BEFORE THE PUBLIC SERVICE COMMISSION
FOR THE STATE OF MISSOURI

JIMMIE E. SMALL, Complainant, v. UNION ELECTRIC CO., d/b/a, AMEREN MISSOURI.	))))))))	Case No. EC-2015-0058

COMPLAINANT'S RULE 59.01 REQUEST TO ADMIT FACTS

COMES NOW, the Complainant, pro se in the above captioned matter, and pursuant to Rule 59.01 of the Missouri Rules of Civil Procedure requests that Respondent UNION ELECTRIC Co. d/b/a Ameren Missouri, admit or deny each of the following allegations within thirty (30) days after service upon nRespondnet Utility Company. A FAILURE TO TIMELY RESPOND TO REQUESTS FOR ADMISSIONS IN COMPLIANCE WITH RULE 59.01 SHALL RESULT INNEACH MATTER BEING ADMITTED BY YOU AND NOT SUBJECT TO FURTHER DISPUTE.

1. That Respondent Union Electric Company d/b/a Ameren Missouri entered into federal contracts, license, or other binding agreement[Federal Energy Regulatory Commission] presently in effect and further subject to state of Missouri statute of limitations and federal debt collection practices V.A.M.S. section 516.120 five year statute of limitations following the alleged 2007 occurrence. See also 15 U.S.C. sect 1692 et seq. 97 ALR 137.

   RESPONSE:

2. Respondent is requested to admit R.S. Mo. V.A.M.S. Chapter 516.120 what actions within five (5) years applies to the alleged 2007 past due account of $846.15 as shown of record above the signature of Respondnet Karhy Hart Utility agent.
RESPONSE.

3. Respondent Union Electric Co a Missouri based Utility does interstate commerce business in the State of Illinois, Oklahoma, and the State of Iowa using the United States Mail service to serve alleged debt due correspondence to Claimant Small, above the signature of Kathy Hart, [agent], dated late 2014 time period.
RESPONSE:

4. Admit, that the Missouri Public Service Commission's adverse decision denying Complainant's Motion for Summary Determination violates the Commerce Clause of the United States Constitution, placing an unconstitutional burden on interstate commerce because the Commission's decision[s] EC-2015-0058, appears essential to the foundation of the Union, see, Granholm v. Heald, 544 U.S. 460, 472, 125 S.Ct. 1885, 161 L. Ed 2d 796 (2004)

RESPONSE:

5. The Mo. Pub. Serv. Comm'n, Commission Staff investifators, and counsel for state of Missouri violated M. Const. Art v, Sect. 4.1 by its acts scheduling the April 20, 2015 hearing on the merits, involving an alleged 2007 electric Utility debt, on time-barred claims.
RESPONSE:

6. That owing to Mo. Political policies, practices and customs, the Mo. Pub. Serv. Comm's, its staff investigators have never entered findings of fact applicable to V.A.M.S. sect. 516.102 et seq.. in thepast 40 years, thus showing preferential treatment for a Private Utility over the interest of the undersigned disabled vet, in violation of the U.S. Commerce Clause, also involving an admitted Iowa Resident Small. See Bendix, 486 U.S. at 894, 108 S. Ct. 2218. See also State ex rel., B P Products North America, Inc., v. Ross 163 S.W. 3d 922 (Mo. Banc 2005).
RESPONSE:

7. Respondent Utility is requested to admit that under the 14th Amendment to the United States Constitution, Iowa resident Small, has a protected liberty interest [Affirmative Defense right] made applicable to Missouri's five (5) year statute of limitations issues, raised in No. EC-2015-0058 by Utility agent Kathy Hart's demand letter served late 2014 and continuing. V.A.M.S. sect 516.120.(1) et seq. See State ex rel., B P Products North America., Inc., v. Ross, 163 S.W. 3d 922 (Mo. Banc) (Issuing Writ of Prohibition to forbid proceeding on time-barred claims).

RESPONSE:

8. The Mo. Pub Serv. Comm's , Commission Staff, and Counsel for State actors [Missouri] violated Mo. Const. Art v. Sect. 4.1 by state action scheduling a hearing on the merits, involving an alleged debt due back in 2007, on time-barred claims. (2007 alleged debt without signed contract, see UCC laws).

