STATE OF MISSOURI
NINETEENTH JUDICIAL CIRCUIT
COUNTY OF COLE, MISSOURI

G.R. RESTAURANT, INC., d/b/a GRANNY SCHAFFER'S FAMILY RESTAURANT and J.J. GROUP, INC., d/b/a JOHNNY'S BEANERY,	)	
Plaintiffs,	)	
v.	)	**Cause No. 07AC-CC00276**
MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS,	)	**Division IV**
Defendant.	)	

REPLY BRIEF OF AMICUS CURIAE ST. LOUIS AREA JOBS WITH JUSTICE, JOINED BY HEARTLAND PRESBYTERY AND MISSOURI ACORN, IN SUPPORT OF DEFENDANT MISSOURI DEPARTMENT OF LABOR

I. INTRODUCTION

Plaintiffs turn to this Court as a last resort after having had their position already rejected by the voters, by the Governor and, to date, by the General Assembly. They ask that Missouri's minimum wage law be reinterpreted to make Missouri virtually the only state in the nation that sets no minimum base wage for tipped employees. To do this, they misread Missouri's law as establishing an utterly unprecedented and inexplicable "maximum wage" – an interpretation that clashes with the plain language of the statute, with its purpose, and with the controlling agency regulation construing it. Indeed, even the restaurant industry's supporters in the General Assembly have recognized that, absent an amendment to the law as it is now written, tipped employees are legally entitled to a minimum base cash wage of $3.25 per hour. Failing that, in a final effort to deny their tipped employees the raise they were due on January 1, Plaintiffs ask that Defendant Missouri Department of Labor and Industrial Relations be estopped from

providing proper guidance on what Missouri's wage requirements for tipped employees were as of that date.

Neither of Plaintiffs' requests has any basis in law, and granting either would injure tens of thousands of tipped employees across the state who are struggling to support their families on low wages and who were counting on the raise that they were due on January 1. Accordingly, Amici respectfully urge that the Court deny Plaintiffs' extraordinary requests and dismiss their petition with prejudice.

II. ARGUMENT

A. Plaintiffs' Interpretation of Missouri's Minimum Wage Law Clashes with the Statute's Plain Language and Clear Purpose, and Leads to Absurd Results.

Plaintiffs attempt to obscure the proper application of Missouri's minimum wage law for tipped employees by misreading Section 290.512(1) and taking it out of context. Contrary to Plaintiffs' assertions, Section 290.512(1)'s plain language, and the structure and purpose of the minimum wage law as a whole, point to one unmistakable conclusion: that employers must pay tipped employees a base cash wage of at least $3.25 per hour.

At issue are *two* operative sections of the state's minimum wage law: Sections 290.502 and 290.512(1). In relevant part, Section 290.502 provides that "*every employer* shall pay to *each employee* wages at the rate of $6.50 per hour . . . ." R.S. Mo. § 290.502 (emphasis added). Were it not for Section 290.512(1), the provision addressing tips, Section 290.502 would require employers to pay all employees, including tipped employees, the full minimum wage of $6.50 per hour – regardless of how much additional compensation *patrons* may provide the employees in the form of tips.

However, Section 290.512(1) modifies this requirement in part by granting employers a *partial* exemption from their obligation to pay the minimum wage under Section 290.502.

Section 290.512(1) provides: "No employer of any [tipped employee] is required to pay wages *in excess of fifty percent* of the minimum wage rate specified [in this chapter] . . . ." R.S. Mo. 290.512(1) (emphasis added). This provision effectively exempts employers of tipped employees from paying the *second half* of the $6.50 minimum wage – the portion "*in excess of* fifty percent of" the minimum wage or $3.25. However, nothing in Section 290.512(1) exempts employers from their obligation to pay tipped employees the *first half* of the minimum wage – the portion that is *not* "in excess of fifty percent of" the minimum wage.

Plaintiffs' contention that the minimum wage law establishes a "maximum" or "ceiling" wage but no minimum base cash wage is contrary to its plain language and purpose, and is logically absurd.[1] Plaintiffs focus their argument on the idea that Section 290.512(1)'s use of the phrase "in excess of" effectively "sets a ceiling" for the base cash wage that "an employer must pay to a tipped employee." (Pl. Brief at 3.) But the phrase "in excess of" is more plainly read to set a floor. An employer must pay at least fifty percent of the minimum wage, but no employer is required to pay "in excess of" fifty percent as long as total compensation is no less than the full minimum wage once tips are included.

Moreover, examination of the minimum wage law's broader structure and purpose underscores just how outlandish Plaintiffs' interpretation is. First, as outlined above, Plaintiffs can point to no language in Section 290.512(1) that purports to shield employers from paying

[1] Plaintiffs' contention is also undermined by legislation that is pending in the General Assembly, Mo. S.B. 255 (2007) (House Committee Substitute), attached hereto as Exhibit 1. The legislative summary of S.B. 255 acknowledges – consistent with the Department's position in this litigation – that "[c]urrently, employers may pay tipped employees half of the Missouri minimum wage if their total compensation, including tips, equals the Missouri minimum wage." S.B. 255 proposes in part to *change* the law and allow "employers to pay [tipped] employees $2.13 per hour if their total compensation, including tips, equals the Missouri minimum wage." If the Plaintiffs' interpretation of the state minimum wage law were accurate, S.B. 255 would not need to make this change.

tipped employees the *first* half of the minimum wage mandated by Section 290.502, i.e., the portion that is not "in excess of fifty percent of" the minimum wage. Plaintiffs' attempt to read Section 290.512(1) as giving employers license to pay tipped employees no minimum cash wage at all improperly reads the provision out of context, ignoring the minimum wage mandated by Section 290.502. *See Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145 (Mo. App. W.D. 2006) (holding that statute cannot be read in a vacuum, but must be read in context; statutory provisions relating to the same subject matter are considered *in pari materia*, and the court is required to interpret provision with reference to each other to determine legislative intent). Plaintiffs' citation to other Missouri statutes using the phrase "in excess of" is equally unavailing. (Pl. Brief at 6-8.) Those statutes must each be considered in their individual context, like Missouri's minimum wage law.

