

IN THE SUPREME COURT OF MISSOURI

NO. 95758

STATE OF MISSOURI *ex rel.* TIVOL PLAZA, INC.,

Appellant,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS, *et al.*,

Respondents.

Appeal from Circuit Court of Cole County, Missouri
Case No. 14AC-CC00398

Transferred from the Missouri Court of Appeals, Western District
Appeal No. WD78477

**BRIEF OF THE KANSAS CITY CHAPTER OF THE NATIONAL
EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE IN
SUPPORT OF RESPONDENTS**

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STATEMENT OF CONSENT

Appellant Tivol Plaza, Inc. and all Respondents have consented to the filing of this brief.

STATEMENT OF INTEREST

Amicus Curiae, the Kansas City Chapter of the National Employment Lawyers Association (NELA-KC), is a voluntary membership organization of more than 100 lawyers who represent employees in labor, employment and civil rights disputes throughout Missouri. Our Chapter affiliates with the National Employment Lawyers Association (NELA), which consists of more than 3,000 attorneys (including nearly 70 affiliates), all of whom focus on representing individuals in workplace controversies. NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of employment law to ensure that such law is fully enforced and that the rights of workers are fully protected. Our Chapter's members regularly represent victims asserting discrimination, harassment and retaliation under the Missouri Human Rights Act.

STATEMENT OF FACTS

NELA-KC adopts the Statement of Facts by Respondents Missouri Commission on Human Rights and Karen Norton.

POINTS RELIED ON

- I. **The trial court did not err in dismissing the writ of mandamus filed by Tivol Plaza, Inc. because a writ of mandamus was not the appropriate legal action in that RSMo. 213.111.1 required the Missouri Commission on Human Rights to issue the right to sue letter upon written request of the charging party since the charge was pending one-hundred and eighty days.**

ARGUMENT

I. The trial court did not err in dismissing the writ of mandamus filed by Tivol Plaza, Inc. because a writ of mandamus was not the appropriate legal action in that RSMo. 213.111.1 required the Missouri Commission on Human Rights to issue the right to sue letter upon written request of the charging party since the charge was pending one-hundred and eighty days.

A. Statutory Interpretation Of The Missouri Human Rights Act

This Court's “primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue.” *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. 2009). “Other rules of statutory interpretation, which are diverse and sometimes conflict, are merely aids that allow this Court to ascertain the legislature's intended result.” *Id.* Cases involving the Missouri Human Rights Act (“MHRA”) are no different. This Court must enforce the plain language of the MHRA even when a different policy is preferred. *Keeney v. Hereford Concrete Prod., Inc.*, 911 S.W.2d 622, 624 (Mo. 1995). This Court analyzes MHRA cases under the plain language of the MHRA. See generally, *id.*; *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo. 2007).

B. Jurisdiction For An Administrative Agency Is Determined By Statute

Regarding the jurisdiction of an administrative agency, “[a]s a creature of statute, an administrative agency's authority is limited to that given it by the legislature.” *State ex rel. Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592, 598 (Mo. 2012). “The rules of a state administrative agency duly promulgated pursuant to properly delegated

authority have the force and effect of law and are binding upon the agency adopting them.” *State ex rel. Martin–Erb v. Missouri Com'n on Human Rights*, 77 S.W.3d 600, 607 (Mo. 2002).

C. The Missouri Commission on Human Rights’ Jurisdiction

In order to “eliminate and prevent discrimination,” the Missouri Commission on Human Rights (“MCHR”) is “given general jurisdiction and power” for enforcing the purposes of the MHRA. RSMo. 213.030.1. The MCHR “is empowered to eliminate and prevent discrimination in employment because of race, color, religion, sex, national origin, ancestry, disability, or age.” 8 C.S.R. 60-1.010.3. The MCHR has “jurisdiction over all persons, public or private, except those specifically exempted by law” because of the “overriding public concern in eliminating discriminatory practices[.]” *Id.*

