Case No. SC95758

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, EX REL. TIVOL PLAZA, INC.,

Appellant,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS, *et al.*,

RESPONDENT KAREN NORTON'S SUPPLEMENTAL BRIEF

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1. FILING A TIMELY COMPLAINT WITH THE MCHR IS NOT A CONDITION PRECEDENT TO FILING SUIT PURSUANT TO THE MHRA; HOWEVER, IF A COMPLAINANT CHOOSES TO DO SO, SHE MUST EXHAUST HER ADMINISTRATIVE REMEDIES IN ORDER TO PROCEED WITH FILING SUIT.

The Missouri Constitution, Art. I, sec. 22(a), provides that the "right of trial by jury as heretofore enjoyed shall remain inviolate." Missouri courts have long recognized the constitutional right to a jury trial is implied in all cases in which an issue of fact, in an action for the recovery of money only, is involved, whether the right or liability is one at common law or is a creature of statute. Briggs v. St. Louis & S.F. Ry. Co., 20 S.W. 32, 33 (Mo. 1892).

In the landmark case *State ex rel. Diehl v. O'Malley*, the Court recognized that an action for damages under the Missouri Human Rights Act ("MHRA") seeks redress for an intentional wrong. State ex rel. Diehl v. O'Malley, 95 S.W.3d 82, 87 (Mo. 2003). The *Diehl* Court, in recognizing a jury trial right in MHRA cases, contrasted the remedies provided thereby with those available in worker's compensation claims: "Unlike workers' compensation proceedings where the administrative procedure provides the exclusive remedy and mode of recovery,

Missouri Human Rights Act actions have a separate alternate path available (through R.S.Mo. 213.111, allowing them to opt out)." *Id.*, at 90.

Indeed the Worker's Compensation Act is an illustrative contrast. That statute, as the Diehl Court notes, provides worker's compensation as the sole exclusive remedy, even going so far as to exempt them and individual tortfeasors from work-related negligence. See R.S.Mo. 287.120. It further requires that such claims shall be filed with the Division of Worker's Compensation, and affords no jury trial right. See R.S.Mo. 287.430.

While the *Diehl* Court notes that there is no jury trial right for MRHA complaints resolved within the 180 day statutory window, it perhaps wrongly compares the obtaining of a Right to Sue letter with the requirement for medical malpractice plaintiffs to file an affidavit from a health care provider attesting to the merits of the claim. *Id.* Indeed, this is because, unlike medical malpractice claims, where an affidavit is required, there is no explicit requirement that a MHRA plaintiff actually pursue a remedy with the MCHR.

R.S.Mo. 538.525 provides that plaintiffs in medical malpractice claims *shall* file such an affidavit. The MHRA by comparison, uses permissive language: R.S.Mo. 213.075.1 provides that any person

claiming to be aggrieved by an unlawful discriminatory practice *may* (not shall) file a complaint with the MCHR. Words and phrases used in the statute should be construed using their plain ordinary and usual sense. *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338, 340 (Mo. banc 1991).

The implication of comparing and contrasting the MHRA with other Missouri laws (worker's compensation, medical malpractice) that actually contain conditions precedent is crystal clear: A MHRA claimant has two options for pursuing a remedy for an unlawful discriminatory practice: The first is to file a private right of action. Indeed, there is nothing in the MHRA prohibiting a plaintiff from doing this. These actions are, as the *Diehl* Court noted, intentional torts and subject to the two year statute of limitations for such causes of action. The second path is to pursue the administrative remedy afforded by 213.075.1. Once an administrative remedy is commenced, however, the employee is left with either administrative review of decisions rendered by the commission, pursuant to Section 536.150, or seeking a Right to Sue, pursuant to Section 213.111 of the MHRA.

There seems to be both local and federal law to support this notion. Missouri courts have noted that just because the legislature has granted exclusive primary jurisdiction to an administrative agency,

this does not preclude a court of law from addressing the same matter. See *Antoine v. Fletcher*, 307 S.W.2d 898, 907 (Mo. App. 1958).

Further, while this Court, in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. Banc 2007) noted that our courts should be guided by both Missouri law and federal discrimination law, the Civil Rights Act differs substantially from the MHRA. *Id.*, at 818. The standards of proof- motivating versus contributing factor- are perhaps the most famous departure. But there are other differences as well. Federal Courts are courts of limited jurisdiction, pursuant to Article III of the U.S. Constitution. They have no jurisdiction to do anything at all absent the express authority of Congress. Missouri Courts, by contrast, are courts of general jurisdiction- they can, and often do, decide claims between parties living in other jurisdictions involving circumstances that arose in other jurisdictions.

Perhaps 213.111.1 is the only mechanism for a MHRA claim to find its way into Missouri's Courts. However, if, as the *Diehl* Court notes, the MHRA really does confer a jury trial right, it does indeed seem silly that the MCHR would be a "gatekeeper" for such claims; the more likely explanation, especially considering the subjunctive mood of the statutory language, is that a putative MHRA plaintiff has a choice between an administrative remedy and a judicial one, but once she

chooses, she is bound by her choice.

