

No. SC95976

IN THE SUPREME COURT OF MISSOURI

CHURCH & DWIGHT CO., INC.,

Relator,

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 RELATOR IN SUPPORT OF WRIT OF PROHIBITION

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JURISDICTIONAL STATEMENT

Mo. Const. Art V, § 4.1 provides this Court with the authority to issue original remedial writs. A Writ of Prohibition “is the appropriate remedy to prevent a lower court from proceeding on an action barred by the statute of limitations.” *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434, 437 (Mo. 2015) (quoting *State ex rel. Holzum*, 342 S.W.3d 313, 315 (Mo. banc 2011)). Here, Plaintiff’s Missouri Human Rights Act claims are time-barred; thus a Writ of Prohibition is necessary to prevent needless litigation of Plaintiff’s claims. Similarly, a Writ is the appropriate vehicle to prevent “unnecessary, inconvenient and expensive litigation,” which would result here if Plaintiff were allowed to pursue her time-barred MHRA claims under the guise of common law. *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 369 (Mo. banc 2008).

On October 11, 2016, pursuant to Mo. S. Ct. R. 97, Relators filed and served a Petition for Writ of Prohibition in this Court. On November 22, 2016, this Court issued its Preliminary Writ of Prohibition. Respondent’s Answer was filed on December 22, 2016. Relator Church & Dwight now asks that this Court make its Preliminary Writ absolute.

STATEMENT OF FACTS

On July 27, 2015, Plaintiff Alicia Mulvey filed a Charge of Discrimination with the Missouri Commission on Human Rights (MCHR), alleging that Relator had discriminated and retaliated against her. Exhibit 1, Petition, C&D App. A004 at ¶ 19. The MCHR issued Plaintiff a Notice of Right to Sue dated February 18, 2016. Exhibit 1, Petition, C&D App. A006 at ¶ 20, and Exhibit 2, Notice of Right to Sue, C&D App. A016. The February 18, 2016 Notice of Right to Sue warned Plaintiff she must bring a civil action under the Missouri Human Rights Act (MHRA) **“WITHIN 90 DAYS OF THE DATE OF THIS NOTICE” or “[HER] RIGHT TO SUE IS LOST.”** Exhibit 2, Notice of Right to Sue, C&D App. A016 (emphasis in original). Indeed, the Missouri Human Rights Act requires “[a]ny action brought in Court ... be filed within 90 days from the date of the Commission’s notification letter.” Mo. Rev. Stat. § 213.111.1 (emphasis added). Exhibit 13, C&D App. A130-31.

But Plaintiff Mulvey did not file her petition (which alleged only MHRA claims) until May 19, 2016—91 days after issuance of her Notice of Right to Sue. Exhibit 1, Petition, C&D App. A005-07. On June 24, 2016, Relator filed a motion to dismiss Plaintiff’s petition for failure to state a claim, arguing that Plaintiff’s MHRA claims were time-barred. Exhibit 2, Motion to Dismiss and Suggestions in Support, C&D App. A009-016. Relator’s co-defendants filed a similar motion to dismiss on that same date. Exhibit 3, C&D App. A018-030. These motions were fully briefed on July 14, 2016. Exhibits 5-6, Replies, C&D App. A068-077 and A079-083.

On August 4, 2016, three weeks after the motions to dismiss were fully briefed, Plaintiff filed a motion for leave to amend her petition, seeking leave to add two common law claims against Relator: negligence and wrongful discharge. Plaintiff's proposed claims of negligence and wrongful discharge are based on the identical set of operative facts underlying her untimely MHRA claims. Exhibit 7, Motion for Leave and Suggestions, C&D App. A085-097. On August 12, 2016, Relator filed a response in opposition to Plaintiff's motion for leave to amend. Exhibit 8, Memorandum in Opposition, C&D App. A099-105.

