No. SC95977

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. FOCUS WORKFORCE MANAGEMENT, INC. TAMMY PETERSON, AUSTIN SCHLATTER, BEN SHARP AND ASHLEY POIRIER,

Relators,

vs.

HONORABLE WILLIAM B. COLLINS, Circuit Judge, Division 1, Circuit Court of Cass County, Missouri,

Respondent.

Cass County Circuit Court No. 16CA-CC00096

Court of Appeals No.: WD80054

BRIEF OF RESPONDENT

Todd M. Johnson (48824)
VOTAVA NANTZ & JOHNSON, LLC
9237 Ward Parkway, Suite 240
Kansas City, Missouri 64114
(816) 895-8800
FAX: (816) 895-8801
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Mo. Const. Art. V, §4.1 provides this Court with the authority to issue original remedial writs. The writ of prohibition is an extraordinary remedy to be used with great caution and forbearance and only in cases of extreme necessity. *State ex rel. Cass Cnty. v. Mollenkamp*, 481 S.W.3d 26, 29 (Mo. App. W.D. 2015). A writ of prohibition does not issue as a matter of right; whether a writ should be issued is left to the court's discretion. *Id.* A court may issue a writ of prohibition when the facts and circumstances of the case demonstrate unequivocally that an extreme necessity for preventative action exists. *State ex rel. Washington Univ. v. Richardson*, 396 S.W.3d 387, 391 (Mo. App. W.D. 2013).

The essential function of a writ of prohibition is to correct or prevent an inferior court or agency from acting without or in excess of its jurisdiction. *Mollenkamp*, 481 S.W.3d at 29. Prohibition cannot be used as a substitute for appeal. *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991). Because prohibition is a powerful writ, directing the body to cease further activities, its use has been limited to "three, fairly rare, categories of cases." *State ex rel. Riverside Joint Venture v. Mo. Gaming Comm'n*, 969 S.W.2d 218, 221 (Mo. banc 1998). Prohibition lies where (1) a judicial or quasi-judicial body lacks personal jurisdiction over a party or lacks jurisdiction over the subject matter it is asked to adjudicate; (2) a lower tribunal lacks the power to act as contemplated; and (3) a litigant may suffer irreparable harm or where an important question of law decided erroneously would otherwise escape review on appeal and the aggrieved

party may suffer considerable hardship and expense as a consequence or the erroneous decision. *Id.*

STATEMENT OF FACTS

Respondent adopts Relators' statement of facts except as corrected and supplemented herein.

After Plaintiff Alica Mulvey's Charge of Discrimination with the Missouri Commission on Human Rights (MCHR) was filed, the MCHR served Initial Respondent Interrogatories to Respondents in the MCHR administrative proceeding as part of its investigation process. Resp. App. 030-041. These interrogatories, among other requested information, seek the job title of each individual Respondent and each individual Respondent's home address, telephone number and email address. C&D App. 030-041. Respondents in the MCHR administrative proceeding did not provide the MCHR any of the contact information sought by the interrogatories for it as a company or for its individual employee that was the subject of Plaintiff's Charge of Discrimination.

The MCHR closed its administrative proceeding via administrative closure on February 18, 2016. A Right to Sue letter dated February 18, 2016 was then sent by the MCHR's offices in Jefferson City, Missouri to the parties and counsel in or around Kansas City, Missouri. Resp. App. 0026-0029. Respondents characterizes as a "fact" the very proposition which they bear the burden of proving – namely that §213.111.1 RSMo mandates an action under the MHRA be filed within 90 days from the date of Commission's notification letter. The same statute states the (MCHR) "shall issue to the

person…a letter indicating his or her right to bring a civil action within ninety days of such notice against the person named in the complaint." §213.111.1 RSMo.

Plaintiff electronically filed her Petition for Damages against Defendants at 1:42 am on May 19, 2016. Resp. App. 001-004. The claims made in the Petition for Damages were under the Missouri Human Rights Act ("MHRA"). After counsel for Plaintiff obtained the MCHR investigative file and because Respondents in the MCHR administrative proceeding did not provide the MCHR with the required biographical information, Summons were issued to each Defendant to be served either to their corporate registered agent or their work address with the corporate Defendant. Resp. App. 0005-0012. Service of process of this Petition for Damages was never effected on Defendants Poirier or Peterson. Resp. App. 013-017. Service of process was only effected on Defendants Sharp and Schlatter at their places of business and on relators FOCUS and Church & Dwight through their registered agents. Resp. App. 018-025.