D. Timeliness Is Not A Jurisdictional Requirement For The MCHR

As addressed in *Farrow*, MCHR regulations direct the MCHR “to dismiss or close a complaint at any stage for lack of jurisdiction or in the absence of any remedy available to the complainant.” *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 589 (Mo. 2013). Amicus Curiae respectfully submits that *Farrow* has been incorrectly interpreted to instruct that timeliness is a jurisdictional issue under the MHRA. This interpretation is incorrect because the MHRA does not limit the MCHR’s “jurisdiction” to only timely filed charges. Instead of making a jurisdictional determination, if the MCHR determines a charge is untimely it must dismiss the charge because complainant lacks a remedy. 8 C.S.R. 60–2.025(7)(B)(4). As stated herein, the MHRA does not require a specific time

by which the MCHR must determine jurisdiction or whether a complainant lacks a remedy.

E. The MCHR Must Issue A Right To Sue Letter Upon Written Request Of Complainant When Charge Is Pending For One-Hundred And Eighty Days

The MCHR must issue a right to sue letter to the complainant if the charge has been pending one-hundred and eighty days and the complaint makes such a request in writing. RSMo. 213.111.1.

F. Mandamus is a Discretionary Writ

First, “[t]he law of mandamus is well settled. Mandamus is a discretionary writ, and there is no right to have the writ issued.” *State ex rel. Missouri Growth Ass'n v. State Tax Comm'n*, 998 S.W.2d 786, 788 (Mo. 1999). Accordingly, this alone must affirm the Circuit Court’s dismissal because the Circuit Court had discretion to deny the writ.

Second, a party seeking “relief by mandamus must allege and prove that [the party] has a clear, unequivocal, specific right to a thing claimed.” *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 805 (Mo. 2015). Under the MHRA’s plain language, the MCHR must issue a right to sue letter to the complainant if the charge has been pending one-hundred and eighty days and the complainant makes such a request in writing. RSMo. 213.111.1. Here the complainant, Karen Norton, requested her right to sue letter in writing after her charge was pending over one-hundred and eighty days. Accordingly, the MCHR had no choice but to issue her right to sue letter. RSMo. 213.111.

G. Tivol Plaza Sought The Incorrect Relief

Mandamus is appropriate for compelling a public official or state agency to do something it is required by law to do. It is wholly inappropriate for this case because Tivol Plaza is asking this Court for permission to use it in order to make findings of fact. In doing this, Tivol Plaza appears to confuse a lack of jurisdiction with either a failure to state a claim upon which relief can be granted or the affirmative defense of the running of the statute of limitations. Here, as provided in RSMo. 213.030.1 and 8 C.S.R. 60-1.010.3, it is without question that the MCHR had jurisdiction over the parties and subject matter, from the time of the filing of Ms. Norton's charge of discrimination until the issuance of the right to sue letter. Such is the difference between this case and *Farrow*. In *Farrow*, it was clear from the face of the charge that it was untimely; thus, mandamus or prohibition could be interpreted as mechanisms to force the MCHR to dismiss for failure to state a claim, per 8 C.S.R. 60-2.025 (7)(b)(4). Here, mandamus is inappropriate because the MCHR performed the only act within its statutory power by issuing the right to sue letter, and upon issuance thereof, the MCHR's jurisdiction ceases.

A right to sue letter is a "finding" under the MHRA. *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 590 fn.5 (Mo. 2013). Under the plain language of RSMo. 213.085.2, Tivol Plaza had thirty days to file an appropriate action under RSMo. 536.150.1. Tivol Plaza filed a writ of mandamus but that was properly denied as stated above. Amicus Curiae does not take a position on what mechanism of relief Tivol Plaza should have sought except that the relief must be a form authorized by RSMo. 213.085.2 in conjunction with RSMo. 536.150.1.