Plaintiffs' interpretation is also at odds with the very purpose of a minimum wage: to protect workers from exploitation by establishing a wage floor. *See Phillips v. Walling*, 324 U.S. 490, 493 (1945) (holding that to extend minimum wage and overtime law exemptions "to [categories of workers] other than those plainly and unmistakably within [the] terms and spirit [of the law's exemptions] is to abuse the interpretative process and frustrate the announced will of the people"); *Long v. Interstate Ready Mix*, 83 S.W.3d 571 (Mo. App. W.D. 2002) (instructing that the state law's purpose may be determined by looking to analogous federal law).

Virtually all minimum wage laws in the United States – including the federal Fair Labor Standards Act and nearly all state minimum wage laws, including the laws from Illinois and New Hampshire that Plaintiffs cite – require that tipped employees receive a minimum base cash wage. *See* United States Dept. of Labor, Minimum Wages for Tipped Employees, http://www.dol.gov/esa/programs/whd/state/tipped.htm (last visited May 16, 2007). States use a

variety of different approaches to achieve this result. Some, like Illinois, establish a ceiling on the amount of tips that may be credited toward the full minimum wage. Others, like New Hampshire, establish a separate minimum cash wage for tipped employees. *Compare* 820 ILCS 105/4 *with* N.H. Rev. Stat. § 279:21. The federal Fair Labor Standards Act (FLSA) has alternated between those mechanisms, establishing a maximum tip credit from 1974 to 1996 and establishing a separate base cash wage since then. *Compare* 29 U.S.C. § 203(m) (1995) *with* 29 U.S.C. § 203(m) (2007). But, regardless of the specific mechanism used, all of these wage laws have the same practical effect: to establish a minimum amount of cash wages that employers must pay all tipped employees.[2]

By contrast, no minimum wage law in the United States has ever set a "maximum wage" for employees, tipped or otherwise. Plaintiffs' attempt to reinterpret Missouri's minimum wage law to establish such a ceiling is utterly unprecedented, is wholly antithetical to the purpose of a minimum wage law, and "frustrate[s] the announced will of the people" of Missouri who overwhelmingly voted to increase the minimum wage. *Phillips*, 324 U.S. at 493.

Plaintiffs' suggestion that Missouri's minimum wage law establishes a "maximum wage" is also illogical and self-contradictory, and therefore is strongly disfavored under elementary principles of statutory construction. *See Tribune Pub. Co. v. Curators of Univ. of Missouri*, 661 S.W.2d 575, 583 (Mo. App. W.D. 1983) (disfavoring construction of a statute in a manner that would lead to an "unreasonable, oppressive, or absurd result"). Plaintiffs argue throughout their

[2] Plaintiffs fail to acknowledge FLSA's history when they argue that it "provides no precedent" for interpreting Missouri's minimum wage as establishing a base cash wage of fifty percent of the minimum wage. (Pl. Brief at 4.) When Missouri's minimum wage law was first enacted, FLSA allowed tips to be counted towards up to 50% of the minimum wage, effectively requiring a base cash wage of fifty percent. *See* 29 U.S.C. § 203(m) (1990). While FLSA was later amended to drop the 50% standard and freeze the base cash wage at $2.13, P.L. 104-188, 110 Stat. 1755, the General Assembly has never adopted a similar amendment to the Missouri law.

brief that Section 290.512(1) "sets a ceiling" or a "maximum" base cash wage that employers must pay tipped employees. (Pl. Brief at 3, 4, 5, 6, 8.) Yet, they readily admit that an employer may have to pay *more* than this so-called "maximum" wage of $3.25 per hour if a tipped employee does not earn the full value of the minimum wage after tips are included. (Pl. Brief at 3-4, 8.) Thus, even Plaintiffs concede that their purported "maximum wage" is not, in fact, a maximum, underscoring the incoherence of their interpretation.

Nor do Plaintiffs offer any explanation whatsoever for what a "maximum wage" would mean or how it would operate. Are they arguing that the legislature meant to forbid employers of tipped workers from choosing to pay them a base wage of more than $3.25? Except for very brief periods of wage and price controls such as during the Second World War, such limits or ceilings on wages are completely unprecedented in the United States and have certainly never existed as part of a minimum wage law.

Alternatively, if Section 290.512(1) is supposed to be a cap on the minimum wage that employers may be required to pay tipped employees, it begs the question of who might be requiring such a minimum wage and under what authority. Are Plaintiffs suggesting the legislature was trying to set $3.25 as the maximum wage that employers of tipped workers must pay, regardless of other provisions of state or federal law? Of course, the legislature could not insulate an employer from its obligation to comply with applicable federal law, *see* U.S. Const. art. VI, § 2; 29 U.S.C. § 218, even if the federal base cash wage for tipped workers were higher than $3.25 (which currently it is not). Nor, to the knowledge of Amici, are there any unrelated state laws that establish minimum wages for tipped workers from which Section 290.512(1) could have been intended to shield employers.

Instead, the search for a coherent meaning of a "maximum wage" actually points back to the correct interpretation of the minimum wage law: that Section 290.512(1) establishes a partial exemption from Missouri's otherwise applicable $6.50 minimum wage. It makes clear that employers of tipped workers need not pay a minimum wage "in excess of" fifty percent of the minimum wage, provided that customers give the employees enough in tips to bring their total compensation up to the required $6.50 minimum.