POINTS RELIED ON

1. Plaintiff's MHRA claims are not time-barred because (1) the Rule 44.01 applies to the statutory limitation periods within which suits must be filed and added three days to the prescribed period of time for Plaintiff to file her Petition for Damages

after receiving notice of the Right to Sue letter by mail; and (2) equitable tolling applies.

- §213.111.1 RSMo
- Missouri Rule of Civil Procedure 44.01
- *Morris v. Karl Bissinger, Inc.*, 272 S.W.3d 441 (Mo. App. E.D. 2008).
- *Bowling v. Webb Gas Co., Inc. of Lebanon*, 505 S.W.2d 39, 42 (Mo. 1974).
- *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. 2015).

2. Plaintiff was properly granted leave to amend her Petition for Damages under Rule 55.33 to include claims of negligence and wrongful discharge claims based on public policy.

- Missouri Rule of Civil Procedure 55.33
- *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 668 (Mo. 1999).
- *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010).
- *Akers v. RSC Equip. Rental, Inc.*, 2010 U.S. Dist. LEXIS 138819 at *11-14 (E.D. Mo. Dec. 31, 2010).

ARGUMENT

1. Plaintiff's MHRA claims are not time-barred because (1) the Rule 44.01 applies to the statutory limitation periods within which suits must be filed and added three days to the prescribed period of time for Plaintiff to file her Petition for Damages

after receiving notice of the Right to Sue letter by mail; and (2) equitable tolling applies.

A. The Missouri Rules of Civil Procedure show the action is timely.

Relators' reliance on *Hammond v. Mun. Correction Inst.*, 117 S.W.3d 130, 138 (Mo. App. 2003) fails to account for the application of Rule 44.01(e) when computing Plaintiff's time to file a claim.[1] The request is also not in line with the construction given the Missouri Rules of Civil Procedure, public policy found in the Missouri Human Rights Act[2], the equity afforded this set of circumstances as well as lengthy Missouri precedent favoring cases to be resolved on the merits. *See O'Brien v. Blackwell-Baldwin, Inc.*, 819 S.W.2d

[1] Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served by mail, three days shall be added to the prescribed period. In this case, and despite the relators attempts to argue otherwise, the ***notice*** contemplated in these facts is the ***Notice of Right to Sue*** letter mailed by the MHRC.

[2] This Court has made it clear that Missouri's discrimination safeguards under the MHRA were not identical to the federal standards and could offer greater protection. *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 383 (Mo. banc 2014). To follow *Hammond* would have this Court make the discrimination safeguards under the MHRA inferior to those found in Title VII's federal standards.

417, 421 (Mo. App. S.D. 1991) (Missouri Human Rights Act case where Court noted Missouri's favor to disposing cases on the merits when possible).

Relators primarily rely on *Hammond* to support their right to an order in prohibition. In *Hammond*, the Court of Appeals determined that Rule 44.01(e), which adds three days to any prescribed period of time for which a party is required to act upon receiving ***notice*** by mail, did not apply to a right-to-sue ***notice***. *Hammond*, 117 S.W.3d at 139. In support of its determination, the Court reasoned that (1) the Missouri Rules of Civil Procedure only apply to civil actions "pending" in a trial or appellate court, and (2) Rule 44.01 is not applicable to right-to-sue notices because the Missouri Rules of Civil Procedure do not apply to proceedings in administrative agencies. *Id.*

The Court of Appeals' reasoning in *Hammond* was rightly refuted five years later in *Morris v. Karl Bissinger, Inc.*, 272 S.W.3d 441 (Mo. App. E.D. 2008). In *Morris*, an employee received a right-to-letter from the MCHR dated October 1, 2007. The employee filed suit against the employer on December 31, 2007, 91 days from the date of the right-to-sue letter. The trial court granted the employer's motion to dismiss on the ground that it was untimely.

