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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.,

Respondents.

APPELLANT'S SUPPLEMENTAL BRIEF

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ARGUMENT

1. THE TIMELY FILING OF AN ADMINISTRATIVE CHARGE OF DISCRIMINATION IS A CONDITION PRECEDENT TO FILING A SUIT ALLEGING VIOLATIONS OF THE MHRA AS PART OF A COMPLAINANT'S EXHAUSTION OF ADMINISTRATIVE REMEDIES PRIOR TO BRINGING A LAWSUIT ASSERTING MHRA CLAIMS.

It is axiomatic under Missouri law that, "[b]efore initiating a civil action under the MHRA, a claimant ***must*** exhaust administrative remedies by ***timely*** filling an administrative complaint and either adjudicating the claim through the MCHR or obtaining a right-to-sue-letter." *Alhalabi v. Missouri Dept. of Natural Resources*, 300 S.W.3d 518, 524 (Mo. App. E.D. 2009) (emphasis supplied).[1] This prompt filing deadline – an administrative requirement shared by the MHRA and federal antidiscrimination statutes – is, among other things, intended to encourage the speedy processing of charges of employment discrimination and to shield employers from defending against stale claims. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385,

[1] *See also*, *Reed v. McDonald's Corp.*, 363 S.W.3d 134, 143 (Mo. App. E.D. 2015) (noting that the MHRA requires that all administrative remedies be exhausted before petitioning the courts for relief); *Green v. City of St. Louis*, 870 S.W.2d 794, 796 (Mo. banc 1994) (acknowledging that the statutory scheme of the MHRA requires a party to exhaust its administrative remedies to bring a lawsuit alleging claims under the statute).

394 and 398 (1982).[2] Under the MHRA's statutory framework and its affiliated regulatory scheme, the 180-day timely filing requirement acts as a condition precedent to bringing a lawsuit under the statute.

A. The clear legislative intent of RSMo. § 213.075.1 requires a complainant to timely file a charge of discrimination as a condition precedent to bringing suit under the MHRA.

Section 213.111.1 of the MHRA sets forth the jurisdictional requirements for filing a lawsuit based upon an alleged violation of the MHRA:

> If, after one hundred eighty days from the filing of a complaint alleging an unlawful discriminatory practice . . . the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint . . . Such an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred, either before a circuit or associate circuit judge . . . Any action brought in court under this section

[2] This Court has long recognized that "[i]n deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination case law that is consistent with Missouri law." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007).

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shall be filed within ninety days from the date of the commission's notification letter to the individual but no later than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party.

In *Farrow v. Saint Francis Medical Center*, 407 S.W.3d 579, 591 (Mo. banc 2013), this Court refused to read a "timely" filing requirement (*i.e.*, "If after one hundred and eighty days from filing a ***timely*** complaint…") into the ***jurisdictional*** prerequisites for filing a state court action. However, this Court did find that an employer has a right to challenge the timeliness of an administrative charge via a judicial review proceeding. *Id.* at 589-590. This represents a tacit acknowledgement that: (1) employers have an interest in avoiding untimely claims of discrimination; and (2) are aggrieved when a right to sue letter is issued based on an untimely charge. This result is also consistent with the clear legislative intent of RSMO. § 213.075.1.

In pertinent part, RSMO. § 213.075.1 requires that "[a]ny person claiming to be aggrieved by an unlawful discriminatory practice may make, sign and file with the commission a verified complaint in writing, within one hundred eighty days of the alleged act of discrimination[.]" "When construing a statute, [a court's] primary role is to ascertain the intent of the legislature from the language used in the statue and, if possible, give effect to that intent." *Abrams v. Ohio Pacific Express*, 819 S.W.2d 338, 340 (Mo. banc 1991). The words and phrases used in the statute should be construed using their "plain, ordinary and usual sense." *Id.* Where, as here, statutory language is

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unambiguous, courts "will give effect to the language as written and will not resort to rules of statutory construction." *Martinez v. State*, 24 S.W.3d 10, 16 (Mo. banc 2000).