On August 16, 2016, Respondent heard argument on Relator and its co-defendants' motions to dismiss and Plaintiff's motion for leave to amend. During the hearing, Respondent summarily denied the motions to dismiss and granted Plaintiff's motion for leave to amend. Exhibit 10, Hearing Transcript, C&D App. A113 at 19:10-14 and App. A115 at 25:19 - 26:1, and Exhibit 9, Court's August 16, 2016 Order, C&D App. A107. Without offering any basis for his rulings, Respondent stated only: "The first thing I am going to do is I am going to deny the motion to dismiss in this case. That way you all can take me up. I have been to the Supreme Court twice this month, so it's no problem for me." Exhibit 10, Transcript of August 16, 2016 Hearing, C&D App. A113 at 19:10-14.

On October 11, 2016, Relator filed a writ petition before this Court. On November 22, 2016, this Court issued its Preliminary Writ in Prohibition.

POINTS RELIED ON

1. Relator is entitled to an order prohibiting Respondent from taking any action other than sustaining Relator's motion to dismiss Plaintiff's Missouri Human Rights Act claims because Plaintiff's claims are time-barred in that Plaintiff filed her petition outside the applicable 90-day statute of limitation to file a civil action under the Missouri Human Rights Act (the "MHRA"), Mo. Rev. Stat. § 213.111.1, and neither Rule 44.01(e) nor equitable tolling apply.

- Mo. Rev. Stat. § 213.111.1
- *Hammond v. Municipal Correction Institute, et al.*, 117 S.W.3d 130, 135-36 (Mo. App. A2003).

2. Relator is entitled to an order prohibiting Respondent from taking any action other than denying Plaintiff's motion for leave to amend because Plaintiff's additional claims of negligence and wrongful discharge are futile in that the MHRA and the Missouri Workers' Compensation Act preempt common law claims based on alleged sexual harassment and retaliation.

- *Shawcross v. Pyro Products, Inc.*, 916 S.W.2d 342, 345 (Mo. Ct. App. 1995).
- *Noel v. AT&T Corp.*, No. 4:12-cv-1673, 2013 U.S. Dist. Lexis 43628, at *9 (E.D. Mo. Mar. 27, 2013).
- *Yount v. Davis*, 846 S.W.2d 780, 782–83 (Mo. Ct. App. 1993).
- *Backes v. Walgreen, Co.*, 2:13-CV-04217-NKL, 2014 WL 1655030, at *3 (W.D. Mo. Apr. 25, 2014).

ARGUMENT

On May 19, 2016—91 days after the Missouri Commission on Human Rights (“MCHR”) issued her a Notice of Right to Sue—Plaintiff Alicia Mulvey filed suit against Relator Church & Dwight Co., Inc. (“Church & Dwight”), alleging that Church & Dwight discriminated and retaliated against her in violation of the Missouri Human Rights Act (“MHRA”). The MHRA, Mo. Rev. Stat. § 213.111.1, requires all claims to be brought within 90 days of the Notice of Right to Sue—a requirement repeated on the Notice itself. Exhibit 2, Notice of Right to Sue, C&D App. A016. Because Plaintiff failed to bring her MHRA claims within 90 days, they are time-barred and should have been dismissed. Respondent nevertheless disregarded the statutory limitations period and summarily denied Relator’s motion to dismiss for failure to state a claim.

Respondent then compounded that error by allowing Plaintiff leave to file an Amended Petition. Plaintiff’s proposed Amended Petition offered nothing more than her untimely MHRA claims re-packaged under common law theories, a practice consistently rejected by Missouri courts.¹ Thus, Plaintiff’s proposed amendment, at least with regard to her proposed negligence and wrongful discharge claims, was futile and her request for leave to amend should have been denied. Relator, therefore, respectfully asks this Court for a Writ of Prohibition, ordering Respondent to vacate his Orders (1) denying Relator’s

¹ Plaintiff also sought leave to add a claim for violation of the Service Letter Statute against Co-Defendant Focus Workforce Management. Because that claim is not directed against Relator, Relator did not address it below nor does Relator address it here.

motion to dismiss for failure to state a claim; and (2) granting Plaintiff's motion for leave to amend her petition. Relator similarly asks for an order requiring Respondent to dismiss this case in its entirety.