In reversing the trial court, the Court of Appeals was critical[3] of the earlier opinion

[3] The Court of Appeals in *Morris* noted that the *Hammond* Court cited *AT&T Info. Sys., Inc. v. Walleman*, 827 S.W.2d 217, 221 (Mo. App. W.D. 1992) for the proposition that the Missouri Rules of Civil Procedure do not apply to proceedings in administrative agencies. *Walleman* concerned application of the Missouri Rules of Civil Procedure to a

in *Hammond*. In doing so, the *Morris* Court looked to long-standing Missouri Supreme Court precedent stating that the provisions of ***Rule 44.01 should be construed as applying to statutory limitation periods within which suits must be filed***, as well as to procedures occurring after suit is filed. *Bowling v. Webb Gas Co., Inc. of Lebanon*, 505 S.W.2d 39, 42 (Mo. 1974) (emphasis added)[4]. In words, equally applicable here, the Supreme Court articulated its rationale:

> Our construction of the rule will result in a uniform procedure for computation of time and…a construction contrary to the one we have

---

Chapter 536 contested case in the MCHR. By contrast, and like *Morris*, the instant case is a civil action filed in Circuit Court alleging violations of the Missouri Human Rights Act. It is not an administrative proceeding in the MCHR, despite the relator's attempts to impose administrative procedure in Circuit Court. Indeed, upon issuance of the right-to-sue letter (which relators point to), the "commission shall terminate all proceedings related to the [administrative] complaint." §213.111.1 RSMo; *see also Richardson*, 396 S.W.3d at 397 ("One the letter is issued, the MCHR can take no further action to pursue the complaint…Section 213.111 clearly authorizes a separate civil action for damages ***that is not part of any administrative proceeding***.") (emphasis added)

[4] While Relators are correct that *Bowling* was an action under the Wrongful Death Act, as opposed to the MHRA, that distinction is immaterial as pointed out by the Court in *Morris*.

reached would, for all practical purposes, result in reducing the statutory limitation period.

The Court of Appeals' later holding in *Morris* has been described by the author of Missouri Employment Law and Practice as the "definitive statement" on the applicability of Rule 44.01 to the filing of suit under after receiving a right-to-sue letter. Resp. App. 0047. Although the opinion concerned the application of Rule 44.01(a), as opposed to the matter at hand which concerns Rule 44.01(e)[5], there is little doubt that *Morris* was a reasoned rejoinder of *Hammond* with respect to whether Rule 44.01 applies to the timing

[5] Relators go to great lengths in an attempt to distinguish the applicability of Rule 44.01(a) from Rule 44.01(e). In doing so, it seems to concede that, if May 19, 2016 was a weekend or holiday, the appellate courts' holdings in *Bowling*, *Morris* and others would save Plaintiff's claims as timely under Rule 44.01, but since May 19, 2016 was not a holiday, the same rule does not apply despite the presence of subsection (e) within the same rule. This narrow view of the applicability of the Rules of Civil Procedure is repugnant to their purpose and not in line with the public policy behind the MHRA or Missouri law favoring cases to be disposed of on their merits. Rule 41.02; *see also Macchi v. Whaley*, 586 S.W.2d 70, 75 (Mo. App. E.D. 1979) (The Missouri Rules of Civil Procedure govern all civil actions in the following courts: Supreme Court, Court of Appeals, circuit courts and courts of common pleas. There is no reference to administrative hearings…"

of filing suit after the issuance of a right-to-sue letter. As further support, the holding in *Morris* also cited to *Putnam v. Stix, Baer & Fuller*, 795 S.W.2d 620, 621 (Mo. App. E.D. 1990) and *Westerhold v. Mullenix Corp.*, 777 S.W.2d 257, 266 (Mo. App. E.D. 1989) to find Rule 44.01 applicable to the timeliness of the civil action under the Missouri Human Rights Act. *Putnam* applied Rule 44.01 to a workers' compensation statute of limitations and *Westerhold* applied the same rule to a mechanics' lien statute of limitations. Similarly, albeit in a federal opinion, the Court in *Waldermeyer v. ITT Consumer Financial Corp.*, 767 F. Supp. 989, 991-92 (E.D. Mo. 1991), expressly decided that Rule 44.01 governed the computation of time with respect to civil actions alleging violations of the Missouri Human Rights Act. Applying ***all*** provisions of Rule 44.01 to the matter at hand actually shows the deadline for Plaintiff to file any Petition for Damages would be Monday, May 23, 2016. Rather than being 103 minutes late as the relators urge, the Plaintiff's May 19, 2016 petition was actually filed four calendar days early through the use of Rule 44.01.