"As a creature of statute, an administrative agency's authority is limited to that given it by the legislature." *State ex rel. Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592, 598 (Mo. banc 2012). While at first blush the language of § 213.075.1 may not appear to be mandatory (specifically, the operative word "may" as opposed to "shall"), neither § 213.075, nor any other provision of the MHRA, provides for a process by which a complainant may file a charge of discrimination with the MCHR more than 180 days after of an alleged act of discrimination. Put differently, the clear and unambiguous statutory language necessarily contemplates the timely filing of a charge of discrimination, and provides no legislative basis by which an untimely charge can be received and processed by the MCHR if it is filed more than 180-days after an alleged act of discrimination. This is notable because, regardless of whether a timely filed is a jurisdictional prerequisite for bringing a lawsuit under the MHRA under § 213.111.1, filing a charge and receiving a right to sue letter from the MCHR are. *Farrow*, 407 S.W.3d at 591.

Missouri courts, including, but not limited to this Court, have historically considered the timeliness of an employee's administrative charge and have allowed timeliness to be raised as a defense in a civil lawsuit. *See, e.g., Wallingsford v. City of Maplewood*, 287 S.W.3d 682, 685-86 (Mo. banc 2009); *Tisch*, 368 S.W.3d at 252-55; *Grissom v. First Nat'l Ins. Agency*, 364 S.W.3d 728, 734-35 (Mo. App. S.D. 2012); *Thompson*, 82 S.W.3d at 206-08; *Pollock*, 11 S.W.3d at 763-64. Indeed, while filing a

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timely administrative complaint may not be a jurisdictional prerequisite for suit under § 213.111.1, *cf. Farrow*, 407 S.W.3d at 591, Missouri courts have also unambiguously acknowledged that the timely filing of a charge pursuant to § 213.075.1 is a mandatory ***condition precedent*** to bringing suit under the MHRA. *See, e.g., Tisch v. DST Systems, Inc.*, 368 S.W.3d 245, 252 (Mo. App. W.D. 2012) ("Section 213.075 requires any person claiming to be aggrieved by an unlawful discriminatory practice to file a written verified complaint with the MCHR within 180 days of the alleged act of discrimination"); *Thompson v. Western-Southern Life Assur. Co.*, 82 S.W.3d 203, 207 (Mo. App. E.D. 2002) ("Any act of discrimination occurring outside the 180-day period is considered merely an unfortunate event in history which has no present consequences (internal citation and quotation omitted)); *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 763 (Mo. App. E.D. 1999) ("A victim of discrimination asserting claims based on the MHRA must file an administrative charge with the MCHR within one hundred eighty (180) days of the discriminatory act and must bring a civil action no later than two years after the alleged cause occurred"). To find otherwise would result in a *de facto* judicial elimination of the charge-filing requirement found in § 213.075.1.

B. The MHRA, when considered in pari materia, further evidences a legislative intent that the timely filing of a charge of discrimination operate as a condition precedent to bringing suit under the MHRA.

Assuming *arguendo* that an ambiguity exists as it relates to § 213.075.1, the rules of statutory construction support the conclusion that the timely filing of a charge of discrimination is a condition precedent to bringing suit under the MHRA. One of the

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fundamental rules of statutory construction requires one part of a statute not be read in isolation from the context of a whole act. *Martinez v. State*, 24 S.W.3d 10, 18 (Mo. Ct. App. E.D. 2000). "In ascertaining legislative intent, it is proper that provisions of the entire act be construed together and, if reasonably possible, all provisions should be harmonized." *Id.* Put differently, this court must not be guided by a single word or sentence, but should instead "look to the provisions of the whole law, and its object and policy." *State v. Haskins*, 950 S.W.2d 613, 615 (Mo. Ct. App. S.D. 1997) (quoting *Richard v. United States*, 369 U.S. 1, 11 (1962)).

As recognized in RSMo. § 213.020, the Missouri General Assembly created the MCHR to "encourage fair treatment for and to foster mutual understanding and respect among, and to discourage discrimination against, any racial, ethnic, religious or other group protected by this chapter, members of these groups or persons with disabilities." More specifically, the MCHR was vested with the power to "seek to eliminate and prevent discrimination" and to implement the purpose of the MHRA "***first by conference, conciliation, and persuasion*** so that persons may be guaranteed their civil rights and goodwill be fostered[.]" § 213.030 (emphasis supplied). Among other things, these statutory provisions evidence a legislative intent that the MHRA's primary purpose is to identify discriminatory actions and to eliminate such practices through conference and conciliation – *i.e.*, ***without the involvement of Missouri's courts***. Against this statutory backdrop and clear legislative intent, the importance of a complainant filing a timely charge of discrimination becomes even more evident.