RESPONSE:

9. Respondent UE,AM MO. Serves some one Million Two Hundred Thousand electric power customer, thus subject to Missouri, Iowa and Federal Commerce Clause laws, rules and regulations, Cause No.EC-2015-0058, including equal rights protection under Art V, sect. 4.1 Writ Process, also equal protection under U.S. Const. Art 1, section 8 Commerce Clause.
RESPONSE:

10. Respondent Utility is requested to admit that the Commerce Clause of the United States Constitution, arrogates to the federal government exclusive authority to regulate interstate Commerce, including Respondents interstate business transmitted by Kathy Hart, alleged debt through the United States Mail service to Iowa Resident, Jim Small in late 2014 time period. U.S. Const. Art 1, section 8. See State EX REL., Bloomquist v. Schneider 244 S.W. 3d 139 (Mo. banc 2008).
RESPONSE:

11. At page 2, paragraph seven (7), of its response to Complainant's Summary Determination Motion, Respondent is requested to admit that Utility Company pleaded, argued that, [" The Company disagrees that any

other legal standard applied.] Applies to (a) The United States Commerce Clause involving interstate Commerce business with an Iowa Resident (b) excluding the Iowa residents protected liberty interest under the 14 Amendment to the United States Constitution as made applicable to Missouri, Limitations laws V.A.M.S. sect 516.120(1) et. Seq. See Utilities Affirmative defenses raised to defeat l Sarah Illig v. Union Electric Company, 652 F. 3d 971; 2011 U.S. App. LEXIS 18173. Applicable standards. Statute of Limitations applied to protect Union Electric Company. A court may dismiss a claim under Rule 12(b) (6) as barred by the statute of limitations. Jessie v. Potter, 516 F. 3d 709, 713 n. 2 (8th Cir. 2008).
RESPONSE:

12. With the principles of JESSIE V. POTTER in mind, the Respondent is requested to admit that nothing has been stated or proven by Respondent which tolled the statute of Limitations, under Section 516.120(1) applicable standards owing to an alleged debt occurrence starting back in 2007 time period, ad did not file suit after Consumer Collection Management returned the assigned debt back to Union Electric Co back in 2008 time period. V.A.M.S. Sect. 516.120(1).
RESPONSE:

13. Respondent is requested to admit that at no time in its ANSWER to Small's Complaint did Respondent Union Electric present any affirmative defense of equitable TOLLING of Missouri's statute of Limitations based on the November 2014 alleged debt due, nor did Respondent plead any Affirmative defense of TOLLING when filing its December 22, 2014 Response in Cause No. EC2015-0058 some eight (8) years following the 2007 alleged service/ Debt claims.

RESPONSE:

14. At paragraph nine (9) page 7 of its December 22, 2014 response to Summary Determination, the Company admits that Exhibit A was filed on October 2, 2014 claiming an alleged debt due from an Iowa Resident, 606 West Hwy # 2, Milton, Iowa, in the Amount of $ 846.15. See Payan v. Aramark Mgmt. Servs. Ltd P'ship, 495 F. 3d 1119, 1122-23 (9th Cir. 2007).

RESPONSE:

Respectfully requested

JIMMIE E. SMALL
606 West Hwy # 2,
Milton, Iowa, 52570

CERTIFICATE OF SERVICE
No. EC-2015-0058

The undersigned hereby certifies that a true and complete copy of the foregoing request to admit facts, under Rule 59.01 was served on Respondent Utility with the original filed with the Commission **Data Center** on this Wednesday March 11, 2015, by Fax transmission, and or First Class U.S. Mail, postage fully prepaid, properly addressed.

JIMMIE E. SMALL

Missouri Revised Statutes

Chapter 516
Statutes of Limitation

←516.110 Section 516.120.1 516.130→

August 28, 2014

What actions within five years.

516.120. Within five years:

(1) All actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 516.110, and except upon judgments or decrees of a court of record, and except where a different time is herein limited;

(2) An action upon a liability created by a statute other than a penalty or forfeiture;

(3) An action for trespass on real estate;

(4) An action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated;

(5) An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

(RSMo 1939 § 1014)

Prior revisions: 1929 § 862; 1919 § 1317; 1909 § 1889

(2001) Subdivision (4) of section applies to inverse condemnation actions seeking compensation for damage to personal property. Shade v. Missouri Highway and Transportation Commission, 69 S.W.3d 503 (Mo.App.W.D.).

(2005) Replevin action with five-year limitations period applies for return of seized weapons legally possessed by owner and not used in commission of crime. Elam v. Dawson, 156 S.W.3d 807 (Mo.App.W.D.).