The Missouri Human Rights Act is coextensive with Title VII of the Federal Civil Rights Acts. In deciding cases under the MHRA, the Courts are guided not only by Missouri law, but also by applicable federal employment discrimination decisions. *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 762 (Mo. App. 1999). Since the 90-day period in which to file suit runs from receipt in the federal system under Fed.R.Civ.P. 6, the same deadlines should apply in the state process as well. In its annotation, Rule

44.01(e) actually recites that it is adopted from Fed.R.Civ.P. 6(e).[6] In *Berkowkski v. St. Louis County Bd. of Election Comm'rs*, 895 S.W.2d 819, 827 (Mo. App. E.D. 1993), the Court of Appeals held "both the federal and statute statutes require a civil suit to be filed within ninety days of the receipt of the right to sue letter." *See also Vankempen v. McDonnell Douglas Corp.*, 923 F. Supp. 146, 149 (E.D. Mo. 1996) (Plaintiff met MHRA requirement that suit be filed "within ninety days after receipt of notice of right to sue); *Hill v. John Chezik Imports*, 869 F.2d 1122, 1124 (8th Cir. 1989) (Ninety-day period for filing suit under Title VII begins to run on the day the right to sue letter is received). In this

[6] There is no question that Rule 44.01(e) applies to the civil action Plaintiff filed in Circuit Court. Rule 41.01(a)(1) *See also Scott v. Flynn*, 946 S.W.2d 248, 252 (Mo. App. E.D. 1997) (stating all civil rules apply to all civil actions pending before a circuit judge and noting federal courts' use of interpleader under Missouri Rules of Civil Procedure). Further, Rule 44.01(e) should be construed to secure the just, speedy and inexpensive determination of every action. Rule 41.03. Further, Supreme Court rules govern over contradictory statutes in procedural matters unless the General Assembly specifically annuls or amends the rules in a bill limited to that purpose. *Abbott v. Abbott*, 415 S.W.3d 770, 774 (Mo. App. W.D. 2013). Missouri considers statutes of limitation as procedural only and not as substantive law. *Id.* Rule 44.01 does not "change" the right of Plaintiff's action, but prescribes the method to carry on the suit. Because Rule 44.01 is procedural, it controls this case unless specifically annulled or amended by the legislature. *State v. Reese*, 920 S.W.2d 94, 95 (Mo. 1996). In this case, the legislature has not done so.

case, since the MCHR served notice to the parties on February 18, 2016, this act of serving this notice (a ***Notice*** of Right to Sue) caused the clock to start running and Rule 44.01(e) applied. *Columbia Gas and Window Co. v. Harris*, 945 S.W.2d 5, 6 (Mo. App. W.D. 1997).

B. The purpose of the MHRA shows the action is timely.

The provisions of the Missouri Human Rights Act shall be construed to accomplish the purposes thereof (vindicating the right of those who are discriminated against) and any law inconsistent with any provision of this chapter (including 213.111.1) shall not apply. §213.101 RSMo; *Gilliland v. Mo. Ath. Club*, 273 S.W.3d 516, 523 (Mo. 2009); *Swyers v. Thermal Science, Inc.*, 887 S.W.2d 655, 656-57 (Mo. App. E.D. 1994) (citing legislative purposes). The language of the MHRA itself is silent as to whether the 90-day time frame runs from the date of mailing of the notice or the receipt, however the construction given this statute favors the three-day mailing period already found in Rule 44.01. The seminal rule of statutory construction directs this Court to determine the true intent of the legislature, giving reasonable interpretation in light of the legislative objective. *Acme Royalty Co. v. Director of Revenue*, 96 S.W.3d 72, 74 (Mo. banc 2002). Where the statute's language is clear and unambiguous, there is no room for statutory construction. *Wolff Shoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). However, 213.111.1 RSMo causes confusion as it uses terms interchangeably:

> 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 so indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint. If after the filing of a complaint…as it relates to housing, 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 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. Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint. No person may file or reinstate a complaint with the commission after the issuance of a notice under this section shall be filed within ninety days from the date of the commission's notification letter to the individual but no more than two years after the alleged cause occurred or its reasonable discovery by the alleged injured party.