Because the thirty-day statute of limitation has long expired, Tivol Plaza is now out of time to assert a new mechanism of relief. If Tivol Plaza suggests it should be allowed to still file for other relief under RSMo. 536.150.1 because RSMo. 536.150 does not contain an explicit statute of limitation, that suggestion should be rejected because RSMo. 213.085.2 contains a thirty-day statute of limitation and any inconsistent portion of another statute cannot apply to the MHRA. RSMo. 213.101. That said, there is nothing inconsistent about RSMo. 213.085.2 requiring a specific statute of limitation for challenging a right to sue letter under the MHRA.

If Tivol Plaza suggests *Farrow* or other caselaw holds that seeking a writ of mandamus was proper for Tivol Plaza under these facts, then that too must be rejected. In no way does *Farrow* or any other caselaw hold that mandamus is the proper mechanism for challenging a right to sue letter issued upon request of complainant in writing after the charge was pending one-hundred and eighty days. As shown above, mandamus could never be proper in such a circumstance because the MCHR has no choice but to issue the right to sue letter under RSMo. 213.111.1. Instead, in *Farrow* and other related Missouri appellate cases, Missouri courts clearly analyze the facts in each case and reached a holding based on such facts in conjunction with the law. What may be proper in one case under one set of facts does not therefore make it automatically proper in another case.

If Tivol Plaza requests that this Court provide advisory guidance on what respondents must do in future cases, this Court should deny such a request because Missouri courts “cannot and do not render advisory opinions.” *Matter of Van Cleave's*

Estate, 574 S.W.2d 375, 376 (Mo. 1978). The holding that *Amicus Curiae* respectfully suggests is simply that the Circuit Court must be affirmed because a writ of mandamus was the improper mechanism of relief sought under these facts because the MCHR had no choice but to issue the right to sue letter under RSMo. 213.111.1 upon written request by complainant after the charge was pending one-hundred and eighty days. *Amicus Curiae* respectfully suggests that such a holding be coupled with the direction that parties themselves must determine which mechanism of relief is appropriate on their facts as provided for under RSMo. 536.150.1 with the thirty-day statute of limitation in RSMo. 213.085.1.

H. Framework For Determining Timeliness

The MCHR is “given general jurisdiction and power” for enforcing the purposes of the MHRA. RSMo. 213.030.1. The MHRA does not limit the MCHR’s jurisdiction to only timely charges. There is no requirement on when the MCHR must determine its own jurisdiction or whether the complainant lacks any remedy.

Charges often contain acts occurring both within and beyond one-hundred and eighty days from the filing of the charge. This is because discrimination, harassment and retaliation often involve a series of interrelated acts occurring over a substantial time period. Accordingly, “[u]nder the continuing violation theory, a [discrimination plaintiff] may pursue a claim for an act occurring prior to the statutory period, if [said plaintiff] can demonstrate the act is part of an ongoing practice or pattern of discrimination by [plaintiff’s] employer.” *Plengemeier v. Thermadyne Indus., Inc.*, 409 S.W.3d 395, 401 (Mo.App.E.D. 2013). Under a continuing violation theory, a plaintiff need only allege

that: (1) one act of discrimination, harassment or retaliation occurred within one-hundred and eighty days from the filing of the charge and (2) the other acts of discrimination, harassment or retaliation occurring outside of that one-hundred and eighty days were part of a larger “series of interrelated events, rather than isolated or sporadic acts of intentional discrimination.” *Id.* The purpose of the continuing violation theory is to add some flexibility to an otherwise rigid filing requirement. *Id.* at 400-01. This ensures employers that engage in a pattern of discrimination, harassment or retaliation are not automatically excused for part of that pattern simply because the complainant files a charge beyond one-hundred and eighty days for some unlawful acts. Likewise, “[t]he requirements for timely filing under the MHRA are subject to the principles of waiver, estoppel and equitable tolling.”