B. The Department's Regulation, Which Remains in Force, Confirms the Proper Interpretation of the Minimum Wage Law.

Plaintiffs suggest that the Department's longstanding regulation interpreting the tipped worker requirements of Missouri's minimum wage law, 8 C.S.R. 30-4.020 ("the regulation"), is somehow no longer valid because one provision of the regulation has not yet been updated to reflect the increased wage rate approved by the voters last year. (Pl. Brief at 11.) However, there is absolutely no support for this novel suggestion that duly promulgated regulations are immediately rendered invalid whenever one of their provisions needs updating. The Department has made clear in this litigation that the regulation continues to reflect its authoritative construction of the statute. The rule accordingly deserves substantial weight and confirms that Missouri's minimum wage law establishes a 50% base cash wage for tipped workers.

1. The Department Stands By Its Regulation, Which Accordingly Is Owed Great Weight in Interpreting Missouri's Minimum Wage Law.

Plaintiffs raise a variety of questions about the regulation, including arguing that the Department never "enforced" it prior to the enactment of Proposition B. (Pl. Brief at 9-10.) But, this contention misunderstands the role of the Department under Missouri's minimum wage system, which is chiefly to facilitate compliance, not to remedy violations. The regulation continues to represent the authoritative interpretation of the agency charged with overseeing

Missouri's minimum wage law, and so is entitled to "great weight." *See Foremost-McKesson v. Davis*, 488 S.W.2d 193, 197 (Mo. 1972).

Indeed, even for agencies that do play a major role in enforcing state statutes, a past record of enforcement is seldom relevant. *Cf. Farmers' and Laborers' Cooperative Ins. Assoc. v. Director of Revenue*, 742 S.W.2d 141, 143-144 (Mo. 1987) (holding that Director of Revenue's failure to enforce law for nine years did not absolve taxpayer of duty to pay taxes). This is all the more true under Missouri's minimum wage system, where the agency's role is to facilitate compliance with the statute. Most enforcement is handled through private litigation or, in some cases, criminal prosecution. *See* R.S. Mo. § 290.527 (authorizing private actions for underpayment of wages); R.S. Mo. § 290.525 (establishing criminal penalties for certain violations). While the agency has the authority to investigate compliance, *see* R.S. Mo. § 290.510 (granting the Department power to "investigate and ascertain" wages), the fact that it has limited remedial powers means that most enforcement takes place through private civil actions. (Def. Brief at 6.) It therefore would not be surprising if, as Plaintiffs claim, the Department received no complaints from tipped employees prior to January 1, 2007. (Pl. Brief at 10.)

But, the Department does have authority to provide guidance to employers and employees on compliance with Missouri's minimum wage and has consistently promulgated regulations to do so. The Department's controlling regulations, which comprise five titles in the Missouri Code of State Regulations, *see* 8 C.S.R. 30-4.010 through 30-4.050, were first promulgated in 1993, and have been updated since then to conform with statutory changes, including changes in the federal minimum wage rate, which the Missouri law previously referenced. *See, e.g.,* 8 C.S.R. 30-4.020 (1993); 28 Mo. Reg. 2031 (2003).

Under Missouri's system of administrative law, the Department's regulations interpreting the minimum wage law may be updated and changed only through the statutorily mandated notice-and-comment process. *See* R.S. Mo. § 536.021 (requiring agencies to publish notice of proposed amendments in the Missouri Register). It is unfortunate that Department staff briefly posted erroneous guidance in the form of a Frequently Asked Questions ("FAQ") document and a poster on an agency website. However, that guidance, which has since been withdrawn as erroneous, did not and could not modify the applicable agency regulation, 8 C.S.R. 30-4.020. *United Pharmacal Co. v. Missouri Board of Pharmacy*, 159 S.W.3d 361, 365 (Mo. 2005) (instructing that the agency's "failure to follow rulemaking procedures renders void purported changes in statewide policy") (citing *NME Hosps. Inc. v. Dept. of Soc. Serv.*, 850 S.W.2d 71, 74-75 (Mo. 1993)). In fact, the Department's website included a conspicuous warning that the information it contained was not warranted to be accurate. *See* Missouri Dept. of Labor, Policies, http://www.dolir.mo.gov/policies.htm (last visited May 16, 20067). As no steps have yet been taken to modify the current regulation, it remains in force and is entitled to great weight in interpreting the state minimum wage for tipped employees.

Moreover, even beyond the regulation itself, the Department has reaffirmed in this litigation the interpretation of the statute embodied in the regulation, (Def. Brief at 2.) – an action that equally warrants judicial deference. When an agency takes such a position during litigation on the proper interpretation of one of its rules or statutes, that position is presumed to reflect "the agency's fair and considered judgment on the matter." *Geier v. American Honda Motor Co*., 529 U.S. 861, 884 (2000).

2. The Regulation Remains Valid Because It Is Consistent with the Minimum Wage Law.

Plaintiffs also claim that the regulation is void because it conflicts with Missouri's minimum wage law as amended by Proposition B. (Pl. Brief at 11.) But, in order for the regulation to be invalid, Plaintiffs must prove that it "bear[s] no reasonable relationship to the legislative objective." *See Foremost-McKesson v. Davis*, 488 S.W.2d 193, 197 (Mo. 1972) (holding that regulations "are to be sustained unless unreasonable and plainly inconsistent with the act [and] not to be overruled except for weighty reasons"); *accord Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 517 (Mo. 1999). Plaintiffs have not even begun to meet this heavy burden – nor can they.

Plaintiffs argue that the regulation is invalid because the Department has not yet formally updated the subsection of the regulation that recites the state minimum wage rate (C.S.R. 30-4.020(1)) to reflect the new minimum wage of $6.50 per hour. (Pl. Brief at 11.)[3] But that does nothing to undermine the validity of the separate subsection of the regulation that addresses tips (8 C.S.R. 30-4.020(4)) and sets forth the state's formula for paying tipped employees. The subsection of the regulation on tips was promulgated pursuant to Section 290.512(1) of the minimum wage law, which was not altered in any way by Proposition B. The fact that the applicable minimum wage rate referenced in the first subsection of the regulation (8 C.S.R. 30-4.020(1)) now needs updating does not render the other subsection and formula on tips (8 C.S.R. 30-4.020(4)) suddenly unreasonable or somehow inconsistent with the "sense and meaning" of the underlying statute. *Cf. Osage Outdoor Advertising v. State Highway Commission*, 624

[3] Plaintiffs also argue that the regulation and the statute conflict because they contend that the statute establishes no base cash wage for tipped employees. (Pl. Brief at 11.) As explained above, and in Amici's initial brief, the statute establishes no such requirement.

