismissed because she did not prove that a discriminatory act occurred within 180 days of the date she filed her MHRC complaint is simply not a challenge to whether Ms. Wallingsford has stated a claim upon which relief could be granted.

While early cases concluded the MHRA's 180-day statute of limitations was jurisdictional, *see, e.g., Southwestern Bell Telephone Co. v. Missouri Commission on Human Rights*, 863 S.W.2d 682, 684 (Mo.App. E.D. 1993), more recently courts recognized equitable exceptions may extend this period. *Pollock*, 11 S.W.3d at 763 (stating that the MHRA's "requirements for timely filing are subject to the principles of waiver, estoppel, and equitable tolling"); *Rowe v. Hussman Corp.*, 381 F.3d 775, 782 (8th Cir. 2004) (citing *Pollock*). Because equitable principles can lengthen the MHRA's filing deadline, the 180-day period cannot be jurisdictional. *See Hill v. St. Louis University*, 123 F.3d 1114, 1118 (8th Cir. 1997) (stating that equitable estoppel and waiver principles could not extend a filing deadline that is jurisdictional). The MHRA's 180-day filing period, therefore, is a regular statute of limitations that the City must affirmatively raise in its answer. If established, this defense may defeat a claim, but it does not bar the filing of the

claim. *Jacobs v. Corley*, 793 S.W.2d 512 (Mo.App. E.D. 1990). Consequently, Rule 55.27(a) does not authorize the conversion of the motion to dismiss into a motion for summary judgment because the failure to timely file a complaint with the Commission does not provide a basis for moving to dismiss for failure to state a claim.⁹ Because the sole basis for treating a motion to dismiss as a motion for summary judgment does not exist in this case, the trial court erred in entering summary judgment on the City's motion to dismiss.

Even if the 180-day filing period was jurisdictional and the trial court had properly converted the motion to dismiss as a motion for summary judgment, the trial court clearly erred in overruling Ms. Wallingsford's repeated request to order the City to file a separate motion for summary judgment complying with the requirements of Rule 74.04. The only case cited by the City in its response is also cited by Ms. Wallingsford in her initial Substitute Brief, to wit: *J.B. Allen Inc. v. Pearson*, 31 S.W.3d 529 (Mo.App. E.D. 2000).

⁹ Rule 55.27(b) allows the trial court to convert a motion for judgment on the pleadings into a motion for summary judgment. While the City did not file a motion for judgment on the pleadings, even if it had, this subsection of Rule 55.27 would be inapplicable. A party may only move for judgment on the pleadings "[a]fter the pleadings are closed." Rule 55.27(b). Because the City filed its motion to dismiss in lieu of answering Ms. Wallingsford's petition, the pleadings are not closed. *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676, 679 (Mo.App. E.D. 1997) (holding that ruling on motion for judgment on the pleadings was premature where no answer had been filed).

J.B. Allen, is correct as far as it goes. However, unlike the parties in that case, the record plainly establishes that Ms. Wallingsford never acquiesced or waived a single requirement of Rule 74.04 as the non-movant did in *J.B. Allen*. The City's reliance on *J.B. Allen* is ironic, for in *J.B. Allen* and several other cases, the court of appeals decried the very practice employed by the trial court and urged trial courts to require the moving party to file a proper motion for summary judgment. In *Gladis v. Rooney*, 999 S.W.2d 288, 289 (Mo.App. E.D. 1999), the court stated: "Although Rule 55.27(a) does not specifically require it, we urge trial courts acting pursuant to that rule to have the moving party refile the motion in compliance with Rule 74.04(c) and then order the opposing party to follow the requirements of Rule 74.04." *Accord Wineteer v. Vietnam Helicopter Pilots Ass'n*, 121 S.W.3d 277, 284 (Mo.App. W.D. 2003); *Turner Engineering, Inc. v. 149/155 Weldon Parkway, L.L.C.*, 40 S.W.3d 406, 408 (Mo.App. E.D. 2001); *J.B. Allen*, 31 S.W.3d at 528. This case plainly demonstrates why compliance with Rule 74.04 is imperative when a party files a motion to dismiss pursuant to Rule 55.27 and includes matters outside of the pleadings.

The City further claims that Ms. Wallingsford was not prejudiced by its failure to comply with Rule 74.04 and that her insistence on compliance with this Rule is "nothing more than an attempt to put form over substance." That the City would make such a contention only highlights its failure to grasp that which is made vividly clear by this case. The failure to distinguish between the form in which we dispose of questions of fact and the form we employ to dispose of questions of law, of course, places in question our very system of laws. Both Rule 55.27 and Rule 74.04 must be read in the context of

what each rule is, and is not, designed to accomplish. The law that explains how to treat purely legal questions that transform into fact questions is found in Rule 55.27(a) which states in pertinent part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, **the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04.**

All parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04.

(emphasis added).

Finally, the City claims that Ms. Wallingsford “was fully apprised of the basis upon which Maplewood moved for Dismissal *or* Summary Judgment.” *See* Substitute Brief of Respondent at 19 (emphasis added). The City’s use of a disjunctive indicates the City deems these entirely different dispositions interchangeable and consistent in type, quality, and effect. That is not the law and never has been. The substantial and meaningful difference in the standards of review applicable to each type of disposition reveals the specious nature of the City’s argument. The standard of review governing a motion to dismiss requires the court to assume that all well plead allegations are taken as true. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463-64 (Mo. 2001). On the other hand, in reviewing the grant of summary judgment, the court is charged with the duty to analyze what often is a mass of evidentiary documents, testimony, affidavits and

more to determine the existence *vel non* of a genuine issue of material fact. *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. 2007); *Dial v. Lathrop R-II School Dist.*, 871 S.W.2d 444, 446 (Mo. 1994).

Ms. Wallingford was surprised and prejudiced when the trial court decided to treat the motion to dismiss as a motion for summary judgment. The trial court subsequently ignored numerous provisions of the rule, including the expressed provision of Rule 74.04(c)(5) by refusing her supplemental affidavit. *See WEA Crestwood Plaza, L.L.C. v. Flamers Charburgers, Inc.*, 24 S.W.3d 1, 5 (Mo.App. E.D.2000) (noting it was appropriate to treat motion to dismiss as a motion for summary judgment where “the parties have not suggested any other documents were necessary to decide the question”). The effect was to treat the allegations in the City’s Motion to Dismiss as true, which is not permitted. The trial court erred in doing so.

CONCLUSION

For all of the reasons set forth in the Substitute Brief of Appellant and the Reply Brief of Appellant, Ms. Wallingsford respectfully requests that this Court reverse the trial court's grant of the City of Maplewood's Motion to Dismiss Converted to Motion for Summary Judgment, that this Court hold that Ms. Wallingsford's MHRC charge was timely filed, and that this Court grant such other and further relief as appropriate.

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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 4,654 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).

James R. Dowd

CERTIFICATE OF SERVICE

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 April 27, 2009:

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