**SC95977**

**IN THE SUPREME COURT OF MISSOURI**

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

***Relators*,**

**v.**

**HONORABLE WILLIAM B. COLLINS CIRCUIT JUDGE, DIVISION 1 CIRCUIT COURT CASS COUNTY, MISSOURI**

***Respondent.***

**Appeal from the Circuit Court of Cass County, Missouri The Honorable William B. Collins, Circuit Judge**

# REPLY BRIEF OF RELATORS FOCUS WORKFORCE MANAGEMENT, INC., PETERSON, SCHLATTER, SHARP, AND POIRIER

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## III. JURISDICTIONAL STATEMENT

Relators adopt the Jurisdictional Statement set forth in their opening brief.

## IV. STATEMENT OF FACTS

Respondents adopt the Statement of Facts that they set forth in their Opening Brief.

## V. POINTS RELIED ON

**RELATORS ARE ENTITLED TO AN ABSOLUTE ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN DISMISSING THE PLAINTIFF'S CLAIM UNDER THE MISSOURI HUMAN RIGHTS ACT ("MHRA") FOR THE REASON THAT THE CLAIM IS TIME-BARRED IN THAT PLAINTIFF DID NOT FILE HER LAWSUIT WITHIN THE 90-DAYS FROM THE DATE OF HER "RIGHT-TO-SUE" LETTER AND THERE IS NO BASIS UNDER MISSOURI LAW TO EXCUSE HER FOR THAT FAILURE.**

- Mo. Rev. Stat. § 213.111.1
- Mo. S. Ct. R. 44.01
- *Hammond v. Mun. Corr. Inst.*, 117 S.W. 3d 130 (Mo. App. W.D. 2003)

## VI. ARGUMENT

**RELATORS ARE ENTITLED TO AN ABSOLUTE ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION OTHER THAN DISMISSING THE PLAINTIFF'S CLAIM UNDER THE MISSOURI HUMAN RIGHTS ACT ("MHRA") FOR THE REASON THAT THE CLAIM IS TIME-BARRED IN THAT PLAINTIFF DID NOT FILE HER LAWSUIT WITHIN THE 90-DAYS FROM THE DATE OF HER "RIGHT-TO-SUE" LETTER AND THERE IS NO BASIS UNDER MISSOURI LAW TO EXCUSE HER FOR THAT FAILURE.**

### A. Plaintiff Ignores The Plain Directive Of Missouri Law That MHRA Claims Be Filed Within 90 Days Of The Date Of The Right-To-Sue Letter.

Plaintiff takes great effort to distract this Court from what is a simple issue of statutory interpretation. Plaintiff argues that Relators' position is overly harsh, that dismissal would be contrary the interests of the MHRA, and that Relators' authority is flawed and obsolete. In reality, Relators are simply asking that this Court require the Respondent to follow the plain instructions of the Missouri General Assembly and enforce the time limitations contained in the Act.

The persuasive and binding authority supporting Respondents' position is found in the MHRA itself, specifically the last sentence of §213.111.1, which plainly sets out the deadline for filing a lawsuit under the Act, "[a]ny 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** but no later than two years after the alleged cause occurred or its

reasonable discovery by the alleged injured party." (emphasis added). Thus, a plaintiff must file suit within 90 days of the date on the letter received. This same sentiment is echoed in the Right-to-Sue Letter that is sent, including the Letter sent to Plaintiff. Resps.' Ex. 2-1, Appx. at 15 (Ex. 1 to Defs.' Sugg. in Supp. of Mot. to Dismiss). Still, Plaintiff failed to file the lawsuit within that 90-day window, filing instead on the 91-st day. *See* Br. of Resp., p. 9 ("Plaintiff electronically filed her Petition for Damages against defendants at 1:42 a.m. on May 19, 2016.")

To escape this problem, Plaintiffs are trying to convolute the meaning of what is a plainly worded statute, by arguing that § 213.111.1 is ambiguous as to when the deadline for filing a cause of action began to run. The Court of Appeals for the Western District of Missouri in *Hammond v. Mun. Corr. Inst.,* found that the filing requirement in this last sentence of the statute is "clear and unambiguous." 117 S.W. 3d 130, 137-138 (Mo. App. W. D. 2003)(stating that the 90-day deadline should come as "no surprise to a lay person.")

The Court's primary rule of statutory interpretation is to look at the plain language of the statute at issue and to give effect to the language used by the legislature. *Brinker Mo., Inc. v. Dir. of Rev.*, 319 S.W.3d 433, 437–38 (Mo. banc 2010); *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). Here, the Missouri General Assembly selected the language to be used in the statute, particularly the directive that the date of filing should be 90 days from the "date of the commission's letter. *See* Mo. Rev. Stat. § 213.111.1. There is nothing ambiguous about this plain directive.