S.W.2d 535, 537 (Mo. App. W.D. 1981) (holding that "a rule in conflict with the sense and meaning of a statute is invalid").

There simply is no conflict between the regulation and the statute. The state's policy on tips has remained the same as it has been for nearly fifteen years: employers may claim tips as a credit for up to 50% of the minimum wage, and must pay tipped employees the remaining 50% of the minimum wage in cash wages. All that has changed in this formula is the number to plug in – "the applicable minimum wage."

Plaintiffs are essentially arguing that all of the state's minimum wage regulations are rendered immediately invalid every time the state's minimum wage rate is increased. Such a principle would be terrible administrative policy for the state, since it would leave employers and employees without crucial guidance on their rights and responsibilities throughout the extended period during which new regulations were being promulgated.

As the regulation addressing tipped workers (8 C.S.R. 30-4.020(4)) is neither unreasonable nor inconsistent with the sense and meaning of the minimum wage law, it remains in force, and the Court should accord it substantial weight, further confirming that the base cash wage for tipped workers is 50% of the regular minimum wage.

C. The Department Should Not Be Estopped from Providing Proper Guidance on the Missouri Minimum Wage Law's Requirements as of January 1, 2007 – the Effective Date of Proposition B.

Plaintiffs argue that even if this Court finds that the Department and Amici's interpretation of the Missouri minimum wage law is correct, the Department should nonetheless be estopped from providing guidance to employers on the wages that they owed to tipped employees beginning January 1, 2007 – the effective date of Proposition B – on the grounds that Plaintiffs and others relied on the Department's erroneous web postings from January 1 through

March 14. (Pl. Brief at 13.) But estoppel does not properly apply here in light of the public rights at stake in this case. Nor have Plaintiffs met their burden of proving the four necessary elements of estoppel, especially where the Department did not benefit in any way from its brief erroneous web posting.

First and foremost, Plaintiffs' argument fails because application of estoppel here would have serious and adverse public policy consequences, and would deny tens of thousands of innocent low-income Missourians wages to which they are legally entitled. Estoppel is never applicable "if it will interfere with the proper discharge of governmental duties, curtail the exercise of the state's police power or thwart public policy." *State ex rel. Capital City Water Co. v. Missouri Pub. Servs. Co.*, 850 S.W.2d 903, 910 (Mo. App. W.D. 1993). The court of appeals has succinctly stated the relevant test: "The underlying principle behind [estoppel's] limited application to governmental entities and public officials is that public rights should yield only if private parties possess greater equitable rights." *Fraternal Order of Police Lodge 2 v. City of St. Joseph*, 8 S.W.3d 257, 263-64 (Mo. App. W.D. 1999).

In this case, Plaintiffs are asking that the Department be barred from discharging its responsibility to provide guidance on employers' obligations under the minimum wage law. (Pl. Brief at 13.) The effects for the public – and specifically, for the tens of thousands of Missourians who work in part for tips and who are not parties to this action – would be substantial, possibly impeding them from collecting the back wages that they rightfully earned. Indeed, the public rights at issue – the potential injury to tens of thousands of innocent non-parties – clearly outweigh any injury to the Plaintiffs associated with instructing them to give their employees the raise to which they were entitled on January 1. *Cf. Fraternal Order of Police Lodge 2*, 8 S.W.3d at 263 (holding that "the private rights of the [appellant individual

police officers] do not outweigh the rights of the public, and participating police officers, in maintaining a solvent police pension fund and promoting public safety . . .").

Nor have Plaintiffs shown that they meet the four elements required for estoppel: (1) a statement inconsistent with the claim afterwards asserted; (2) action by another party in reliance on such statement; (3) injury resulting from allowing contradiction of the statement; and, (4) affirmative misconduct. *Fraternal Order of Police Lodge No. 2*, 8 S.W.3d at 263. To begin with, Plaintiffs cannot establish that the Department's conduct rises to the level of "affirmative misconduct," which they concede is a key element for making an estoppel claim. (Pl. Brief at 15.) Plaintiffs cite *Twelve Oaks Motor Inn, Inc. v. Strahan*, 110 S.W.3d 404 (Mo. App. S.D. 2003), in support of their argument. (Pl. Brief at 15-16.) But *Twelve Oaks* differs significantly from this case. There the Missouri Tax Commission mistakenly informed a taxpayer that the deadline for appealing his tax assessment was on a certain date when the actual statutory deadline was earlier. 110 S.W.3d 405-06. When the taxpayer followed the agency's advice and submitted his appeal by the recommended date, the Tax Commission turned around and ruled that it was time-barred. *Id.* at 406. On appeal, the court allowed the tax appeal to go forward, finding that the Commission's erroneous instructions amounted to "affirmative misconduct" warranting estoppel. *Id.* at 409.

A crucial difference between *Twelve Oaks* and this case is that there the agency stood to benefit from its dissemination of erroneous information. By telling a taxpayer that the deadline for appeal was later than it actually was, the agency avoided review of its own decision and maximized its tax collections. By contrast, here the Department benefited in no way from its erroneous web postings. *Cf. Brown v. City of Fredericktown*, 886 S.W.2d 747 (Mo. App. E.D. 1994) ("City did not benefit from these representations. These actions do not amount to the

affirmative misconduct necessary to justify application of equitable estoppel."). By recognizing its error, the Department did not gain any advantage or become entitled to back wages.