I. Plaintiff's MHRA Claims are Time-Barred and should have been Dismissed.

"Statutes of limitation are favored in the law." *Hammond v. Mun. Correction Inst.*, 117 S.W.3d 130, 138 (Mo. App. A2003). The MHRA is no exception. The MHRA's statute of limitations has been strictly construed. *Id.* (citing *Hill v. John Chezik Imports*, 797 S.W.2d 528, 530 (Mo. App. A1990); *Swartzbaugh v. State Farm Ins. Co.*, 924 F. Supp. 932 (E.D. Mo. 1995); *Waldermeyer v. ITT Consumer Financial Corp.*, 767 F. Supp. 989 (E.D. Mo.1991)). This statute of limitations dictates that actions be filed no later than 90 days after the date of the Right to Sue notice:

Any action brought in Court under this Section **shall be filed within 90 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.

Mo. Rev. Stat.. § 213.111.1 (emphasis added). An MHRA action based on a Notice of Right to Sue issued more than 90 days before the filing of a petition is time-barred and, thus, fails to state a claim upon which relief can be granted. *Hammond v. Municipal Correction Institute, et al.*, 117 S.W.3d 130, 135-36 (Mo. App. A2003).

A. The 90-day period runs from the date of the Right to Sue Notice.

§ 213.111.1 is unambiguous in its language: the 90-day limitations period begins to run from the date of the Notice of Right to Sue—not the day Plaintiff received the

notice. *Id.* Moreover, this should be “no surprise to a layperson, because that specific language [is] included twice” in the Notice of Right to Sue. *Id.* at 139. Indeed, Plaintiff’s Notice of Right to Sue expressly warned her—in bold-faced and capital letters—that failing to file within this 90-day window would result in forfeiture of her right to sue:

IF YOU DO NOT FILE A CIVIL ACTION IN STATE CIRCUIT COURT RELATING TO THE MATTERS ASSERTED IN YOUR COMPLAINT WITHIN 90 DAYS OF THE DATE OF THIS NOTICE (AND WITHIN TWO YEARS OF THE ALLEGED CAUSE, OR THE DISCOVERY OF THE ALLEGED CAUSE, OF YOUR COMPLAINT), YOUR RIGHT TO SUE IS LOST.

Exhibit 2, Notice of Right to Sue, C&D App. A016 (emphasis in original).

B. Plaintiff’s Untimely Claims cannot be Salvaged by Application of Missouri Rule of Civil Procedure 44.01(e).

Plaintiff Mulvey acknowledges she filed her Petition 91 days after her Notice of Right to Sue was issued. She nevertheless argues that Rule 44.01(e) should be applied to save her claims. Rule 44.01(e) states:

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.

Exhibit 13, C&D App. A132-33. In other words, in direct contradiction to § 213.111.1 and her Notice of Right to Sue, Plaintiff argues she had 93 days to file her Petition. This

argument was previously rejected by the Missouri Court of Appeals for the Western District and should be rejected by this Court.

Indeed, like Plaintiff Mulvey, in *Hammond v. Municipal Correction Institute*, the plaintiff filed a petition 91 days after his Notice of Right to Sue was issued. And, like Plaintiff Mulvey, he also argued that Rule 44.01(e) saved his claims. But as noted in *Hammond*, the Missouri Rules of Civil Procedure—by their own express terms—apply only to actions already *pending* in the circuit courts. *Id.* at 139 (citing Mo. R. Civ. Pro. 41.01). They do not apply to Notices of Right to Sue, and they do not apply to administrative proceedings. *Id.*

Plaintiff argues that the *Hammond* decision was abrogated by the Missouri Court of Appeals for the Eastern District in *Morris v. Bissinger, Inc.*, 272 S.W.3d 441 (Mo. Ct. App. 2008). It was not. In *Morris*, the plaintiff's 90-day deadline fell on a Sunday; plaintiff then filed her Petition on the following Monday. The Eastern District applied Rule 44.01(a), finding that the plaintiff's filing was timely. Plaintiff Mulvey does not argue that Rule 44.01(a) is applicable to this case. Indeed, Plaintiff Mulvey's 90th day was May 18, 2016—a Wednesday.