In *Hammond*, the Court of Appeals determined that the statute used terms interchangeably and caused confusion. "We agree with Hammond that the first two sentences are not clear as to whether the notice of the right to sue runs from the date the letter is issued or on the date the letter is received. This is because the drafters used the words "letter" and "notice" interchangeably, except for the last sentence, in which they used the words "notification letter." The Court in *Hammond*, felt the last sentence clarified

any confusion, however all it did was introduce a third, undefined term that does not specify whether the action is valid upon writing, mailing or receipt. In fact, since Rule 44.01 and subsection (e) of the rule were promulgated pursuant by Section 5 of Article V of the Constitution of Missouri, it supersedes all inconsistent statutes, including relator's construction of 213.111.1 RSMo. *See* Rule 41.02; *see also Crist v. Missouri State Div. of Family Servs.*, 775 S.W.2d 266, 267-68 (Mo. App. W.D. 1989) (Missouri Rule of Civil Procedure superseded 90-day notice of appeal provision); *S.J.V. v. Voshage*, 860 S.W.2d 802, 804 (Mo. App. E.D. 1993) (when there is a conflict between the rules and statutes affecting procedural rights, the rule prevails).

In situations in which the language of a statute is not clear, the Court must be cognizant of two things. First, the Court must look to the purpose of the statute. A statute is not to be interpreted narrowly if such an interpretation would defeat the purpose of the legislation. *St. Louis County v. B.A.P.*, 25 S.W.3d 629, 631 (Mo. App. 2000). "Notice" is synonymous with receipt: this is why the Missouri Rules of Civil Procedure favor personal service and service via certified mail, as well as "actual notice" of actions. It is also why Rule 44.01 contains a three-day mailing provision lifted directly from Rule 6 of the Federal Rules of Civil Procedure.

The MHRA is a broadly remedial statute for which liberal construction is necessary. *Vankempen*, 923 F. Supp. At 148. Interpreting the language of 213.111.1 RSMo with the legislative intent of the drafters then, favors the filing deadline running from receipt of the right-to-sue letter as opposed to the date set forth on that letter. A contrary interpretation of the phrase "such notice" found in 213.111.1 violates the purpose of the statute, as it

would mean a claimant seeking to file an action in circuit or associate circuit court could have fewer than 90 days to file suit, depending entirely on when the MCHR chose to mail the letter (in this case, from Jefferson City, Missouri to the Kansas City area)[7]. Such a result is inconsistent with the Missouri Supreme Court's holding in *Bowling* as well. *Supra* at 42. Based upon the equitable and remedial nature of the legislation, as well as the common understanding of the phrase "notice" meaning "receipt," the most logical construction of 213.111.1 is that the filing deadline begins to run at the time the claimant receives the right-to-sue letter from the MHRC. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

C. Equity shows the action is timely.

The receipt of a right-to-sue letter is not a jurisdictional prerequisite to suit under the Missouri Human Rights Act. Therefore, a failure to file within ninety days does not necessarily wrest jurisdiction from this Court or render any suit filed out of time a nullity. Rather, it is similar to a statute of limitation, not of repose, and is subject to equitable tolling or estoppel under appropriate circumstances. *Croffuy v. United Parcel Serv., Inc.*, 575 F. Supp. 1264 (E.D. Mo. 1984) (Plaintiff held not to have "received" notice of right-to-sue letter when wife, who signed for it, had accident and was hospitalized on the same day). Likewise, Rule 44.01 provides for three days to be added to the prescribed period. This equitable principle may also apply to the right-to-sue letter issued by the MCHR as already

[7] Resp. App. 0026-0029.

implicitly found by the trial court when it permitted Plaintiff leave to file a First Amended Petition for Damages.[8]

2. Plaintiff was properly granted leave to amend her Petition for Damages under Rule 55.33 to include claims of negligence and wrongful discharge claims based on public policy.[9]