Moreover, in *Twelve Oaks*, estoppel was allowed in order to avoid an unfair procedural default that would have prevented review of the merits of the dispute. Applying estoppel simply allowed the court to adjudicate the dispute, leaving open the possibility that plaintiff's tax appeal would be denied and that he would still be liable for the taxes assessed. By contrast, here Plaintiffs make a far broader request. They seek to invoke estoppel to prevent any court from resolving the merits of what Missouri's minimum wage rules were for tipped employees as of January 1, 2007, when Proposition B took effect.

Nor is it clear that Plaintiffs can establish other key elements of estoppel. For example, Plaintiffs cannot establish that they *reasonably* relied on the Department's erroneous web postings. As explained in Amici's opening brief, the Department's erroneous web posting included an express disclaimer warning that the information presented was not warranted to be accurate. (Am. Brief at 27.) In addition, because all parties are charged with constructive knowledge of the law, *Farmers' and Laborers' Cooperative Ins. Assoc.*, 742 S.W.2d at 143, Plaintiffs and their legal counsel should have been well aware of the conflicting interpretation contained in the Department's longstanding tip regulations, putting them on notice that the web posting might not be reliable. Moreover, long ago, the Missouri Supreme Court made clear that reliance on an agency's informal advice is not reasonable when a party is "in position to be acquainted with the legal rules governing [its] business." *See State ex rel. City of California v. Missouri*, 96 S.W.2d 607 (Mo. 1936). In light of the Department's regulation and the warnings that its web posting might well not be reliable, Plaintiffs cannot establish that they reasonably relied on the FAQ in paying their tipped employees.

In reality, what Plaintiffs are asking the Court to do is not to estop the Department, but rather to estop – and possibly extinguish the claims of – unrepresented tipped employees. In effect, Plaintiffs are asking this Court to recognize for the first time what amounts to a "good faith defense" to minimum wage liability in Missouri. (*See* Pl. Pet. at ¶ 43) (seeking a declaration that they may not be "required to pay a minimum cash wage of $3.25 per hour to their tipped employees retroactive to January 1, 2007."). Good faith defenses provide a safe harbor from liability where a party relied on an agency interpretation that later proved to be inaccurate. Such good faith defenses exist under a variety of statutes, including some portions of the federal Fair Labor Standards Act. *See, e.g.*, 29 U.S.C. § 258 (establishing a good faith defense to FLSA violations based on good-faith reliance on United States Department of Labor written opinion letters). However, good faith defenses have been recognized only where they have been expressly created by statute. *See Onsite Computer Consulting Servs., Inc. v. Dartek Computer Supply Corp*., No. 05AC-000108, Circuit Court of Missouri, St. Louis County (May 17, 2006) (copy attached as Exhibit 2) (citing various federal appellate cases on good faith defenses). And, the General Assembly has authorized no such defense under Missouri's minimum wage law.

If this Court were to grant the relief that Plaintiffs seek, it would effectively be legislating a good faith defense where none exists, potentially extinguishing the claims of thousands of innocent tipped employees who are not even parties to this action. The result would be an unprecedented windfall for Plaintiffs, and deeply unfair to the unpaid employees who are not parties in the case and who are in no position to defend themselves. There is simply no legal basis for extending the doctrine of estoppel in this fashion to limit the rights of non-parties to collect the wages that they are owed by law.

III. CONCLUSION

Plaintiffs have failed to show that Missouri's minimum wage law somehow establishes a "maximum wage" for tipped employees or that the Department's regulation construing the statute as establishing a base cash wage for tipped employees is invalid. Nor have they shown that the extraordinary remedy of estoppel is appropriate in this case. For these reasons, Amici respectfully request that this Court enter judgment for the Department.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby states that on this 17th day of May 2007, a copy of the foregoing Motion was mailed via first-class mail, postage prepaid to:

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_____
Christopher N. Grant

Exhibit 1

SB 255	Reinstates federal standards for overtime wages

Sponsor:	*Loudon*		
LR Number:	1250L.05C	**Fiscal Note:**	1250-05
Committee:	Small Business, Insurance & Industrial Relations		
Last Action:	5/16/2007 - H Calendar S Bills for Third Reading	**Journal Page:**	
Title:	HCS SS SCS SBs 255, 249 & 279	**Calendar Position:**	
Effective Date:	August 28, 2007		
House Handler:	*Muschany*		

Full Bill Text | All Actions | Available Summaries | Senate Home Page | List of 2007 Senate Bills

Current Bill Summary

HCS/SS/SCS/SBs 255, 249 & 279 - This act reinstates the Federal overtime standards in place before the passage of Proposition B (2006) including exemptions for firefighters, commissioned employees, and flex-time rates.

A provision is repealed that requires the minimum wage to be increased or decreased according to fluctuations in the Consumer Price Index.

Currently, employers may pay tipped employees half of the Missouri minimum wage if their total compensation, including tips, equals the Missouri minimum wage. This act allows employers to pay such employees $2.13 per hour if their total compensation, including tips, equals the Missouri minimum wage.

This act contains an emergency clause.

CHRIS HOGERTY

FIRST REGULAR SESSION

HOUSE COMMITTEE SUBSTITUTE FOR

SENATE SUBSTITUTE FOR

SENATE COMMITTEE SUBSTITUTE FOR

SENATE BILL NOS. 255, 249 & 279

94TH GENERAL ASSEMBLY

Reported from the Special Committee on General Laws April 5, 2007 with recommendation that House Committee Substitute for Senate Substitute for Senate Committee Substitute for Senate Bill Nos. 255, 249 & 279 Do Pass. Referred to the Committee on Rules pursuant to Rule 25(21)(f).