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RSMo. § 213.075.3 specifically reinforces the need for prompt notice and action as it relates to alleged discriminatory practices by requiring the executive director of MCHR to "***promptly*** investigate the complaint, and if the director determines after investigation that probable cause exists for crediting the allegations of the complaint, the executive director shall ***immediately*** endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation, and persuasion." (Emphasis supplied.) Employment discrimination cases "are inherently fact-based and often depend on inferences rather than direct evidence." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007). Delayed reporting necessarily increases the chances that relevant evidence may be lost, thereby frustrating the MCHR's duty to promptly investigate claims of discrimination and determine whether probable cause exists for crediting the same.

As it relates to similar charge filing requirements under Title VII and other federal anti-discrimination laws, the United States Supreme Court has recognized that timely-filing requirements "encourage a potential charging party to raise a discrimination claim before it gets stale, ***for the sake of a reliable result and a speedy end to any illegal practice that proves out.***" *Edelman v. Lynchburg College*, 535 U.S. 106, 112-13 (2002) (emphasis supplied). Guided by federal law, Missouri appellate courts have also acknowledged the importance that a charge "give notice of all claims of discrimination in the administrative complaint." *Reed v. McDonald's Corp.*, 363 S.W.3d 143 (Mo. App. E.D. 2012) (dismissing a plaintiff's constructive discharge claim for failure to exhaust administrative remedies as it relates to providing notice of all claims); *Alhalabi*, 300

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S.W.3d at 525 (*quoting Stuart v. General Motors Corp.*, 217 F.3d 621, 630 (8th Cir. 2000)).

By requiring that a complainant provide early and comprehensive notice to their employer of potentially discriminatory practices, the MCHR advances the primary objective of the MHRA– *i.e.*, to identify and eliminate such discriminatory practices through conference and conciliation. Conversely, if this Court determines that timely reporting is ***not*** a condition precedent to bringing suit, it will undermine the purpose of the MHRA by implicitly encouraging complainants to sit on claims of discrimination until such time as is convenient and/or most strategically sound for any future litigation that may arise from their discrimination claims.

C. State regulations promulgated by the MCHR pursuant to the properly designated authority of RSMo. § 213.030 unambiguously require that a complainant timely file a charge of discrimination as a condition precedent to bringing suit under the MHRA.

Upon passing the MHRA, the Missouri General Assembly imbued the MCHR with the power to "adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this chapter and the policies and practices of the commission in connection therewith." RSMo. § 213.030.6. "The rules of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them." *State ex rel. Martin-Erb v. Missouri Com'n on Human Rights*, 77 S.W.3d 600, 607 (Mo. banc 2002). State regulations promulgated pursuant to properly delegated authority also "have the force and

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effect of law and ***are therefore binding on courts***." *Pollock*, 11 S.W.3d at 766 (emphasis supplied).

The Missouri state legislature, "in the same legislation that created [a plaintiff's] statutory cause of action, granted the MCHR the broad authority to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this chapter and the policies and practices of the commission in connection therewith." *Id.* at 767 (*quoting* RSMo. § 213.030.1(6)). Therefore, MCHR regulations "are considered of the legislative variety, ***and a court may no more substitute its judgment as to the content of a legislative rule than it may substitute its judgment as to the content of a statute***." *Id.* at 766 (internal quotations omitted) (emphasis supplied).

As it relates to this case, ***the language and intent of the MCHR's regulations unambiguously establish that the timely filing of a charge of discrimination is a condition precedent to bringing suit under the MHRA***. When construing administrative regulations, courts use the same principles as those used to interpret statutes. *Id.* at 767. 8 C.S.R. 60-2.025(3) explicitly requires that "[a]ny complaint filed under Chapter 213, RSMo ***shall be filed within one hundred eighty (180) days of the alleged unlawful discriminatory practice or its reasonable discovery***." (Emphasis supplied.) The "plain, ordinary and usual" meaning of this regulation could not be clearer: complainants ***must*** file any administrative charge of discrimination under Chapter 213 within 180 days of the alleged unlawful discriminatory practice.

