Case No. SC95759

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL. CAESARS ENTERTAINMENT OPERATING CO., INC., ET AL.,
Appellants

v.

MISSOURI COMMISSION ON HUMAN RIGHTS, ET AL.,
Respondents

APPELLANTS' SUPPLEMENTAL BRIEF

LITTLER MENDELSON, P.C.
Sarah Jane Preuss, MO Bar 50952
1201 Walnut, Suite 1450
Kansas City, MO 64106
Telephone: (816) 627-4400
Facsimile: (816) 627-4444
jpreuss@littler.com

ATTORNEYS FOR APPELLANTS

SUPPLEMENTAL BRIEFING

Caesars Entertainment Operating Company, Inc. (f/k/a Harrah's Operating Co., Inc.), Harrah's North Kansas City LLC, Patrick Espinoza, and Chris Wilson (collectively "Harrah's") hereby provide the following supplemental briefing pursuant to the Court's Amended Order dated February 8, 2017.

I. THE TIMELY FILING OF A COMPLAINT WITH THE MISSOURI COMMISSION ON HUMAN RIGHTS IS A CONDITION PRECEDENT TO FILING A LAWSUIT IN THE CIRCUIT COURT.

The Missouri Commission on Human Rights ("commission") was created by the Missouri Human Right Act ("MHRA"). *See* RSMo. § 213.010. The commission's purpose is to "eliminate and prevent discrimination" in housing, employment, and public accommodations because of race, color, religion, national origin, ancestry, sex, disability, or familial status. 8 CSR 60-1.010(2). "Because of the overriding public concern in eliminating discriminatory practices, the commission shall have jurisdiction over all persons, public or private, except those specifically exempted by law." 8 CSR 60-1.010(2). Indeed, "the commission has the powers, **duties**, and functions to enforce Chapter 213, RSMo. [*i.e.*, the MHRA]." 8 CSR 60-1.010(4) (emphasis added). *See also* RSMo. § 213.030.

To invoke the powers of the commission (and, thus, to come under the protection of the MHRA), "[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 [180] days of the alleged act of discrimination, which shall

state the name and address of the person alleged to have committed the unlawful discriminatory practice and which shall set forth the particulars thereof and such other information as may be required by the commission." RSMo. § 213.075(1).

"After the filing of any complaint, the executive director [of the commission] **shall**, with the assistance of the commission's staff, investigate the complaint" to determine whether "probable cause exists for crediting the allegations of the complaint." RSMo. § 213.075(3) (emphasis added). If the executive director finds probable cause, she "**shall** immediately endeavor to eliminate the unlawful discriminatory practice . . ." *Id.* (emphasis added). Importantly, the MHRA permits the filing of a civil action in circuit court only upon issuance of a notice of right to sue. *See* RSMo. § 213.111(1) (If the commission has not completed its investigation within 180 days from the filing of the complaint and the complainant has requested in writing a notice of right to sue, "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.") (emphasis added). *See also Public Sch. Ret. Sys. v. Mo. Comm'n on Human Rights*, 188 S.W.3d 35, 44 (Mo. Ct. App. 2006) ("Pursuant to the MHRA, § 213.111.1, a MHRA suit may be brought in the circuit court upon the issuance of a right-to-sue letter."). "Any action brought in court under this section **shall** be filed within ninety days from the date of the commission's notification letter to the individual." RSMo. 213.111(1).

As a result of these procedures, this Court and others have held, "[t]he filing of a complaint with the Missouri Human Rights Commission is a prerequisite to seeking

judicial relief." *Igoe v. Dep't of Labor and Indus. Relations of State of Mo.*, 152 S.W.3d 284, 287 (Mo. 2005). *See also State ex rel. Wash. Univ. v. Richardson*, 396 S.W.3d 387, 397 (Mo. Ct. App. 2013) ("Prior to any suit in circuit court, a complainant under the MHRA is required to file a complaint with the MCHR in order to give the agency the opportunity to determine the validity of the claim, to investigate, and to determine if there is probable cause that discrimination has taken place."); *Public Sch. Ret. Sys.*, 188 S.W.3d at 44 ("Although not jurisdictional, a right-to-sue letter is a prerequisite to the filing of a MHRA claim in state court."); *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 853 (8th Cir. 2012) ("Under the MHRA, a complainant must file an administrative complaint that set[s] forth the particulars of the unlawful discriminatory practice . . . The filing of an administrative complaint is a prerequisite to seeking judicial relief.") (internal quotations omitted).