Plaintiff suggests that the case of *Berkowski v. St. Louis County Board of Election Commissioners*, 854 S.W.2d 819 (1993) "held" that both the federal (Title VII) and state

(MHRA) statutes have the same 90-day statute of limitations. Br. in Opp. at 16. The *Berkowski* decision, however, only discusses that plaintiff's federal and state claims in a general sense, finding them to be untimely. 854 S.W.2d at 827. The *Berkowski* Court never addressed when either of these 90-day periods began to run, and certainly made no holdings on the issue. *Id.* The *Berkowski* Court was not required to consider whether there were any notable differences between the federal and state causes of action.

It is important to note that while the MHRA may have been modeled after federal law (Title VII), the Missouri General Assembly chose to use different language from the federal statute in crafting §213.111.1. *See* 42 U.S.C. 2000(e)-(5)(f)(1)(litigant has 90 days from receipt of right-to-sue letter to bring suit under Title VII). This Court must then assume that this choice to alter the language to make the 90-day period more restrictive was intentional and must give effect to that intent. *See Hammond,* 117 S.W.3d at 137 (comparing differences in MHRA and Title VII and enforcing strict 90-day timeline from date on letter.)

In interpreting provisions such as statutes of limitations, the Court is bound to consider the intentional choices of the legislature. *See State ex rel. Beisly v. Perigo*, 469 S.W.3d 434, 456 (Mo. 2015)(Russell M., dissenting). It is the legislature's job, not the role of the Court, to act to correct any unintended or overly harsh results. *Id.* The Missouri General Assembly has had almost 14 years since *Hammond* was decided to correct any perceived error in the statute. Thus, while the MHRA may be intended to meet a broad purpose, the Court cannot ignore the restrictions that the General Assembly has placed on MHRA litigants, including the time limitations for filing a cause of action.

### B. None Of The Rule 44.01 Calculation Provisions Apply To Extend Plaintiff's Time For Filing.

Rule 44.01 includes several provisions that govern how deadlines are calculated or, in some instances, extended, in Missouri courts. Relators are not arguing, as Plaintiff's response would indicate, that Rule 44.01 does not apply to any case filed under the MHRA. Instead, Relators merely point out that none of the Rule 44.01 rules, as written, applies to extend *this Plaintiff's* time for filing beyond May 19, 2015.

#### 1. The Three-Day Mailing Rule, Rule 44.01(e) Does Not Apply Where The Deadline Is Not Triggered By Service.

Plaintiff's primary argument in opposition to dismissal is that her 90-day window for filing her MHRA claim should have been extended by three days through Rule 44.01(e). Although Respondent did not provide any rationale for his decision not to dismiss the Plaintiff's claim, the application of this rule is the likely reason for his ruling.

Unfortunately for Plaintiff, Rule 44.01(e) simply does not apply in her particular case. As Relators discussed in detail in the initial brief, this Rule is limited to deadlines that are triggered by "service of a notice." *See* Rule 44.01(e). If some other act or event starts the clock running, Rule 44.01(e)'s three-day mailing rule does not apply. *See Columbia Glass and Window Co. v. Harris*, 945 S.W.2d 5, 6 (Mo. App. W. D. 1997)(Rule 44.01(e) did not apply to extend ten day period for filing application of trial de novo because period began from entry of judgment, not when the court serves notice of the judgment).

Plaintiff argues that Relators are promoting a "narrow" application of the Rules of Civil Procedure. Relators are simply requesting that this Court apply these Rules as they

are written. Mo. Rev. Stat. § 213.111 does not calculate the deadline for filing a private cause of action from service or receipt of the Right-to-Sue Letter, but from the date of the letter itself. *See Hammond,* 117 S.W.3d at 139. Because the service is irrelevant to the starting of the 90-day period under the MHRA, Rule 44.01(e) has no bearing in calculating the time for filing Plaintiff's lawsuit.

### 2. Case Law Interpreting Rule 44.01(a) Is Not Relevant To The Issues Presented In This Writ.

Plaintiffs' reliance on Rule 44.01(a) and cases interpreting this section is also misplaced. If Plaintiff's 90th day had fallen on a weekend or holiday, then Plaintiff's deadline may have been eligible for an extension. Instead, here the 90th day in Plaintiff's statutory window fell on a Wednesday.