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1 of 1 DOCUMENT

Sarah Illig; Gale Illig, for Themselves and as Representatives of a Similarly Situated Persons, Appellants, v. Union Electric Company, Appellee.

No. 10-3488

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

652 F.3d 971; 2011 U.S. App. LEXIS 18173

June 15, 2011, Submitted
August 31, 2011, Filed

PRIOR HISTORY: [**1]
Appeal from the United States District Court for the Eastern District of Missouri.
Illig v. Union Elec. Co., 2010 U.S. Dist. LEXIS 115175 (E.D. Mo., Oct. 29, 2010)

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant landowners sued appellee electric company in Missouri state court for inverse condemnation and trespass. The company removed the case to the United States District Court for the Eastern District of Missouri, which granted the company's motion to dismiss. The landowners appealed.

OVERVIEW: A railroad which held a right-of-way across the landowners' property had entered into a license agreement allowing the company to install electrical transmission poles and lines along the railroad line. The right-of-way was converted to a public trail under the National Trails System Act of 1968, 16 U.S.C.S. § 1241 et seq. The railroad sold the right-of-way to a trail operator and assigned to the operator the license agreement with the company. The landowners claimed that the company's use of and presence on the property exceeded the scope of the easements created by the Trails Act. The court of appeals agreed with the district court that the landowners' claims were time-barred. The claims accrued when a Notice of Interim Trail Use or Abandonment (NITU) was issued, not on the later date when the railroad formally transferred its easement. Once the NITU was issued, the company's license was no longer valid under Missouri law because it could no longer be used for "railroad purposes." Sufficient notice was provided of the issuance of the NITU. The landowners did not state a claim for continuing trespass, as they did not allege repeated intrusions onto tbe property.

OUTCOME: The district court's judgment was affirmed.

CORE TERMS: trail, trespass, license, railroad, notice, right-of-way, easement, inverse condemnation, statutes of limitations, abandonment, exemption, railroad purposes, interim, railroad line, causes of action, ascertainment, conversion, terminated, landowner, repeated, accrue--, deed, Trails Act, continuing trespass, railbanking, discontinue, negotiate, abandon, accrued, property interests

LexisNexis(R) Headnotes

Transportation Law > Rail Transportation > Rails to Trails
[HN1] Pursuant to the National Trails System Act of 1968, 16 U.S.C.S. § 1241 et seq., through a process known as "railbanking," a railroad may negotiate with a state, municipality, or private group (the trail operator) to assume financial and managerial responsibility for operating a railroad right-of-way as a recreational trail.

Transportation Law > Rail Transportation > Rails to Trails
[HN2] The typical railbanking process begins when a rail carrier files an abandonment application or a request for an

exemption. 49 U.S.C.S. §§ 10903, 10502. If the Surface Transportation Board (STB) approves the request for an exemption, it will publish a notice of exemption in the Federal Register. 49 C.F.R. § 1121.4(b) (2004). A potential trail operator may then file a railbanking petition pursuant to 49 C.F.R. § 1152.29(a). If the railbanking petition meets the criteria specified in the regulations, and the railroad agrees to negotiate with the petitioner and so communicates to the STB within ten days of the filing of the trail use petition, the STB will issue a Notice of Interim Trail Use or Abandonment (NITU). 49 C.F.R. § 1152.29(b)(2) and (d). This NITU permits the railroad to discontinue service, cancel tariffs, and salvage track and other equipment, consistent with interim trail use and rail banking without consummating an abandonment and the NITU extends indefinitely to permit interim trail use once an "agreement" is reached between the railroad and the trail operator. 49 C.F.R. § 1152.29(d)(1).

Transportation Law > Rail Transportation > Abandonment
Transportation Law > Rail Transportation > Rails to Trails
[HN3] Only one Notice of Interim Trail Use or Abandonment (NITU) is issued once the parties indicate their intent to negotiate for conversion of a rail corridor to trail use. If negotiations go as planned and an agreement is reached, the NITU extends indefinitely for the duration of recreational trail use subject to the trail operator's fulfillment of its agreed-upon obligations. The Surface Transportation Board retains jurisdiction for possible future railroad use, and state law reversionary interests that would normally vest upon abandonment are blocked. An "escape-clause" is also provided by the NITU such that if no agreement is reached within 180 days, the NITU automatically converts into an effective notice of abandonment, which permits the rail carrier to abandon the line entirely and liquidate its interest.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN4] A court of appeals reviews de novo a district court's dismissal of an action for failure to state a claim under Fed. R. Civ. P. 12(b)(6) and accepts the factual allegations of the complaint as true.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN5] In addressing a motion to dismiss, a court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record. The same standard applies to a Fed. R. Civ. P. 12(b)(6) motion to dismiss.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Governments > Legislation > Statutes of Limitations > Pleading & Proof
[HN6] A court may dismiss a claim under Fed. R. Civ. P. 12(b)(6) as barred by the statute of limitations if the complaint itself establishes that the claim is time-barred.