Title VII and other federal anti-discrimination laws also require exhaustion of administrative remedies with the U.S. Equal Employment Opportunity Commission ("EEOC") as a prerequisite to filing a lawsuit in federal court. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108–09 (2002) (describing Title VII exhaustion requirements). Accordingly, federal cases describing the purposes of the exhaustion requirement under Title VII are instructive to the disposition of this case. *Daugherty v. City of Md. Heights*, 231 S.W.3d 814, 819 (Mo. 2007) ("In deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination caselaw that is consistent with Missouri law.").

The timely administrative filing requirement serves several important purposes. "It gives the EEOC an opportunity to eliminate unlawful practices through informal conciliation, and it provides employers with formal notice of the charges being brought against them." *Ulvin v. Northwestern Nat. Life Ins. Co.*, 943 F.2d 862, 865 (8th Cir. 1991); *Horton v. Jackson Cty. Bd. of Cty. Comm'rs*, 343 F.3d 897, 899 (7th Cir. 2003) ("The purpose of requiring exhaustion of administrative remedies in Title VII cases is to place the employer on notice of an impending suit that he can try to head off by negotiating with the complainant, utilizing the conciliation services offered by the EEOC."). It also "promotes the prompt and less costly resolution of the dispute by settlement or conciliation." *Teal v. Potter*, 559 F.3d 687, 691 (7th Cir.2009). *See also Mayes v. Potter*, 418 F. Supp. 2d 1235, 1239 (D. Colo. 2006) ("Requiring a Title VII plaintiff to exhaust administrative remedies for each individual discriminatory act is consistent with the policy goals of the statute: First, requiring exhaustion of administrative remedies serves to put an employer on notice of a violation prior to the commencement of judicial proceedings. This in turn serves to facilitate internal resolution of the issue rather than promoting costly and time-consuming litigation."). Lastly, adhering strictly to the administrative filing requirement is the best guarantee for all parties involved – private litigants and the state – of evenhanded administration of the law. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("[E]xperience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.").

II. A PLAINTIFF'S FAILURE TO TIMELY FILE A COMPLAINT SHOULD BE RAISED AS AN AFFIRMATIVE DEFENSE IN THE CIRCUIT COURT.

The Missouri Court of Appeals has described the requirement to file a complaint with the commission and obtain a right to sue as a "prerequisite to the filing of a MHRA claim in state court," but "not jurisdictional." *Public Sch. Ret. Sys.*, 188 S.W.3d at 44. Similarly, the Court of Appeals for the Eight Circuit held, "[t]he filing of a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to a suit in federal court. Rather, it is a condition precedent and, 'like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.'" *Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447, 451 (8th Cir. 1998) (quoting *Zipes v. Trans World Airlines,* 455 U.S. 385, 393 (1982)). *See also Thompson v. W.-S. Life Assur. Co.*, 82 S.W.3d 203, 206-208 (Mo. Ct. App. 2002) (holding that "the requirements for timely filing are subject to principles of waiver, estoppel, and equitable tolling, including the continuing violation theory exception.").

Thus, both Missouri and federal law are consistent that the MHRA and Title VII's administrative procedures are conditions precedent that must be exhausted before the filing of a lawsuit. However, the mere facts that a plaintiff filed a complaint with the commission and received a right to sue do not mean the plaintiff's claims are timely (*i.e.*, the complaint was filed within 180 days of the alleged act of discrimination). It means only that the plaintiff has satisfied the conditions precedent to filing a lawsuit in state court. Accordingly, the failure to file a *timely* complaint at the administrative stage

should be asserted as an affirmative defense in the circuit court if and when the discrimination lawsuit is filed -- just like statute of limitations, waiver, estoppel, or any other affirmative defense would be asserted. *State ex rel. Tivol Plaza, Inc. v. Mo. Comm'n on Human Rights*, Case No. WD78477, 2016 Mo. App. LEXIS 349, at *31 n.6 (Mo. Ct. App. 2016) (Ahuja, J., dissenting) (collecting cases in which Missouri courts have considered the timeliness of a complaint filed with the commission as a defense in the underlying discrimination lawsuit). Indeed, the timeliness defense asserted by defendants in these proceedings is in fact a statute of limitations defense (*i.e.*, a challenge to the statutorily-prescribed time limits in which to bring a claim), which is undoubtedly an affirmative defense to be asserted in a responsive pleading. *See* Mo. R. Civ. P. 55.08 (listing "statute of limitations" as an affirmative defense).