Moreover, in reaching its conclusion, the *Morris* Court specifically noted that *Hammond* examined the application of Rule 44.01(e), not 44.01(a). *Id.* at 442-43. The *Morris* Court also noted a contrary holding (*i.e.*, a holding that plaintiff's limitations period expired on a Sunday) would effectively reduce the statutory limitations period. *Id.* That is not the case here. Instead, application of Rule 44.01(e) would *expand* the statutory limitations period, giving Plaintiff Mulvey 93 days to file her Petition, when the Missouri

legislature gave her only 90 days.²

Additionally, Rule 44.01(e), by its own express terms, does not apply to the 90-day deadline under the MHRA. “Rule 44.01(e), by its own terms, applies when a party has a limited amount of time to exercise some right or comply with some requirement ‘after the service of a notice or other paper.’ In other words, it applies to situations *where the act of serving notice causes the clock to start running*. If an event other than a service of notice starts the clock, then Rule 44.01(e) does not apply.” *Columbia Glass and Window Co. v. Harris*, 945 S.W.2d 5, 6 (Mo. App. AW. Dist. 1997) (emphasis added). Here, Mo. Rev. Stat. § 213.111.1 clearly states that plaintiff’s 90-day period runs from the date of the Notice of Right to Sue, not the service of it. Rule 44.01(e), therefore, is inapplicable.³

² Plaintiff also argues *Bowling v. Webb Gas Co., Inc. of Lebanon*, 505 S.W.2d 39 (Mo. 1974) applies and is “controlling.” Exhibit 11, Hearing Transcript, C&D App. 109-110 at 7:5-11 and 8:22-9:19. But *Bowling* was not brought under the MHRA or Mo. Rev. Stat. § 213.111.1. *See* 505 S.W.2d at 40. Instead, *Bowling* was a case arising under the Missouri Wrongful Death Act and, like in *Morris*, the Court utilized Rule 44.01(a) to extend the time for filing when the last date of the statute of limitations fell on a date the court was closed, noting that a contrary holding would serve to shorten the limitations period. *Id.* *Bowling* does not address the issues here because Plaintiff’s 90th day did not fall on a weekend or holiday.

³ On the other hand, Rule 44.01(a), applied to the MHRA claim in *Morris*, is worded

C. Equitable Tolling cannot save Plaintiff's MHRA Claims.

The MHRA's 90-day limitation period "may be suspended or tolled only by specific disabilities or exceptions enacted by the legislature, and courts cannot extend those exceptions." *Hammond*, 117 S.W.3d at 138. Because Plaintiff has not alleged any facts that would bring her MHRA claims within one of these statutory exceptions, they should have been dismissed.

Even if the MHRA's 90-day limitations period were subject to equitable tolling, Plaintiff has alleged no facts showing she is entitled to equitable tolling. A plaintiff can avoid the statute of limitations through equitable tolling if, and only if, she can demonstrate: "(1) that she has been pursuing [her] rights diligently, and (2) that some extraordinary circumstances stood in [her] way." *Adams v. Div. of Emp't Sec.*, 353 S.W.3d 668, 673 (Mo. Ct. App. E.D. 2011). "The application of any exceptions must be construed strictly, even in cases of hardship." *State ex rel. Mahn, J.H. Berra Constr. Co., Inc.*, 255 S.W.3d 543, 547 (Mo. Ct. App. E.D. 2008). Accordingly, "courts have applied equitable tolling sparingly, usually restricting it to situations where the defendant has misled the plaintiff regarding the cause of action; the plaintiff has been prevented from asserting his or her rights; or . . . the plaintiff brought the action in the wrong forum."

more broadly, allowing application in a number of situations where the deadline for a party's action falls on a day when the court is not open. *See* Rule 44.01(a) (extending "any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute.") (emphasis added).