Governments > Legislation > Statutes of Limitations > Time Limitations
Real Property Law > Inverse Condemnation > Defenses
Real Property Law > Torts > Trespass to Real Property
Torts > Premises Liability & Property > Trespass > Defenses > Statutes of Limitations
Torts > Procedure > Statutes of Limitations > Accrual of Actions > General Overview
[HN7] A ten-year statute of limitations applies to an inverse condemnation claim under Missouri law, and a five-year statute of limitations applies to a trespass claim, Mo. Rev. Stat. § 516.120(3). Both causes of action accrue when the damage is capable of ascertainment. Under Missouri law, "capable of ascertainment" means capable of being ascertained by a reasonable person using reasonable diligence. The test is objective and is met when the plaintiffs' right to sue arises and they could have first maintained the action successfully.

Real Property Law > Inverse Condemnation > General Overview
[HN8] Under Missouri law, a landowner may bring a claim of inverse condemnation against an entity with condemning authority when the condemnor invades or appropriates a valuable property right, causing injury to the landowner.

Real Property Law > Torts > Trespass to Real Property
[HN9] Under Missouri law, one can commit the tort of trespass either by unauthorized entry on land or by exceeding the scope of any license to enter upon the land.

Real Property Law > Limited Use Rights > Easements > Characteristics
Real Property Law > Limited Use Rights > Licenses
Transportation Law > Rail Transportation > Lands & Rights of Way

[HN10] Under Missouri law, if a railroad holds an easement "for railroad purposes," a third party's license to use the easement remains valid as long as it, too, is used "for railroad purposes." A railroad company holding an easement may contract with another to construct and maintain a telephone line "for railroad purposes"; but the consensus of opinion is to the effect that the railroad company is not permitted to use, sell, or incumber the easement for other than railroad purposes. It is true that the owner of an easement may, in some circumstances, license or authorize third persons to use its right-of-way for purposes not inconsistent with the principal use granted.

Transportation Law > Rail Transportation > Abandonment
Transportation Law > Rail Transportation > Rails to Trails
[HN11] When a Notice of Interim Trail Use or Abandonment (NITU) is issued under the National Trails System Act of 1968, 16 U.S.C.S. § 1241 et seq., state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting. Although the NITU does not signal a final agreement between a railroad and a trail operator, the NITU nevertheless triggers a taking, even if the resulting taking is ultimately temporary. Once the NITU has been issued, the railroad's right-of-way will either be assumed by the trail operator (indefinitely blocking the landowners' state-law reversionary interests) or, if no agreement is reached, abandoned (allowing the landowners' state-law interest to revert). In either case, once the Surface Transportation Board issues the NITU, the railroad has relinquished its interest in and discontinued its involvement with the property. The NITU permits the railroad to discontinue service, cancel tariffs, and salvage track and other equipment.

Transportation Law > Rail Transportation > Rails to Trails
[HN12] If the Surface Transportation Board approves a request for an exemption under the National Trails System Act of 1968, 16 U.S.C.S. § 1241 et seq., it will publish a notice of exemption in the Federal Register.

Real Property Law > Torts > Trespass to Real Property
Torts > Premises Liability & Property > Trespass > Defenses > Statutes of Limitations
Torts > Procedure > Statutes of Limitations > Accrual of Actions > Continuous Torts
[HN13] Missouri law recognizes "continuing trespass" theory. The Missouri Court of Appeals has explained the distinction between a single trespass and a continuing trespass as follows: When there is only one wrong that results in continuing damage, the cause of action accrues once that wrong has been committed and the resulting damage becomes capable of ascertainment. But when there are continuing or repeated wrongs that are capable of being terminated, successive causes of action accrue every day the wrong continues or each time it gets repeated, the end result being that the plaintiff is only barred from recovering those damages that were ascertainable prior to the statutory period immediately preceding the lawsuit.