In addition to the legal framework, practical considerations also make raising the timeliness issue in the circuit court the appropriate process. First, "[u]nless and until a discrimination lawsuit is filed, the timeliness of an administrative charge, and the propriety of the Commission's issuance of a right to sue letter, may be of solely academic interest even to the employer and employee." *Tivol Plaza*, 2016 Mo. App. LEXIS 349, at *33 (Ahuja, J., dissenting). Accordingly, it would be wasteful and inefficient to require a would-be defendant to engage in speculative collateral litigation against the Commission to challenge the timeliness of issues that may never matter. *Id.* Because employers would have 30 days to file a collateral action and employees would have 90 days to file in the circuit court, the inefficiencies and wastefulness would be unavoidable.

Additionally, the Commission has scarce resources, is not in the best position to make timeliness determinations, and in any event does not have the same interest as the parties in litigating the issue. The more efficient and comprehensive process would be to permit the litigants to address the issue in the circuit court on whatever record is needed for the court to render a considered decision on the issue.

III. A COMPLAINT SHOULD BE FILED WITHIN 180 DAYS OF THE ALLEGED DISCRIMINATORY ACT.

A determination that the filing of a timely complaint with the Commission is not a condition precedent given the outer two-year limitations period would obfuscate the purpose of the administrative process as a whole. This will disadvantage employees, employers, and the state. As the Court reiterated in *Morgan*, "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108 (2002); *also Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). As this Court has recognized, employment discrimination cases are "inherently fact-based and often depend on inferences rather than on direct evidence." *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. 2007). Employment cases rarely proceed on direct evidence of discrimination; rather, they are generally based on nuances with in the workplace. *See Miller v. Missouri Dep't of Soc. Servs. Div. of Youth Servs.*, No. 4:13-CV-1102 NAB, 2015 WL 5853790, at *2 (E.D. Mo. Oct. 6, 2015); s*ee also United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (noting there will seldom be eyewitness testimony as to an employer's mental processes).

The longer it takes for an employer to be on notice of a charge – and thus potential litigation involving its employment practices – the more likely it is that there will be no inferential documents regarding the case. Additionally, over a two-year period, the workplace could change such that the nuances in support of a plaintiff's claims are no longer available or have shifted, meaning the fact finder has to ultimately decide such claims on credibility issues rather than merit. This will hamstring both employers' and employees' abilities to prosecute and defend these claims as the relevant documents from which inferences and facts in support of the claim originate, typically rest with the employer. For the very reason that this Court has cautioned that "summary judgment should seldom be used in employment discrimination cases," the complaining party and employers are left with limited means of evidentiary support if there is no 180-day requirement for a person to file a complaint with the commission, thereby placing the employer on notice of potential litigation.

Further, this could lead to distraction from the case on the merits as discovery could take on a scorched earth approach to uncover any documents and witnesses that may be available after a two-year period, during which an employer may have no notice that an employee intends to challenge its employment practices. An employer, who otherwise has no legal obligation, may purge documents pursuant to a routine document retention policy within the two-year period. A prudent complaining party will likely seek an adverse inference instruction on any number of bases. This would lead to mini-trials regarding document retention and spoliation which would result in protracted litigation that will serve to unnecessarily expend judicial resources. *See Lewy v. Remington Arms*

Co., 836 F.2d 1104, 1112 (8th Cir. 1988) (analyzing what the court should consider in determining whether an employer's retention policy is sufficient and whether routine destruction of business records warrants an adverse inference). The 180-day period benefits not just the parties, but the Court that will have to make determinations regarding document preservation efforts depending on the employer's policies, the length of time within the two-year period that the employee waited to complain, and the requests sought.

IV. CONCLUSION

As discussed *supra*, the timely filing – within 180 days of the alleged discriminatory act – of a complaint with the Commission is a condition precedent to filing a lawsuit. A plaintiff's failure to do so should be raised as an affirmative defense in the uncertain event that the plaintiff proceeds with litigation following the administrative agency process.

Respectfully submitted,

/s/ Sarah Jane Preuss
Sarah Jane Preuss #50952
LITTLER MENDELSON, P.C.
1201 Walnut, Suite 1450
Kansas City, MO 64106
Telephone: 816.627.4400
Facsimile: 816.627.4444
jpreuss@littler.com

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2017, the foregoing APPELLANTS' 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:

Mr. D. Ryan Taylor
Assistant Attorney General
CHRIS KOSTER
Attorney General
Fletcher Daniels State Office Building
615 E. 13th Street, Suite 401
Kansas City, Missouri 64106
ryan.taylor@ago.mo.gov

Mr. James R. Layton
Solicitor General
CHRIS KOSTER
Attorney General
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
james.layton@ago.mo.gov

ATTORNEYS FOR RESPONDENTS
MISSOURI COMMISSION ON HUMAN RIGHTS
AND ITS EXECUTIVE DIRECTOR, ALISA WARREN

/s/ Sarah Jane Preuss
ATTORNEY FOR APPELLANTS