2. WHEN THE TIMELY FILING OF A COMPLAINT IS A CONDITION PRECEDENT TO BRINGING SUIT, WHERE IT IS CLEAR FROM THE FACE OF THE CHARGE OF DISCRIMINATION THAT THE COMPLAINT WAS NOT TIMELY, THE COMMISSION HAS AN OBLIGATION TO DISMISS THE MATTER FOR WANT OF A REMEDY; IF IT FAILS TO DO THIS, THE PROPER RECOURSE IS A WRIT. ALTERNATIVELY, WHERE TIMELINESS OF THE CHARGE IS DISPUTED, THE PROPER RECOURSE FOR A RESPONDENT IS TO SEEK ADMINISTRATIVE REVIEW OR PERHAPS ALTERNATIVELY, AT TRIAL.

As stated above, a Plaintiff who elects an administrative recourse must exhaust such remedies. In such situations, 213.211.1 makes such exhaustion a condition precedent to filing suit.

In *Farrow*, it was clear from the face of the charge that it was not filed within 180 days of the last discriminatory act. *Farrow v. St. Francis Med. Ctr.*, 407 S.W.3d 579, 588 (Mo. banc 2013). Thus, the Commission, there, should have dismissed the complaint, pursuant to 8 C.S.R. 60-2.025(7)(B)(4) for want of a remedy. As the Court correctly noted, if an employer in such a situation believes the MCHR acted beyond the scope of its authority, the most appropriate recourse would

have been a write. *Id.* See also R.S.Mo. 536.150.1.

If, alternatively, timeliness is in dispute, as is the case present, the appropriate remedy for a defendant challenging the issue of timeliness would not be mandamus but a separate provision of section 536.150.1: "When an administrative body…having rendered a decision which is not subject to administrative review… such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition, or other appropriate action."

Alternatively, as suggested during the oral arguments, although authority appears scant, it might be most economical if an employer, in matters where timeliness is in dispute, and who raised the issue of timeliness at the administrative level, were allowed to challenge this issue at the trial level, as it is a fact issue.

As previously stated, timeliness is not a jurisdictional issue. An untimely filed claim or charge is either outside its statute of limitations or fails to state a claim upon which relief may be granted. These are affirmative defenses; want of jurisdiction or lack of a claim upon which relief can be granted is not an affirmative defense in Missouri. It need not be pled nor proven as such, and may be raised at any time. Pursuant to Rule 55.27(g)(3), if a court should at any time determine it lacks jurisdiction, it is required to dismiss the case. Indeed, a charge

need not be timely filed in order for either the Court or the Commission to exercise jurisdiction over it.

3. THE BENEFICIARY OF THE 180 DAY ADMINISTRATIVE REQUIREMENT FOR FILING SUIT IS THE EMPLOYEE. THE 180 DAY REQUIREMENT ALLOWS THE COMMISSION AMPLE TIME TO INVESTIGATE THE CLAIM WHILE THE CLAIM IS STILL FRESH, IF THE EMPLOYEE CHOOSES THIS COURSE OF ACTION VIS-À-VIS DIRECT SUIT.

Another notable difference between Missouri State law and Title VII is the lack, in the latter statute, of any statute of limitations other than the requirement that suit be filed within 90 days of issuance of the EEOC's Right to Sue Letter. There is no two year "drop dead date" for Title VII cases. Because of this, all Title VII plaintiffs must not only exhaust administrative remedies, but in doing so, they are free to allow the EEOC as long as it wishes to investigate such claims. In other words, the requirement for filing charges with the EEOC is very clearly to keep those cases fresh so that the commission may investigate them; and, moreover, because of the limited jurisdiction of federal courts, Congress's intent in enacting Title VII was very much to use the EEOC as the gatekeeper for such claims.

In Missouri, as the *Diehl* Court noted, the statute of limitations

for bringing a discrimination lawsuit pursuant to the MHRA is 2 years: it is an intentional tort. The legislature intended all MHRA claims to be brought within two years of their occurrence.

Seeing as it would not benefit a putative MHRA plaintiff to wait one year, 364 days to bring a claim, as doing so might cause much of her evidence to be lost, a plaintiff seeking a private right of action would have all the incentive to bring suit sooner rather than later. A plaintiff wishing to avoid administrative relief does not need a 180 day requirement to bring suit; indeed, the best means of investigating the merits of a discrimination claim is to file suit on Day 1, and serve discovery requests, as the powers of Missouri's Courts to compel production are significantly broader and more potent than those of the Commission.

However, because the Legislature vested the Commission with general jurisdiction in investigating and prohibiting discrimination, it set forth an imperative for plaintiffs seeking administrative relief to file their charges within 180 days. This not only allows the Commission to investigate claims while still fresh, but it also provides time on the back end, for the Plaintiff to obtain a Right to Sue, pursuant to 213.111.1, and file suit within the two year deadline.

CONCLUSION

In light of the foregoing, Karen Norton respectfully requests the Court affirm the judgment of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Rule 84.06(c), counsel for Respondent Karen Norton states that this Substitute Brief complies with the provisions of Rule 84.06(b), in that beginning with its Points Relied on, and concluding with the last sentence before the signature block, the brief contains 2,020 words. Further, the brief is in compliance with Rule 84.06(a) in that it was prepared using Century Schoolbook font, with a 13 point size which is no larger than Times New Roman font, 13 point size. Moreover, the brief has been scanned for viruses, and is free of the same.

/s/ Phillip M. Murphy II

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing, February 14, 2017, with the Clerk of the Court using the Missouri eFiling System, which provided notification of the same as detailed below.

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