Further, "[c]ommission regulation 8 C.S.R. 60-2.025(7)(B) directs the [MCHR] to dismiss or close a complaint at any stage for lack of jurisdiction or in the absence of any

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remedy available to the complainant." *Farrow*, 407 S.W.3d at 589. Because it is bound by the regulations it has created, where the MCHR determines a claim is untimely, it lacks authority to issue a right to sue – *i.e.*, one of the ***jurisdictional*** prerequisites to bringing suit under the MHRA – and must close such complaints. *Id.* Put differently, the 180-day timely filing requirement ***must*** be a condition precedent, because without a timely filed charge, the MCHR cannot issue a right to sue notice thereby barring the would-be-plaintiff from satisfying all of the jurisdictional prerequisites for bringing a lawsuit.

The MCHR's document retention policies also demonstrates the necessity of the 180-day timely filing requirement. Specifically, 8 C.S.R. 60-3.010.4 requires:

> Any personnel or employment record made or kept by an employer including, but not necessarily limited to, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation and selection for training or apprenticeship ***shall be preserved by the employer for a period of one (1) year from the date of making the record or the personnel action involved, whichever occurs later.***

(Emphasis supplied.)

Similarly, the MCHR's regulations require an employer to retain all records relating to a discrimination complaint upon being provided with notice that an administrative charge has been filed. *See* 8 C.S.R. 60-3.010.5. That regulation states:

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> Where a complaint of discrimination has been filed and the respondent notified, the respondent employer shall preserve all personnel records relevant to the complainant until final disposition of the complaint. The term personnel records relevant to the complaint, for example, would include personnel or employment records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant and application forms or test papers completed by an unsuccessful applicant or by all other candidates for the same position as that for which the complainant applied and was rejected. ***The date of final disposition of the complaint means the date which litigation is terminated, with regard to the complaint.***

(Emphasis supplied.)

The last sentence of 8 C.S.R. 60-3.010.5 recognizes that litigation may result from the charge (presumably under § 213.111.1), and mandates that an employer retain records upon receipt of ***notice of filing of the administrative charge*** preserve records for the duration of the administrative and subsequent judicial proceedings.

These regulations, which are binding on Missouri employers, the MCHR, and Missouri courts, become inoperable if employees are allowed to file their charge well-beyond the 180-days from any alleged discriminatory practices and as late as 18 months after the alleged discriminatory action. Under such circumstances, a would-be plaintiff could wait until 18 months after her discharge – and presumably after the employer has disposed of the records it would have used to justify the employee's discharge – and then

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file a charge, wait 180 days, and then request and receive a notice of right to sue (all within the two-year window permitted by § 213.111.1).

If this Court finds for the first time that the timely filing of a charge of discrimination is not a condition precedent to bringing suit under the MHRA, then the court invites the possibility that scores of future charges and lawsuits brought under the MHRA will be investigated and litigated without the benefit of essential documentary evidence, including, but not necessarily limited to: (1) the hiring, promotion, demotion, transfer, layoff, termination, and/or compensation documents purportedly establishing a discriminatory practice; (2) HR investigation documents related to any internal complaints or grievances of discrimination; (3) the job application and other "onboarding" documents for the complainant; and (4) internal communications, including, but not necessarily limited to emails which provide an essential window into the motives underlying inherently fact-based employment decisions.

Such an outcome would substantially interfere with MCHR's investigation and conciliation efforts, thereby undermining the primary purpose of the MHRA in the first instance. Additionally, it would unfairly prejudice Missouri employers' ability to defend against stale employment discrimination claims, regardless of whether such employers are in substantial compliance with the MCHR's binding regulations requiring the retention of employment records for one-year. This is not and cannot be the intent of the MHRA and demonstrates why the mere existence of a secondary two-year statute of limitations period does not negate the 180-day timely filing condition precedent to bringing suit under the MHRA.

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2. WHERE THE MCHR HAS MADE NO FINDINGS RELATED TO THE TIMELINESS OF THE ALLEGATIONS IN AN ADMINISTRATIVE CHARGE OF DISCRIMINATION AND, THEREFORE, HAS NOT DETERMINED WHETHER A COMPLAINANT HAS EXHAUSTED HER ADMINISTRATIVE REMEDIES, TIMELINESS CAN BE RAISED AS A DEFENSE IN ANY SUBSEQUENT LAWSUIT.