Ross v. Union Pac. R.R. Co., 1995 WL 15466, *4 (Mo. App. 1995), *aff'd*, 906 S.W.2d 711 (Mo. 1995).

Here, Plaintiff merely alleges she did not have the personal addresses of the individual defendants, which she blames on Relator's supposed failure to give their personal addresses to the Missouri Commission on Human Rights.⁴ But Plaintiff did not need the personal addresses of these individuals to file her Petition. Indeed, Plaintiff did not even use their personal addresses when she filed her Petition. Instead, she used the individual defendants' business addresses—all of which she had (and gave to the MCHR) at the time she filed her Charge of Discrimination in July 2015. Exhibit 5, Charge of Discrimination, C&D App. A027-30. Equitable tolling, therefore, does not apply.

⁴ Of course, the individual defendants were all employed by defendant Focus, not Relator. Exhibit 1, Petition, C&D App. 001-006. Thus, Relator would not have had their personal addresses. Moreover, the MCHR had merely issued a Request for Information; Relator was under no legal obligation to respond and the MCHR never followed up on the information *via* a subpoena.

II. Plaintiff's Common Law Negligence and Wrongful Discharge Claims⁵ Fail on Their Face and Her Motion for Leave to Add Them should have been Denied.

Although the Missouri Rules of Civil Procedure permit liberal amendment, “a party does not have an absolute right to file even a first amended petition.” *Baker v. City of Kansas City*, 671 S.W.2d 325, 329 (Mo. Ct. App. A1984); *Bratt v. Cohn*, 969 S.W.2d 277, 284 (Mo. Ct. App. A1998). A motion to amend should be denied on grounds of futility where, even with the amendment, no legal cause of action exists. *See Yocum v. Piper Aircraft Corp.*, 738 S.W.2d 145, 147 (Mo. Ct. App. A1987) (affirming denial of motion to amend). It is not error to deny leave to amend “where the asserted claim has no merit.” *Bratt*, 969 S.W.2d at 284. Here, Respondent should have denied Plaintiff's motion for leave to amend her Petition with regard to the negligence and wrongful discharge counts because those counts do not state a claim, making amendment futile.

A. Plaintiff's Negligence Claim is Preempted by Both the MHRA and the Missouri Workers' Compensation Act.

Plaintiff's negligence claim is based on factual allegations identical to those alleged in her untimely MHRA claims. Indeed, Plaintiff's negligence claim does nothing more than re-package her discrimination and retaliation claims using negligence terminology:

⁵ Plaintiff also sought leave to add a claim for violation of the Service Letter Statute against Defendant Focus Workforce Management. Because that claim is not directed against Relator, Relator did not address it below nor does Relator address it here.

- Relator and co-defendant Focus have a duty to supervise and train their employees to prevent discrimination and retaliation;
- They breached this duty;
- As a result, Plaintiff was discriminated and/or retaliated against; and
- Plaintiff suffered damages.

Exhibit 11, Amended Petition, C&D App. A117-126.

The MHRA already provides Plaintiff with a comprehensive remedial scheme for her discrimination and retaliation claims. Indeed, the MHRA prohibits discrimination in employment on the basis of sex, including sexual harassment. *See* Mo. Rev. Stat. §213.055; *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 666 (Mo. 2009). The MHRA also prohibits retaliation against any person because that person opposed any practice prohibited by the MHRA or because that person “filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing conducted pursuant to” the MHRA. Mo. Rev. Stat. § 213.070. Moreover, there is no remedy that Plaintiff could obtain under a negligence theory that she could not obtain under the MHRA. A plaintiff may recover damages for lost wages, emotional distress and punitive damages under either theory; and the MHRA provides the additional remedy of attorneys’ fees. *See* Mo. Rev. Stat. § 213.111.2.