D. ADAM CRUMBLISS, Chief Clerk

1250L.05C

AN ACT

To repeal sections 290.502, 290.505, and 290.512, RSMo, and to enact in lieu thereof three new sections relating to minimum wage law, with an emergency clause.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Sections 290.502, 290.505, and 290.512, RSMo, are repealed and three new sections enacted in lieu thereof, to be known as sections 290.502, 290.505, and 290.512, to read as follows:

290.502. **[**1.**]** Except as may be otherwise provided pursuant to sections 290.500 to 290.530, effective January 1, 2007, every employer shall pay to each employee wages at the rate of $6.50 per hour, or wages at the same rate or rates set under the provisions of federal law as the prevailing federal minimum wage applicable to those covered jobs in interstate commerce, whichever rate per hour is higher.

[2. The minimum wage shall be increased or decreased on January 1, 2008, and on January 1 of successive years, by the increase or decrease in the cost of living. On September 30, 2007, and on each September 30 of each successive year, the director shall measure the increase or decrease in the cost of living by the percentage increase or decrease as of the preceding July over the level as of July of the immediately preceding year of the Consumer Price

EXPLANATION — Matter enclosed in bold-faced brackets **[**thus**]** in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

Index for Urban Wage Earners and Clerical Workers (CPI-W) or successor index as published by the U.S. Department of Labor or its successor agency, with the amount of the minimum wage increase or decrease rounded to the nearest five cents.**]**

290.505. 1. No employer shall employ any of his employees for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

2. Employees of an amusement or recreation business that meets the criteria set out in 29 U.S.C. § 213(a) (3) must be paid one and one-half times their regular compensation for any hours worked in excess of fifty-two hours in any one-week period.

3. With the exception of employees described in subsection (2), the overtime requirements of subsection (1) shall not apply to employees who are exempt from federal minimum wage or overtime requirements **[**pursuant to 29 U.S.C.§§ 213(a)-(b)**] including, but not limited to, the exemptions or hour calculation formulas specified in 29 U.S.C. Sections 207 and 213, and any regulations promulgated thereunder**.

4. Except as may be otherwise provided under sections 290.500 to 290.530, this section shall be interpreted in accordance with the Fair Labor Standards Act, 29 U.S.C. Section 201, et seq., as amended, and the Portal to Portal Act, 29 U.S.C. Section 251, et seq., as amended, and any regulations promulgated thereunder.

290.512. 1. No employer of any employee who receives and retains compensation in the form of gratuities in addition to wages **[**is required to pay wages in excess of fifty percent of the minimum wage rate specified in sections 290.500 to 290.530, however, total compensation for such employee shall total at least the minimum wage specified in sections 290.500 to 290.530, the difference being made up by the employer**] shall pay such employee a cash wage at a rate less than the cash wage amount specified in the Fair Labor Standards Act, 29 U.S.C. Section 203(m), for tipped employees. However, the total compensation for such tipped employee shall not be less than the minimum wage specified in section 290.502**.

2. If an employee receives and retains compensation in the form of goods or services as an incident of his employment and if he is not required to exercise any discretion in order to receive the goods or services, the employer is required to pay only the difference between the fair market value of the goods and services and the minimum wage otherwise required to be paid by sections 290.500 to 290.530. The fair market value of the goods and services shall be computed on a weekly basis. The director shall provide by regulation a method of valuing the goods and services received by any employee in lieu of the wages otherwise required to be paid under the provisions of sections 290.500 to 290.530. He shall also provide by regulation a method of

determining those types of goods and services that are an incident of employment the receipt of which does not require any discretion on the part of the employee.

Section B. Because of the need to preserve federal standards relating to overtime payments to employees, section A of this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and section A of this act shall be in full force and effect upon its passage and approval.

✓

Exhibit 2

Onsite Computer Consulting Services, Inc. v. Dartek Computer Supply Corp.
Mo.Cir.,2006.
Only the Westlaw citation is currently available.
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Circuit Court of Missouri, St. Louis County.
ONSITE COMPUTER CONSULTING SERVICES, INC., Plaintiff,
v.
DARTEK COMPUTER SUPPLY CORP., Defendant.
No. 05AC-000108 I CV.

May 17, 2006.

Max G. Margulis, Margulis Law Group, Chesterfield, Mo. for Plaintiff.
Kathryn M. Hough, Gillespie, Hetlage & Coughlin, LLC, Clayton, MO for Defendant.

ORDER

RENO, J.
***1** This matter came before the Court for trial on April 10, 2006. This is an action originally brought by Onsite Computer Consulting Services, Inc., ("Onsite") against Dartek Computer Supply Corp. ("Dartek") alleging that Dartek sent unsolicited advertisements to Onsite by facsimile transmission between the dates of September 24, 2003 and January 19, 2004, in violation of the Telephone Consumer Protection Act ("TCPA") 47 U.S.C. ß 227.[FN1]

FN1. 47 U.S.C. ß 227 as codified in Pub.L. No. 102-243, 105 Stat. 2394. This statute was amended, effective July 9, 2005. See Pub.L. No. 109-21, 119 Stat. 359. The earlier version of this statute which can be found at Pub.L. No. 102-243, 105 Stat. 2394, is the version applicable to the fax transmissions in this case which predate the 2005 amendment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant admits sending the faxes at issue but argues that it did not violate the TCPA because it had an "established business relationship" ("EBR") with Plaintiff. The parties do not dispute that an EBR existed between Onsite and Dartek as that term is defined by the TCPA. Plaintiff argues that an EBR is an defense to the portion of the TCPA dealing with *telemarketing* calls (47 USC 227(c) *et seq.*), but is not a defense to the portion of the TCPA dealing with facsimile advertisement. Dartek also argues that Onsite had a duty to mitigate his damages by contacting Dartek and asking that future faxes be stopped.

Validity of an EBR defense for a facsimile advertisement transmission.