As noted above, *supra* p. 5, prior to this Court's opinion in *Farrow*, employers regularly raised the timeliness of an employee's administrative charge as a defense in an employee's discrimination lawsuit. However, based on this Court's relevant holding in *Farrow*,[3] time-consuming, burdensome, and expensive petitions for collateral extraordinary writs have been filed at increasing rates across the state. This framework of collateral litigation has placed a significant burden on ***all*** parties involved – plaintiffs, defendants, the courts, and the MCHR.

In its appeal, Tivol sought review of a judgment by the Cole County Circuit Court that narrowed the scope of *Farrow*'s holding, applying it only to those instances where,

[3] Specifically, that the only means of challenging the issuance of a notice of right to sue on an untimely charge of discrimination is by a writ action in circuit court "as the parties did in *Public School Retirement System*, [188 S.W.3d 35 (Mo. App. W.D. 2006] challenging the Commission's jurisdiction to issue the right to sue letter[.]" *Farrow*, 407 S.W.3d at 590.

"[d]efendants took no action whatsoever to challenge the timeliness of [an employee's] complaint while it was pending prior to the issuance of a right to sue letter, despite having notice of the complaint." [*Legal File*; App. A6 (*quoting*, *Farrow*, 407 S.W.3d at 589).] However, as Tivol noted during oral arguments on November 30, 2016, there is a cleaner way to harmonize the *Farrow* holding with the pre-*Farrow* practice of allowing employers to raise timeliness as a defense in the underlying civil litigation. Such an interpretation would inure to the benefit of all parties, but would be particularly beneficial to the MCHR which has limited resources and time available to deploy to the large number of charges of discrimination filed each year.

In *Farrow*, this Court found:

> Commission regulation 8 C.S.R. 60-2.025(7)(B) directs the Commission to dismiss or close a complaint at any stage for lack of jurisdiction or in the absence of any remedy available to the complainant. Hence, the Commission was required to determine its own jurisdiction even if it did not make a decision on the merits of Farrow's claims. Had the Commission determined Farrow's claim was untimely, it would lack the authority to issue the right to sue letter. The Commission's only option would be to close the complaint for lack of jurisdiction or in the absence of any remedy. ***The Commission did not close or dismiss Farrow's complaint for want of jurisdiction; rather it exercised its authority to issue the right to sue letter, thus implicitly finding Farrow's claim was timely.***

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Id. at 589 (emphasis supplied). In other words, this Court found that the MCHR's silence as it related to its own jurisdiction to issue a notice of right to sue, was tantamount to an implicit finding that the complainant's charge was timely filed, particularly where the employer had failed to raise timeliness at its earliest opportunity.

The instant case is distinguishable. Here, the MCHR was not silent regarding its jurisdictional authority to issue a notice of right to sue. Instead, the MCHR issued its right-to-sue-letter to Norton with the following proviso: "This notice of right to sue is being issued as required by Section 213.111.1, RSMo., because it has been requested in writing 180 days after filing of the complaint. **Please note that administrative processing of this complaint, including determinations of jurisdiction, has not been completed.**" [LF, p. 20 (emphasis in original).]

This procedural distinction is important. As the MCHR has noted, each year it receives "numerous complaints, and whether a complaint (or a particular claim in a complaint) is timely – the issue Tivol raised – is case-specific and can turn on fact intensive inquires." [Respondent's Substitute Brief, p. 16 (*citing, generally, Tisch*, 368 S.W.3d at 252).] The MCHR most deploy its very limited resources to "determine which few cases to investigate thoroughly in order to proceed with its own hearing and determination of the claims" and which claims should be allowed "to be litigated in court after issuance of a right-to-sue letter." [*Id.* (*quoting, Igoe v. Dept. of Labor and Industrial Relations of the State of Missouri*, 152 S.W.3d 284, 287 (Mo. 2005)).]

By limiting *Farrow* and the judicial review procedure outlined therein to the peculiar factual circumstances of the case – *i.e.*, those instances where the MCHR issues

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a notice of right-to-sue letter that either makes an explicit jurisdictional finding and/or is silent regarding the same – this Court protects the interests of all parties involved and preserves judicial resources by eradicating unnecessary and the inefficient collateral judicial review of questions of timeliness.