Where a statutory remedy “fully comprehends and envelopes the remedies provided by common law,” the statutory remedy displaces the common law. *Shawcross v. Pyro Products, Inc.*, 916 S.W.2d 342, 345 (Mo. App. E. Dist. 1995). *See also* *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W. 3d 81, 95-96 (Mo. 2010); *Dierkes v. Blue Cross*

and *Blue Shield of Mo.*, 991 S.W. 2d 662, 668 (Mo. banc 1999); *Detling v. Edelbrock*, 671 S.W. 2d 265, 271-72 (Mo. banc 1984); *See also Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560, 565 (W.D. Mo. 1990); *Pugh v. St. Louis Police Relief Ass’n*, 179 S.W. 2d 927, 933 (Mo. Ct. App. A1944) (“The common law does not apply where there is an applicable statute, because the statute displaces the common law to the extent that it is applicable...”). This maxim applies when harassment and discrimination claims are disguised as common law theories. *See Noel v. AT&T Corp.*, No. 4:12-cv-1673, 2013 U.S. Dist. Lexis 43628, at *9 (E.D. Mo. Mar. 27, 2013) (where plaintiff brought common law claim for wrongful discharge, court dismissed common law claim because plaintiff “has an independent statutory remedy under the MHRA”); *Thompson v. Greyhounds Lines, Inc.*, No. 4:12-cv-2014, 2013 U.S. Dist. LEXIS 82420 (E.D. Mo. June 12, 2013) (holding that MHRA preempted plaintiff’s common law retaliation claim because the MRHA’s remedies comprehend and envelop the common law remedies); *Nichols v. American Nat’l Ins. Co.*, 945 F.Supp. 1242, 1246 (E.D. Mo. 1996) (holding the plaintiff’s common law claim for wrongful discharge was not available because Title VII provides a “comprehensive remedial” scheme); *Schneider v. Sullivan Univ.*, No. 4:01-cv-1237, 2004 U.S. Dist. LEXIS 31818 (E.D. Mo. Aug. 4, 2004) (dismissing plaintiff’s common law claims against employer and individual defendant for conspiracy, emotional distress, and tortious interference because common law claims were preempted by Title VII and the MHRA because they were based on the same allegations as the Title VII claim). This result makes complete sense; otherwise, a plaintiff could circumvent the administrative

requirements and limitations periods of the MHRA by simply pleading a violation of the statute under the guise of negligence.

Plaintiff's negligence claim is also preempted by the Missouri Workers' Compensation Act ("MWCA"). The MWCA provides the exclusive legal remedy for injuries arising out of employment:

The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee, his wife, her husband, parents, personal representatives, dependents, heirs or next kin, at common law or otherwise, on account of such accidental injury or death, except where such rights and remedies as are not provided for by this chapter.

Mo. Rev. Stat. § 280.120.2. Missouri courts have consistently held this exclusivity provision bars common law tort actions arising out of incidents covered by the MWCA, including sexual harassment. *Yount v. Davis*, 846 S.W.2d 780, 782–83 (Mo. Ct. App. A1993) (affirming dismissal of common law “intentional infliction of emotional distress” claims against employer that arose out of sexual harassment); *State ex rel. FAG Bearings Corp. v. Perigo*, 8 S.W.3d 118, 121–23 (Mo. Ct. App. A1999) (“The Worker's Compensation Law is wholly substitutional in character and any rights which a plaintiff might have had at common law have been supplanted and superseded by the act, if applicable.”); *St. Lawrence v. Trans World Airlines, Inc.*, 8 S.W.3d 143, 149 (Mo. Ct. App. A1999) (negligent training); *Hardebeck v. Warner–Jenkinson Co., Inc.*, 108 F.Supp.2d 1062, 1064 (E.D. Mo. 2000) (intentional and negligent infliction of emotion

distress arising from workplace sexual harassment); *Backes v. Walgreen, Co.*, 2:13-CV-04217-NKL, 2014 WL 1655030, at *3 (W.D. Mo. Apr. 25, 2014) (negligence per se arising out of sexual harassment).

Here, Plaintiff's negligence claim is nothing more than a claim that she was injured at work, through sexual harassment and retaliation. Thus, the exclusivity provision of the MWCA bars Plaintiff's proposed negligence claim. And, even if her claim was not for a workplace injury, it would still be displaced by the statutory scheme provided by the MHRA. As such, her negligence claim fails as a matter of law, and leave to amend should have been denied.