[8] These failures thwarted Plaintiff's ability to file her petition by unnecessarily forcing additional work to be undertaken to identify the proper Defendants (primarily those individual defendants associated with Relator FOCUS in the companion matter) and take measures to enable them to be served with the Summons and Petition for Damages. Relators should not now benefit from their failure to answer these interrogatories through a dismissal of Plaintiff's action under Count I. *See Adams v. Inter-Con Sec. Sys.*, 242 F.R.D. 530 (N.D. Cal. 2007) (defendants' failure to provide contact information delayed Plaintiffs' pursuit of legal rights); *see also Beisly*, 469 S.W.3d at 445. Although Relators believe this argument is misleading, the docket sheet in the Circuit Court action below shows service was never effected on Defendants Poirier or Peterson and service was only effected on Defendants Sharp and Schlatter at their places of business and on Defendants FOCUS and Church & Dwight through their registered agents.

[9] Relators did not petition this Court for a Writ of Prohibition as to Respondent's Order

A. Missouri's Rules of Civil Procedure permit the amendments.

Despite not requesting a writ on the issue, Relators now also challenge the trial court's decision to permit Plaintiff leave to amend under Rule 55.33 to add new counts and to add greater specificity as to why her claims under the Missouri Human Rights Act were timely. The tradition of allowing amendments to pleadings is longstanding. *See State ex rel. Kan. City S. Rwy. Co. v. Nixon*, 282 S.W.3d 363, 366 (Mo. 2009). This decision reflects the directive contained in Rule 55.33, which provides that leave to amend a pleading shall be freely given when justice so requires. Neither Rule 55.27 nor §213.111.1 RSMo requires the circuit court to stop everything and dismiss the action. Neither rule precludes the opposing party from filing a motion under Rule 55.33 and a motion to amend may be the most appropriate response to a motion to dismiss under these circumstances. *See Id; see also Southwestern Bell Yellow Pages v. Wilkins*, 920 S.W.2d 5, 16 (Mo. App. E.D. 1996) (Rule 55.33 permits overlooked amendments); *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 85 (Mo. 2008) (writ modified to allow Plaintiff to amend action to state a proper cause of action). Especially when relator can cite to no legitimate claim or

---

permitting Plaintiff leave to amend her Petition for Damages. As such, Plaintiff moves to strike the arguments contained in Relators' Brief as to these topics. Further, and unlike Relator Church & Dwight Co, Inc. in SC95976, the First Amended Petition for Damages contains a claim under Missouri's Service Letter Statute that has not been challenged as futile. Out of caution, Plaintiff includes her arguments as to why the Court should quash its preliminary writ as to this issue as well.

defense which it is deprived of because of the amendments. *See Wheeler v. Phenix*, 335 S.W.3d 504, 511 (Mo. App. S.D. 2011).

Among other valid claim, Plaintiff's First Amended Petition for Damages pleads even more clearly that her action under the Missouri Human Rights Act is timely. *See State ex rel. Tivol Plaza, Inc. v. Mo. Comm'n on Human Rights*, 2016 Mo. App. LEXIS 349 (Mo. App. W.D. April 12, 2016) (equitable tolling applies to charges filed with the Missouri Commission on Human Rights); *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. 2015) (equitable estoppel tolled statute of limitations).

B. Plaintiff's negligence claims are not preempted.

Relators argue Plaintiff's negligence claims are preempted by her claims under the Missouri Human Rights Act as well as the Workers' Compensation Act. However, a statutory right of action does not supersede common law remedies unless the statutory remedy fully comprehends and envelopes the remedies provided at common law. *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 668 (Mo. 1999). A statutory cause of action does not preempt a common law claim so long as a Plaintiff's claim asserts more than a mere violation of the statute. *Id.* at 669. In her First Amended Petition, Plaintiff's claims for negligence assert more than a mere violation of the Missouri Human Rights Act. The negligence count specifically alleges, among other things, that relator negligently failed to train, supervise and prevent its agents and employees in a manner reasonable employers would under the circumstances. The petition withstands dismissal as it invokes substantive principles of law entitling Plaintiff to relief and alleges ultimate facts informing

defendant of that which Plaintiff will attempt to establish at trial. *Grewell v. State Farm Mut. Auto. Ins. Co.*, 102 S.W.3d 33, 36 (Mo. 2003).