3. STRIPPING EMPLOYERS OF THEIR RIGHT TO CHALLENGE THE TIMELINESS OF THE ALLEGATIONS IN A COMPLAINANT'S CHARGE OF DISCRIMINATION FRUSTRATES THE LEGISLATIVE INTENT THAT EMPLOYERS BE TIMELY NOTIFIED OF PURPORTED DISCRIMINATORY PRACTICES, THAT THEY BE SPARED THE BURDEN OF DEFENDING AGAINST "STALE" EMPLOYMENT DECISIONS WHICH ARE LONG-PAST, AND INCREASES THE LIKELIHOOD THAT RELEVANT EVIDENCE – PARTICULARLY EVIDENCE OF THE EMPLOYER'S INTENT – FADES AWAY.

As noted above, *supra* pp. 4-5, Missouri courts recognize that a purported victim of discrimination asserting claims based on the MHRA must file an administrative charge with the MCHR within 180 days of the purported discriminatory practice and must bring a civil action no later than two years after the alleged cause of occurred. *See, e.g.*, *Pollock*, 11 S.W.3d at 763. Missouri courts have done so without providing specific insight into the purpose of the timely filing requirement.

However, Federal courts, in the context of analyzing similar timely-filing requirements, emphasize the importance that "[a]n individual must file a charge within

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the statutory time period and serve notice upon the person against whom the charge is made." *See, also*, *Reed*, 363 S.W.3d at 143; *Alhalabi*, 300 S.W.3d at 525 (both recognizing that the exhaustion of administrative remedies requires a claimant to give notice of all claims of discrimination in an administrative complaint). These courts have also frequently noted that, "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002). Put differently, these timely-charge filing requirements serve "to encourage a potential charging party to raise a discrimination claim before it gets stale, for the sake of a reliable result and a speedy end to any illegal practice that proves out," *Edelman,* 535 U.S. at 112–13, 122 S.Ct. 1145, and to "protect employers from the burden of defending claims arising from employment decisions that are long past," *Delaware State Coll. v. Ricks,* 449 U.S. 250, 256–57, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980).

As argued above, *supra* pp. 2-11, the statutory and regulatory frameworks underlying the MHRA evidence a similar legislative intent that a charging party raise a discrimination claim before it gets stale and that the MHRA seeks to protect employers from the burden of defending claims arising from employment decisions that are long past. These timely-filing requirements also advance the primary statutory goal of the MHRA – to identify and eliminate discrimination through conference and conciliation. To achieve these goals, the MCHR necessarily relies on the active participation of employers. If this Court holds that the timely filing a charge is no longer a condition precedent for bringing suit, it will frustrate employers' ability to effectively participate in

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the investigation or conciliation efforts, thereby undermining the MHRA's opportunity to timely address and resolve potentially discriminatory practices.

Once again, there is probably no greater indication of the importance of timely filing requirements than 8 C.S.R. 60-3.010.4. As noted above, if this Court finds that the 180-day timely filing requirement is not a condition precedent to bring suit under the MHRA, it invites employees to sit on charges until the evidentiary trail goes cold. This will necessarily undermine the MCHR's investigation and conciliation processes and prejudice employers' ability to defend against discrimination lawsuits.

4. THE 180-DAY TIMELY FILING REQUIREMENT PROVIDES THE MCHR AN OPPORTUNITY TO DETERMINE THE VALIDITY OF A CLAIM, TO INVESTIGATE, AND TO IMPLEMENT THE PURPOSES OF THE MHRA FIRST THROUGH CONFERENCE, CONCILIATION, AND PERSUASION.

In its supplemental briefing order, this Court asked the parties to describe what "additional purpose is intended to be served by the requirement that a complaint be filed with the commission within 180 days of the alleged discrimination?" This request, however, seems to necessarily imply that the two-year statute of limitations is of greater importance or purpose than the 180-day filing requirement. It is not. Rather, given the legislator's clear intent that claims be promptly filed, investigated, and processed by the MCHR, Tivol would respectfully submit that more relevant inquiry is what additional purpose does the MHRA's two-year statute of limitations serve in light of the 180-day timely filing requirement?