B. Plaintiff's Wrongful Discharge Claim is also Preempted by the MHRA.

Much like Plaintiff's proposed negligence claim, her proposed wrongful discharge is nothing more than an MHRA claim disguised as a common law claim. Plaintiff alleges:

- A co-worker sexually harassed her through his "conduct, comments, and actions;"
- She reported the sexual harassment; and
- As a result, her employment was terminated.

Exhibit 11, Amended Petition, C&D App. A117-26. But again, any claim arising from such allegations is fully addressed and enveloped by the MHRA, which prohibits discrimination and retaliation and provides plaintiffs with a complete panoply of remedies. The law does not allow Plaintiff to substitute a common law wrongful discharge claim for an MHRA claim. *See, e.g., Noel v. AT&T Corp.*, No. 4:12-cv-1673, 2013 U.S. Dist. Lexis 43628, at *9 (E.D. Mo. Mar. 27, 2013) (where plaintiff brought

common law claim for wrongful discharge, court dismissed common law claim because plaintiff “has an independent statutory remedy under the MHRA”).

Indeed, the narrow public policy exception to Missouri's employment-at-will doctrine embodied in a wrongful discharge claim provides only that when an employer has a statutory, regulatory, or constitutional duty to refrain from discharging an employee for a specified reason and the employer breaches that duty, the at-will employee may have a cause of action for wrongful discharge. *Trapp v. Von Hoffmann Press, Inc.*, Case No. 02-4016-CV-C-5, 2002 WL 1969650 at *2 (W.D. Mo. June 12, 2002) (citing *Osborn v. Professional Service Industries, Inc.*, 872 F.Supp. 679, 680–81 (W.D. Mo. 1994)). The rationale underlying this public policy exception is the vindication or protection of certain strong policies of the community. *Id.* (citation omitted). However, if these policies are preserved by other remedies, such as a statutory right of action, then the public policy is sufficiently served. *Id.*

Here, any public policy that could be served through Plaintiff's wrongful discharge claim is already served by the MHRA. Moreover, her proposed wrongful discharge claim provides her with no additional remedies because both claims would provide for lost wages, emotional distress damages, and punitive damages. As such, the MHRA fully comprehends and envelopes Plaintiff's proposed wrongful discharge cause of action, thereby displacing it. *See Prewitt v. Factory Motor Parts, Inc.*, 747 F. Supp. 560, 565 (W.D. Mo. 1990); *Pugh v. St. Louis Police Relief Ass'n*, 179 S.W. 2d 927, 933 (Mo. Ct. App. A1944) (“The common law does not apply where there is an applicable statute, because the statute displaces the common law to the extent that it is

applicable...”). Thus, Plaintiff has no cognizable claim for wrongful discharge, and her motion for leave to amend should have been denied.

CONCLUSION

A Writ of Prohibition is appropriate in this case because Plaintiff filed her MHRA claims outside of the statutory limitations period; yet Respondent refused to dismiss them. Moreover, in a transparent attempt to avoid the consequences of her untimeliness, Plaintiff sought leave to repackage these same theories as common law claims. And, despite clear case law disapproving of such theories, Respondent allowed the amendment. Relator should not be required to bear the burden and expense of litigating time-barred and facially deficient claims. Relator respectfully requests this Court issue a Writ of Prohibition ordering Respondent: (1) to vacate his Orders denying Relator’s motion to dismiss for failure to state a claim and granting Plaintiff’s motion for leave to amend her petition. Relator similarly requests this Court and (2) to sustain Relator’s motion to dismiss and deny Plaintiff’s motion to for leave to amend.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,112 words.

CERTIFICATE OF SERVICE

I hereby certified that on January 23, 2017, a true copy of this Brief in Support of Writ of Prohibition, together with Relator's Appendix, were served, via United States mail, postage prepaid, on the individuals listed below.

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