Plaintiff has cited *Morris v. Karl Bissinger, Inc.*, 272 S.W.3d 441 (Mo. App. E.D. 2008), and many other authorities to demonstrate that Rule 44.01 can be applied to MHRA actions. None of these cases, which all relate to Rule 44.01 subsection (a)[1], are relevant to Plaintiff's case. Notably, Plaintiff has not cited a single case applying Rule 44.01(e) to an MHRA case or to any other cause of action for which the time for filing is triggered by an act other than service.

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[1] *See, e.g. Putnum v. Stix, Baer, & Fuller,* 795 S.W.2d 620 (Mo. App. E.D. 1990)(applying Rule 44.01(a) to workers' compensation case); *Westerhold v. Mullenix Corp*., 777 S.W.2d 257 (Mo. App. E.D. 1989)(applying Rule 44.01(a) to mechanics' lien case when last day to file fell on a Sunday); *Waldermeyer v. ITT Consumer Fin. Corp*., 767 F. Supp. 989 (1991)(applying weekend rule to extend deadline for filing MHRA claim in federal court).

As discussed in the opening brief, the language of Rule 44.01(a) in comparison to the restricted language in Rule 44.01(e) explains why the two provisions are not interchangeable. Subsection (a) is open-ended in its application, which explains why it can be applied in so many instances. Subsection (e) only extends deadlines that are triggered by service, which this deadline is not. Plaintiff's reasoning that, simply because one section of Rule 44.01 has been applied to an MHRA claim, all sections should apply overlooks the directive of these Rules. The Rules should be applied and enforced as written. As written, neither of these provisions extended the date for Plaintiff to file her Petition.

### 3. The Western District Decision In *Hammond v. Municipal Correction Institute*, Is Instructive On The Issue Of Interpreting §213.111.1 And Remains Good Law.

The Western District, in *Hammond v. Municipal Correction Institute,* 117 S.W.3d 130 (2003) considered this exact same issue and the exact same arguments raised by this Plaintiff and found that the Plaintiff in that case, who filed his lawsuit under the MHRA exactly 91 days after the date on his right-to-sue letter, had allowed his claim to lapse. As was the case in *Hammond*, § 213.111.1 serves as ample authority to support the same result. The *Hammond* decision considered the plain language utilized by the Missouri General Assembly in directing that the clock for filing an MHRA claim is triggered by the date on the plaintiff's letter, not by service of or receipt of that letter. Thus, the *Hammond* Court declined to apply Rule 44.01(e) to extend the 90-day period. *Id.* at 18.

In hopes of distracting this Court from the language of the statute and of the sound rationale utilized by the *Hammond* Court to interpret §213.111.1, Plaintiff continues to

argue the flaws of a second line of reasoning in *Hammond* – an argument that has not been presented by the Relators and is not relevant to this case.

As Relators explained in their opening brief, the *Hammond* Court further distinguished the application of Rule 44.01 by reasoning that the Rules of Civil Procedure did not apply to administrative procedures, such as a proceeding before the MCHR. *Id*. at 139-40. Relators first do not believe that this conclusion is part of the holding in *Hammond* because, as that Court notes, the plaintiff in that case had failed to raise Rule 44.01 on appeal. *See id.* at 139. More importantly, however, this Court need not consider the issue either because, as Relators have explained, the plain language of Rule 44.01(e) directs that it only apply to deadlines that are triggered by service, which §213.111.1 is not. Thus, any discussion of this administrative law distinction is merely a distraction from the issue actually raised in this writ.

### C. Plaintiff's Argument That Equity Should Extend Her Time Filing Lacks Any Basis In Law Or In Fact.

First, there are no legal grounds that would extend Plaintiff's statute of limitations under the facts set forth in her Petition or in her brief. Plaintiff argues that Rule 44.01(e) should apply to equitably toll her time for filing. As explained above, this rule does not apply to this case. Further, Rule 44.01(e) is a rule that governs how time is calculated; it is not a tolling device and it does not speak to equity.

The *Croffut* case cited by Plaintiff for the proposition that equitable tolling applies to her claim (Br. in Opp., at 20-21) was decided by a federal court applying the time limits imposed under Title VII, not the MHRA. *See Croffut v. United Parcel Serv., Inc*., 575 F. Supp. 1264, 1265 (E. D. Mo. 1984). As noted in *Hammond* and discussed above,

while the Missouri General Assembly may have modeled the MHRA under Title VII, a notable distinction is the difference between its time limit provisions and those set forth under §213.111.1. *Croffut* did not consider or discuss § 213.111.1 of the MHRA and is not applicable here.