Defendant principally rests its defense to liability on the existence of an EBR between itself and Plaintiff. Defendant contends that such an EBR constitutes a defense to the fax advertising provisions of the TCPA. Plaintiff points out that the statute contains no such defense and Congress spoke clearly and provided that defense for telemarketing calls but *specifically removed* that defense from the junk fax provisions of the TCPA. The courts have not been uniform in resolving this issue. Some have held that an EBR defense exists for unsolicited faxes, and some have held that such a defense is not available. Compare *Carnett's, Inc. v. Hammond*, 610 S.E.2d 529 (Ga.2005) with *Jemiola v. XYZ Corp.*, 802 N.E.2d 745 (Ohio C.P.2003). See also *Altman v. Inside Edge. Inc.*, 2004 TCPA Rep. 1291 (Div.39) (Mo.Cir. Aug. 2, 2004) and cases cited therein.

At first glance, Plaintiff seems to be correct in its analysis of the statutory language and the fact that Congress specifically removed the EBR defense from the TCPA before passage. A plain language analysis of the statute demonstrates that such a defense is not relevant to the prohibitions of the TCPA with regard to unsolicited faxes. The only defense to that portion of the statute is for the sender to obtain "prior express

permission or invitation" from the recipient before sending facsimile advertisements. Compare 47 U.S.C. ß 227(a)(3) which lists an EBR defense along with defenses of express permission or invitation, and a tax exempt nonprofit organization defense, with 47 U.S.C. ß 227(a)(4) which has a defense for "express permission or invitation" but does not list an EBR defense.

However, Defendant points out that the Federal Communications Commission ("**FCC**") has adopted a position regarding the **relevance** of an EBR in regard to the facsimile advertising restrictions in the TCPA. Originally, the **FCC** position favored the position adopted by Defendant. In a footnote in 1992, the **FCC** stated "[a] facsimile transmission from persons or entities who have an established business **relationship** with the recipient can be deemed to be invited by the recipient." In the same footnote, however, the **FCC** stated "[i]n banning telephone facsimile advertisements, the TCPA leaves the Commission *without discretion to create exemptions* from or limit the effects of the prohibition (see ß 227(b)(1)(c))." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 7 **FCC** Rec. 8752, n.87 (1992) (emphasis added). Three years later, the **FCC** cited this order and stated that it "makes clear that the existence of an established business **relationship** establishes consent to receive facsimile advertisement transmissions." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Memorandum **Opinion** and Order, 10 **FCC** Rec. 12391 ∂ 37 (1995). The **FCC** has also repeated this interpretation in its enforcement actions taken against TCPA violators. In 2003, the **FCC** reversed this interpretation. It adopted an interpretation that an EBR standing alone would not be sufficient to establish "prior express permission or invitation." [FN2]

FN2. This new "interpretation" was stayed until July 1, 2005. In the mean time, Congress acted and amended the statute.

ANALYSIS

***2** "When statutory interpretation is at issue, the plain and unambiguous meaning of a statute prevails." *Muwwakkil v. Office of Personnel Management,* 18 F.3d 921, 924 (Fed.Cir.1994). As a matter of statutory construction, Plaintiff is correct. The plain language of the statue and legislative history make clear that there is no EBR defense for facsimile advertisements and an "established business relationship" can not be considered to be equivalent to "express permission or invitation" since the two terms are used separately and disjunctively in the statute. Congress does not use unnecessary words, and when Congress includes two different terms, they mean different things. *United States v. Illinois Central R. Co.,* 303 U.S. 239, 243 (1938). Other courts have pointed out that where the TCPA requires "express" permission, it is inconsistent to interpret it to be "inferred" by an EBR:

This notion of deeming permission is based on an inference and, as such, seems to conflict with the TCPA's requirement that the invitation or permission be express. *See* 47 U.S.C. ß 227(a)(4). Characterizing permission granted by implication as 'express' runs afoul of the plain meaning of the word. Generally, 'express' means 'clearly and unmistakably communicated; directly stated.' Black's Law Dictionary 601 (7th ed.1999).

Chair King, Inc. v. GTE Mobilenet of Houston, 135 S.W.3d 365 (Tex.App.2004). This reasoning is sound.

The **FCC's** first promulgation in 1992 is inconsistent at best. It states that the Commission is "without discretion" to create exemptions to the fax provisions of the TCPA yet in the next sentence, Defendant argues that the Commission created such a new exemption. The latter reversal belies the mercurial nature of the **FCC's** position.

The **FCC's** "interpretation" that an EBR constitutes "prior express permission or invitation," conflicts with the plain language of the statute, with the legislative history, and with the basic canons of statutory construction. This Court agrees with other St. Louis courts and those in other states who have reached the same conclusion. See, e.g., *Altman v. Inside Edge, Inc.,* 2004 TCPA Rep. 1291 (Div.39) (Mo.Cir. Aug. 2, 2004) and cases cited therein.

While Defendant may have acted with belief in the accuracy of the **FCC**, such reliance by Defendant on the **FCC's** interpretation does not exculpate it. Plaintiff is entitled-as a matter of law-to the remedy Congress specified if it is a victim of a violation of the TCPA. If a government agency tells you a particular act is permitted, but in fact that act is not permitted and the government agency is wrong, you can still be liable for your violations of the law to a victim in civil court for the liquidated damages specified by the statute. *Reynolds v. Spears,* 93 F.3d 428, 435-36 (8th Cir.1996) (defendant's reliance on

incorrect advice from law enforcement officer is not a defense under Federal Wiretapping Act); *Heggy v. Heggy,* 944 F.2d 1537, 1541 (10th Cir.1991) (rejecting "good faith" defense to civil liability based upon mistake of law), cert. denied, 503 U.S. 951 (1992); *United States v. McIntyre,* 582 F.2d 1221, 1224-25 (9th Cir.1978) (rejecting contention illegal wiretapping acts were not "willful" because defendants believed in good faith, based on advice from a law enforcement communications technician, that their conduct was lawful). If Congress wanted to permit a "good faith" defense, it would have done so as it has in other statutes. See, e.g., *Heggy, supra,* at 1542 (noting that 18 U.S.C.A. ß 2520(d) expressly provides a good faith defense in a limited number of instances, such as reliance on a court warrant or order, grand jury subpoena or legislative or statutory authorization).