C. Plaintiff's Wrongful Discharge Claims are not preempted.

Plaintiff's wrongful discharge claims based on public policy are also recognized. As noted earlier, Missouri's discrimination safeguards under the MHRA are not identical to the federal standards and can offer greater discrimination protection. *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818-19 (Mo. 2007). Therefore, the Court is not bound to determine that the MHRA preempts a public policy claim based on the public policy just because Title VII has preempted claims based on public policy under Title VII. *Shelton v. Village of Bel Nor*, 2011 U.S. Dist. LEXIS 82929 at *9-10 (E.D. Mo. July 28, 2011).

In *Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. 2010), the Missouri Supreme Court adopted the public policies cited by Plaintiff as exceptions to Missouri's at-will employment doctrine. Specifically, the Court stated that an exception existed for the reporting of wrongdoing or violations of law to superiors or public authorities. If an employer terminates an employee for this reason, then the employee has a cause of action in tort for wrongful discharge based on the public-policy exception. In Plaintiff's First Amended Petition, Plaintiff sets out a number of criminal statutes making clear statements of public policy, Sections 565.090.1 (harassment) and 565.070.1 (assault). Plaintiff further alleged, during her employment, she complained to certain of the Defendants about offensive conduct, comments and actions and was acting in the interests of the clear mandates of public policy by complaining and reporting the believed violations

of the aforementioned criminal statutes. *See Akers v. RSC Equip. Rental, Inc.*, 2010 U.S. Dist. LEXIS 138819 at *11-14 (E.D. Mo. Dec. 31, 2010) (motion to dismiss wrongful termination claims denied where Plaintiff made complaints under Missouri's criminal assault statute); *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 857 (8th Cir. 2012). Therefore, the MHRA does not preempt a wrongful discharge claim based under the public policy as set forth in Missouri law. *See Shelton*, U.S. Dist. LEXIS at *9-10; *see also Lewey v. Vi-Jon, Inc.*, 2012 U.S. Dist. LEXIS 71237 at *n.3 (E.D. Mo. May 22, 2012).

CONCLUSION

A Writ of Prohibition is not appropriate in this case because of the construction given the Missouri Rules of Civil Procedure, public policy found in the Missouri Human Rights Act, the equity afforded this set of circumstances as well as lengthy Missouri precedent favoring cases to be resolved on the merits. Further, Plaintiff's common law claims are recognized under Missouri law and leave to amend was properly granted (with or without the pending Motions to Dismiss). As such, Respondent respectfully requests this Court dismiss Relators' Petition, dissolve as improvidently issued its Preliminary Writ of Prohibition, assess all costs of this proceeding to Relators and for such other and further relief as the Court deems just and proper.

/s/ Todd M. Johnson
Todd M. Johnson (48824)
VOTAVA NANTZ & JOHNSON, LLC
9237 Ward Parkway, Suite 240
Kansas City, Missouri 64114

(816) 895-8800
FAX: (816) 895-8801
ATTORNEY FOR RESPONDENT
tjohnson@vnjlaw.com

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 6,039 words.

CERTIFICATE OF SERVICE

This is to certify that, on the 24th day of February, 2017, a true and correct copy of this Brief of Respondent, together with Respondent's

Appendix were served via regular mail, postage prepaid, on the following. In addition, the undersigned certifies, pursuant to Rule 55.03, that he has signed the original pleadings:

Jennifer M. Hannah
Tedrick A. Housh, III
Henry W. Tanner
LATHROP & GAGE, LLP
2345 Grand Boulevard, Suite 2200
Kansas City, MO 64108-2618
ATTORNEYS FOR DEFENDANTS/
RELATORS FOCUS WORKFORCE
MANAGEMENT, INC., TAMMY
PETERSON, AUSTIN SCHLATTER,
BEN SHARP AND ASHLEY
POIRIER

Patrick F. Hulla
Jennifer K. Oldaver
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
4520 Main Street, Suite 400
Kansas City, MO 64111
ATTORNEYS FOR DEFENDANT/
RELATOR CHURCH & DWIGHT CO., INC.

The Honorable William B. Collins
Circuit Court of Cass County, Missouri
2501 W. Mechanic Street
Harrisonville, MO 64701
RESPONDENT

/s/ Todd M. Johnson
Attorney for Respondent