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As a practical matter, budgetary and time constraints (particularly in the wake of *Farrow*) prevent the MCHR from performing a thorough investigation of the vast majority of the claims filed in Missouri. Given the foregoing, the MHRA's two-year statute of limitations serves the essential function of preventing the deterioration of the relevant evidentiary trail underlying a charge of discrimination and of protecting employers from having to attempt to defend against the same. It also avoids the possibility that a timey-filed charge can effectively die on the vine while an employee weighs whether they want to pursue a previously (and timely) filed charge of discrimination in civil court.

However, in an attempt to approach this question from the perspective posed by this Court, the 180-day timely filing requirement forces employees to be proactive and to bring claims in a timely – as opposed to convenient, self-serving, or strategic – fashion. The 180-day timely filing requirement discourages employees from actively retaining only that evidence which supports their claim, while simultaneously hoping that adverse evidence is lost, deleted, or otherwise destroyed. The 180-day timely filing requirement prevents an employee from courting friendly witnesses or waiting for adverse witnesses to either relocate on or otherwise have their relationship with the employer sour. Finally, given the workload of the MCHR, its limited financial resources, and the sheer number of discrimination claims engendered by a causation standard which all but eliminates any possibility for summary judgment, the 180-day timely filing requirement represents a necessary filter for non-meritorious, yet largely indefensible claims premised entirely on circumstantial or unsubstantiated evidence.

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5. THE PUBLIC AND ALL PARTIES TO A CLAIM OF DISCRIMINATION ARE THE INTENDED BENEFICIARIES OF THE TIMELY-FILING REQUIREMENT.

The Missouri legislature passed the MHRA in order to create the MCHR which is tasked with encouraging "fair treatment for and to foster mutual understanding and respect among, and to discourage discrimination against, any racial, ethnic, religious or other group protected by this chapter, members of these groups or persons with disabilities." RSMo. § 213.020. To effectively pursue that goal, the MCHR was granted broad authority to "adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter and the policies and practices of the commission in connection therewith." RSMo. § 213.030.1(6).

Using its powers to issue broad, legislative regulations, the MCHR removed all doubt or potential ambiguity as it relates to timely charge filing requirement: "Any complaint filed under Chapter 213, RSMo ***shall*** be filed within one hundred eighty (180) days of the alleged unlawful discriminatory practice or its reasonable discovery." 8 C.S.R. 60-2.025(3) (Emphasis supplied.)

Simply stated, the public and all parties to a charge of discrimination are the intended beneficiaries of the timely charge-filing requirement. More specifically: (1) employers benefit from the timely-filing requirement because they are provided prompt notice of claims being asserted against them, are shielded from defending against stale claims, and are provided greater opportunities for early conciliation or to promptly cure any potentially discriminatory practices; (2) the MCHR benefits from the timely-filing

requirement because it is afforded a more robust evidentiary record and more options for potential conciliation when it is able to promptly notified and allowed to investigate claims of discrimination; and (3) employees and the public benefit from the timely-filing requirement because they are provided a greater opportunity for reliable results and a speedy end to any illegal practice that proves out. Should the MCHR not be able to complete its investigation within 180 days, however, the MCHR leaves open the employee's right to file a lawsuit, while at the same time imposing the secondary two-year limitations period found in § 213.111.1, as a guard to prevent an employer from suffering the prejudice caused by defending against aging claims.

CONCLUSION

Based on the foregoing, Tivol respectfully requests that this Court reinforce the well-established principle that the timely filing of a charge of discrimination is a condition precedent to bringing a claim under the MHRA and affirm employers' interest in challenging potentially untimely claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Appellant states that this Appellant's Supplemental Brief complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that beginning with the Table of Contents and concluding with the last sentence before the signature block, Appellant's Supplemental Brief contains 5,971 words. The word count was generated by Microsoft Word 2010, and complies with the word limitations contained in Rule 84.06(b). This brief complies with Missouri Supreme Court Rule 84.06(a)(6) in that it was prepared using Times New Roman 13-point font. Furthermore, in compliance with Missouri Supreme Court Rule 84.06(c), Appellant's Supplemental Brief has been scanned for viruses, and it is virus-free.

/s/ Michael L. Blumenthal
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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2017, the foregoing APPELLANT'S SUPPLEMENTAL BRIEF was filed with the Clerk of the Supreme Court of Missouri using the Missouri eFiling System, and service paper copies were sent via U.S. mail, postage prepaid and addressed to the following:

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