***3** While the **FCC** may believe that what it adopted was part of its permitted administration of the TCPA, this Court can not follow such a false step when faced with such obviously clear statutory language. This is not a suit against the **FCC**. This is a civil case between two private parties and "[s]ince the **FCC** is not a party, it will have no[ ][e]ffect upon it." *Cincinnati Bell Tel. Co. v. Public Utilities Com'n of Ohio,* 466 N.E.2d 848, 853 (Ohio, 1984). Plaintiff brought suit under the plain language of an unambiguous statute. The Court, in its role as adjudicator of the conflict between these two private parties is to apply the law as written and has a duty to "say what the law is" when a dispute as to what the law says arises in civil litigation. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

It is true that courts generally give deference to the interpretation of a statute by the administrative agency charged with administering that statute. *Chevron U.S.A. v. Natural Res. Def. Council,* 467 U.S. 837, 842-43 (1984). But whatever degree of deference would be due here is not at issue, as a court does not even reach the agency's interpretation of the statute when the statute is plain on its face as the TCPA is. "If congressional intent is clear, a contrary interpretation by an agency is not entitled to deference." *The* *Missouri Muni. League et. al v. **FCC***, 299 F.3d 949, 952 (8th Cir.2002) citing *Ragesdale v. Wolverine Worldwide, Inc.,* 218 F.3d 933, 966 (8th Cir.2000) *aff'd,* 122 S.Ct. 1155 (2002); *Muwwakkil v. Office of Personnel Management,* 18 F.3d 921, 925 (Fed.Cir.1994) ("When an agency's interpretation of a statute ... is contrary to the intent of Congress, as divined from the statute and its legislative history, we owe it no deference.")

Stated more directly, if a statute is clear on its face, there is no resort to an agency's interpretation for guidance. Since this Court finds the statutory language plain on its face, the **FCC** interpretation is not reached. An agency's interpretation is *only* considered if the statute is ambiguous. *Chevron, supra.* It puts the proverbial cart before the horse to bootstrap an agency's interpretation onto the stage, by using the agency's interpretation to create ambiguity in an otherwise unambiguous statute.

Congress deleted an actual EBR defense for fax advertisements from the TCPA before passage in 1991.[FN3] No court can accept an administrative agency action that essentially rewrites a federal statute to pencil pack in language that Congress intentionally removed from that statute before passage. See, e.g., *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 200 (1974) (stating Congress's deletion of provisions from bill before passage shows Congress does not intend a result it expressly declined to enact). That is nothing less than rewriting the statute, regardless of whether it is called a rule, an order, or a "statutory interpretation" by the agency that did it. Repeating it in administrative orders or in the Federal Register does not make it any more deserving of deference. To permit such an act to be controlling on this Court under the guise of agency administration would be to sanction an unconstitutional intrusion by an administrative agency into the law*making* powers that the Constitution grants exclusively to Congress.

> FN3. An EBR appeared in the House version of the TCPA. H.R. 1304, 102d Cong., 1st Sess. ß 3, ß 227(a)(4), (Passed by the House, Nov. 18, 1991) but was removed before passage into law by the full Congress. This was confirmed by a committee report accompanying a bill to amend the TCPA, the Junk Fax Prevention Act, where the House committee report noted "Congress initially included such an [EBR] exemption in the TCPA for junk faxes, but removed it from the final version of the statute." House Rpt. 108-593 at 5-6.

Mitigation of Damages.

***4** Defendant finally argues that Plaintiff failed to mitigate his damages by not calling Dartek to ask that future faxes be stopped. Plaintiff argues that

mitigation of damages does not apply in this context and that each fax is a separate actionable tort.

An individual cannot ignore an opportunity to stem the continuing increase in damages from an injury and recover the same from a defendant. *Cline v. City of St. Joseph,* 245 S.W.2d 695 (Mo.App.1952). He has the responsibility to mitigate the recovery of further damages. Mitigation applies only once an injury is sustained; the issue of mitigation can only be raised in the context of damages. Prior to the assessment of liability, consideration of mitigation is improper. *Evinger v. Thompson,* 265 S.W.2d 726 (Mo. banc 1954). However, the law generally does not permit mitigation to be asserted in response to intentional conduct. *Fletcher v. City of Independence,* 708 S.W.2d 158 (Mo.App.W.D.1986).

This issue has already been addressed extensively by other St. Louis courts. Judge Jamison in *The Daniel Co. of Springfield v. Fax.com, Inc.,* 2004 TCPA Rep 1265 (Mo.Cir.Div.43, Feb. 19, 2004) and Judge Burton in *Nat'l Ed. Acceptance, Inc. v. Smartforce, Inc.,* 2002 TCPA Rep. 1057 (Mo.Cir.Div.41, Jun. 21, 2002). This Court agrees with the reasoning of these courts. Plaintiff was not required to mitigate its damages by calling Defendant and asking that the faxes be stopped. Each fax is an independent act and independently actionable. Prior to the fax, there are no damages from that fax to mitigate. In the context of unsolicited faxes, there are no ongoing damages to be mitigated.

CONCLUSION

This Court holds that the provision of the TCPA in question is plain and unambiguous. Being a plain and unambiguous statutory provision, the Court does not have a basis for consulting or considering the **FCC** interpretation of that provision. A "defense" based on the existence of an "established business relationship" between Defendant and Plaintiff is not available in a cause of action arising out of the transmission of an unsolicited advertisement to Plaintiff's fax machine in violation of 47 U.S.C. ß 227(b)(2) sent prior to July 9, 2005. The Court also holds Plaintiff was not required to mitigate its damages by calling the Defendant and asking that the faxes be stopped.

A judgment consistent with this Order shall issue separately.

SO ORDERED:

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Onsite Computer Consulting Services, Inc. v. Dartek Computer Supply Corp.
Not Reported in S.W.3d, 2006 WL 2771640 (Mo.Cir.)

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