It is anticipated that Tivol Plaza will argue that certain acts (such as Ms. Norton’s firing) occurred within one-hundred and eighty days of the charge yet other acts occurred outside of the one-hundred and eighty days. Therefore, Tivol Plaza may argue that, the MCHR can only issue a right to sue on acts occurring within one-hundred and eighty days from the filing of the charge. But nothing in the MHRA places a time deadline for the MCHR to investigate and make determinations on whether to dismiss the charge in-whole or in-part. Moreover, given the continuing violation theory, Amicus Curiae respectfully submits the only proper framework for when at least one act of discrimination, harassment or retaliation is timely as determined by the face of the charge or as learned through investigation, would be for the MCHR to issue a right to sue letter so that the Circuit Court in the subsequent discrimination case can determine whether the

continuing violation theory should apply or whether any other equitable relief should apply. Requiring the MCHR to be the gatekeeper on whether the continuing violation theory or other equitable relief should later apply in Circuit Court would only greatly increase litigation challenging right to sue letters (like the case here) and would be directly contrary to the purposes of a continuing violation theory and other equitable relief parties may seek in the Circuit Court.

Therefore, Amicus Curiae respectfully submits the following should be the proper timeliness framework under the MHRA:

1. If the face of the charge of discrimination and an investigation, if any, reveal all assertions of discrimination, harassment or retaliation were filed out of time (over one-hundred and eighty days), then while the charge is pending a respondent is permitted to seek relief from the MCHR and/or seek a writ of prohibition and/or mandamus if appropriate;
2. If the face of the charge of discrimination and an investigation, if any, reveal all assertions of discrimination, harassment or retaliation were filed out of time (over one-hundred and eighty days), and a right to sue letter is issued at any time (before, at or after one-hundred and eighty days) and for any reason (upon request of complainant or not), then a respondent is permitted to seek proper relief under RSMo. 536.150.1 within thirty days as required by RSMo. 213.085.2;
3. If the face of the charge of discrimination or any investigation reveal a basis supporting timeliness for at least one act of discrimination, harassment or

- retaliation or if equitable relief such as waiver or estoppel could excuse untimeliness and a right to sue letter is issued at any time (before, at or after one-hundred and eighty days) and for any reason (upon request of complainant or not), whether acts outside of one-hundred and eighty days are compensable is decided under the continuing violation theory or other equitable relief by the Circuit Court in the subsequent discrimination case and such is not decided by the MCHR; and
4. If the face of the charge of discrimination or any investigation reveal a basis supporting timeliness for at least one act of discrimination, harassment or retaliation or equitable relief (such as waiver or estoppel) could apply, and the MCHR disposes of the charge without a right to sue letter or otherwise aggrieves the complainant, the complainant is permitted to seek proper relief under RSMo. 536.150.1 within thirty days as required by RSMo. 213.085.2.

This framework respects both the rights of complainants and respondents while ensuring that the Circuit Courts determine whether the important continuing violation theory or other equitable theory should apply on the facts of each case. This framework is consistent with the MCHR's "general jurisdiction and power" for enforcing the purposes of the MHRA under RSMo. 213.030.1. Most importantly, this framework is consistent with the plain language of the MHRA. By properly placing Circuit Courts in the position of determining whether the continuing violation theory or other equitable relief should apply on the particular facts of each case, and by removing the MCHR as a gatekeeper for such determinations on limited facts, this greatly reduces challenges to

right to sue letters like this one where at least one act of discrimination, harassment or retaliation was timely and the timeliness of other acts is an open question.

CONCLUSION

For the reasons set forth above, Amicus Curiae respectfully requests that this Court affirm the judgment of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations set forth in Rule 84.06(b). According to the word count function of Microsoft Word, the foregoing brief, from the Table of Contents through the Conclusion, contains 3,295 words.

/s/ Paul A. Bullman
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CERTIFICATE OF SERVICE

The undersigned certifies that on November 10, 2016, the foregoing document was served through the electronic filing system upon:

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