Even if the *Croffut* decision did apply, its holdings do not help Plaintiff. *Croffut* merely stands for the proposition that the filing deadlines of Title VII should be treated like a statute of limitations rather than a statute of repose. *See* 575 F. Supp. at 1265. Missouri law tolls statutes of limitations on very limited bases set out by the legislature and courts do not have the power to extend those circumstances. *Rowling v. Neslie Holdings*, 437 S.W.3d 180, 184 (Mo. en banc 2014)(citations omitted). There are no exceptions to the 90-day time limit set forth in § 213.111.1, which has been previously recognized by Courts interpreting the provision. *See Hammond,* 117 S.W.3d at 133; *Houston-Morris v. AMF Bowling Centers, Inc.,* No. 11-00325-CV-W-FJG, 2011 WL 5325646, *3 (W.D. Mo. Nov. 3, 2011)(federal case discussing the time for filing an MHRA action).

Finally, even if equitable tolling were available to Plaintiffs who fail to file within the 90-day window, Plaintiff has not offered a factual situation that would compel tolling here. In Missouri, equitable tolling principles apply only in those circumstances where the plaintiff was prevented from timely filing suit by the defendant's action or by other pending litigation. *Rowling*, 437 S.W.3d at 184 (citations omitted). Plaintiff cites the lack of proper service information on the defendants, but fails to explain how that delayed her filing. Indeed, when Plaintiff filed her lawsuit, she filed it with what she now complains of as incomplete service information. If Plaintiff was able to file on the 91st

day without complete service information, there is no reason that she could have submitted her filing a mere two hours earlier and could have fallen within the timeline.

The reality is that Plaintiff simply missed her deadline, even if only by a few hours. There was no action or delay by any party or entity that led Plaintiff to file her lawsuit out of time. Equity is not available to save claims that have lapsed due to Plaintiff's neglect.

## VII. CONCLUSION: THE WRIT SHOULD BE MADE PERMANENT

Plaintiff does not address Relators' position that a writ is appropriate in this case. Respondent has allowed Plaintiff to proceed with a cause of action that is clearly barred by Missouri law. The MHRA sets a specific deadline for filing suit, which was not met. Under the facts presented in Plaintiff's Petition, and which are not corrected in the Amended Petition[2], Relators are immune from suit under the MHRA. The refusal of Respondent to dismiss the MHRA action has forced the four Employee Relators to continue to defend unnecessary litigation. In addition, Relator Focus and Defendant Church are forced to defend against claims that expand any remedies that Plaintiff would otherwise be entitled to under common law.

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[2] As Relators indicated in their opening brief, Defendant Church and Wright has filed an accompanying writ proceeding (Case No. Case SC95976). Relators did not argue the additional issues raised in Defendant Church's Writ Petition in their writ Petition and, therefore, will not respond to the arguments that Plaintiff has offered in its Brief in Opposition in this case. Relators, however, do support the arguments raised in Church's Petition. Should the Court grant the relief requested by Defendant Church, that ruling would be equally applicable to Relators.

A permanent writ should issue because it is inappropriate to require that Relators and Defendant Church participate in unnecessary, inconvenient, and expensive litigation of these claims. This Court should order that its preliminary writ of prohibition in this case become permanent. *See State ex rel. Holzum v. Schneider*, 342 S.W.3d 313, 315 (Mo. 2011)(writ of prohibition is "the appropriate remedy to prevent a lower court from proceeding on an action barred by the statute of limitations.")

Respondent has refused to follow the plain, unambiguous, and controlling language of Mo. Rev. Stat. § 213.111.1, allowing Plaintiff to proceed with a claim that she failed to file within the statutory window. Relators Focus Workforce Management, Inc., Tammy Peterson, Austin Schlatter, Ben Sharp, and Ashley Poirier respectfully request that the Preliminary Writ of Prohibition by this Court be made absolute.

Dated: March 9, 2017

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By: */s/ Jennifer M. Hannah*

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## CERTIFICATE OF SERVICE

I hereby certify that, on March 9, 2017, I filed a true an accurate Adobe PDF copy of this Reply Brief of Relators via the court's electronic filing system, which notified the following that filing:

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## CERTIFICATION THAT BRIEF COMPLIES WITH THE WORD LIMITATIONS AND ELECTRONIC FILING REQUIREMENTS OF RULE 84.06(c)

I certify that I prepared this brief using Microsoft Word 2010 in the Times New Roman size 13 font. I further certify that this brief complies with the word limitations of the Supreme Court Rule 84.06(b), as this brief contains 2,906 words.

*/s/ Jennifer M. Hannah*
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