COUNSEL: For Sarah Illig, Gale Illig, for Themselves and as Representatives of a Class of Similarly Situated Persons, Plaintiffs - Appellants: Lindsay S.C. Brinton, Mark F. Hearne, II, Meghan Sue Largent, ARENT & FOX, St. Louis, MO.

For Union Electric Company, Defendant - Appellee: Jeffery Thomas McPherson, James J. Virtel, ARMSTRONG & TEASDALE, St. Louis, MO.

JUDGES: Before MURPHY and SMITH, Circuit Judges, and READE,[1] District Judge.

1 The Honorable Linda R. Reade, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

OPINION BY: SMITH

OPINION

[*973] SMITH, Circuit Judge.

Sarah and Gale Illig (collectively, "Illig"), on behalf of themselves and others similarly situated, brought suit against Union Electric Company ("Union") in Missouri state court, alleging claims of inverse condemnation and trespass under Missouri law. After Union removed the case to federal district court,[2] the court granted Union's motion to dismiss, concluding that the applicable statutes of limitations had expired on both of Illig's claims. Illig challenges this ruling on appeal. For the following reasons, we affirm.

2 The Honorable [**2] David D. Noce, United States Magistrate Judge for the Eastern District of Missouri, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

I. *Background*

A. *Missouri Pacific's Right-of-Way on Illig's Property*

The present dispute stems from the conversion of a railroad line on Illig's property to a public trail, pursuant to the National Trails System Act of 1968 ("Trails Act"),[3] 16 U.S.C. § 1241, *et seq.* [*974] This conversion took place between 1991 and 1994. Illig has owned certain lots of land in St. Louis County, in fee simple absolute, since 1984. The land had been encumbered prior to Illig's ownership. Missouri Pacific Railroad Company ("Missouri Pacific") operated a 6.2-mile long railroad line--known as the Carondelet Branch--through Illig's land, pursuant to an easement obtained as early as 1872. It is undisputed that Missouri Pacific's easement was "for railroad purposes." In 1972, Missouri Pacific executed a Wire License Agreement with Union, allowing Union to install electrical transmission poles, lines, and other appurtenances along the railroad line.

3 For background purposes, we briefly review the procedures for such a conversion [**3] under the Trails Act before discussing the conversion of the property in the present dispute.

The Surface Transportation Board (STB) regulates "the construction, operation, and abandonment of most railroad lines in the United States." *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004). If a railroad wishes to abandon a right-of-way within the STB's jurisdiction, it must either apply for abandonment or seek an exemption. *Id.* "If the STB approves a standard abandonment application or grants an exemption and the railroad ceases operation, the STB relinquishes jurisdiction over the abandoned railroad right-of-way and state law reversionary property interests, if any, take effect." *Id.* at 1228-29 (citing *Preseault v. Interstate Commerce Comm'n* (*Preseault I*), 494 U.S. 1, 6-8, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1989)).

Alternatively, [HN1] pursuant to the Trails Act, through a process known as "railbanking," a railroad may "negotiate with a state, municipality, or private group (the 'trail operator') to assume financial and managerial responsibility for operating the railroad right-of-way as a recreational trail." *Id.* at 1229. The Federal Circuit has described the railbanking process, and its legal effects on property [**4] owners, as follows:

> [HN2] [T]he typical railbanking process begins when a rail carrier files an abandonment application or, as in this case, a request for an exemption. 49 U.S.C. §§ 10903, 10502; *see also* [*Nat'l Ass'n of Reversionary Prop. Owners* (*NARPO*) *v. STB*, 158 F.3d 135, 138, 332 U.S. App. D.C. 325 (D.C. Cir. 1998)].
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> If the STB approves the request for an exemption, it will publish a notice of exemption in the Federal Register. 49 C.F.R. § 1121.4(b) (2004). A potential trail operator may then file a railbanking petition pursuant to 49 C.F.R. § 1152.29(a). . . . If the railbanking petition meets the[] criteria [specified in the regulations], and the railroad agrees to negotiate with the petitioner and so communicates to the STB within ten days of the filing of the trail use petition, the STB will issue a Notice of Interim Trail Use or Abandonment ("NITU"). 49 C.F.R. §§ 1152.29(b)(2) and (d). This NITU permits the railroad to discontinue service, cancel tariffs, and salvage track and other equipment, "consistent with interim trail use and rail banking" without consummating an abandonment and the NITU extends indefinitely to permit interim trail use once an "agreement" is reached between the railroad and the trail [**5] operator. 49 C.F.R. § 1152.29(d)(1).
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> * * *
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> [HN3] Only one NITU is issued once the parties indicate their intent to negotiate for conversion of the corridor to trail use. If negotiations go as planned and an agreement is reached, the NITU extends indefinitely for the duration of recreational trail use subject to the trail operator's fulfillment of its agreed-upon obligations. The STB retains jurisdiction for possible future railroad use, and state law reversionary interests that would normally vest upon abandonment are blocked. *Preseault I*, 494 U.S. at 8, 110 S. Ct. 914. An "escape-clause" is also provided by the NITU such that if no agreement is reached within 180 days, the NITU "automatically converts into an effective . . . notice of abandonment," *id.* at 7 n.5, 110 S. Ct. 914, which permits the rail carrier to "abandon the line entirely and liquidate its interest." *Id.* at 7, 110 S. Ct. 914; *see also* 49 C.F.R. § 1152.29(d)(1).

Id. at 1229-30.

In February 1992, Missouri Pacific sought to abandon and discontinue its railroad operations over the Carondelet Branch, including the 6.2-mile stretch of railroad line on Illig's land. Pursuant to the Trails Act, Missouri Pacific filed a notice of

exemption [**6] with the STB,[4] seeking permission to do so. In its notice, Missouri Pacific "certifie[d] that no local traffic has moved over the line for at least two years" and that "[o]verhead traffic previously moved over the line has been rerouted successfully." Missouri Pacific also certified that it had published a notice of its abandonment and its notice of exemption on January 29, 1992, "in [the] *Watchman-Advocate* in Clayton, Missouri, [a] newspaper in general circulation in St. Louis, County, Missouri[,] where the rail line is located."

4 As of January 1, 1996, the STB succeeded and began performing "all functions" formerly performed by the Interstate Commerce Commission (ICC). 49 U.S.C. § 702. We use "STB" to refer to both the STB and the ICC.

Around this same time, Gateway Trailnet ("Trailnet"), a private non-profit organization devoted to creating and operating public trails, asked the STB to issue a NITU, which would allow Trailnet to acquire Missouri Pacific's easement and convert the railroad corridor to a public trail. On March 2, 1992, Missouri Pacific informed [*975] the STB of its willingness to negotiate with Trailnet for interim trail use.

On March 25, 1992, the STB issued a NITU, permitting [**7] Missouri Pacific and Trailnet to enter into negotiations. The NITU further stated:

> The parties may negotiate an agreement during the 180-day period prescribed below. If no agreement is reached within 180 days, [Missouri Pacific] may fully abandon the line.
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> * * *
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> . . . [Missouri Pacific] may discontinue service, cancel tariffs for the line on not less than 10 days' notice to the Commission, and salvage track and related materials consistent with interim trail use/rail banking after the effective date of this decision and notice. . . .
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> * * *
>
> . . . If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by the 180th day, [Missouri Pacific] may fully abandon the line subject to the condition set forth above.

On December 30, 1992, in a Donation, Purchase, and Sale Agreement ("Trail Use Agreement"), Missouri Pacific agreed to sell its right-of-way over Illig's property to Trailnet. That same day, Missouri Pacific signed a quitclaim deed, conveying its interests to Trailnet. Also on that day, Missouri Pacific assigned to Trailnet several agreements that it had previously [**8] entered into with licensees, including Union. Missouri Pacific recorded the deed with the St. Louis County Recorder of Deeds office on January 6, 1993.

On December 28, 1998, Illig sued the United States in the United States Court of Federal Claims, alleging that the conversion of Missouri Pacific's railroad line to a recreational trail amounted to a taking under the Fifth Amendment. Ultimately, in 2005, the court dismissed Illig's claim as untimely under the applicable six-year federal statute of limitations. *See Illig v. United States*, 67 Fed. Cl. 47, 50 (2005).

B. *Instant Litigation*

On December 23, 2002, while Illig's claim was pending in the Court of Federal Claims, Illig initiated the instant action against Union in Missouri state court. Union removed the case to the federal district court, which stayed the case pending the final outcome of *Illig v. United States*. After that case was resolved, Illig filed an amended complaint in the district court, asserting causes of action for inverse condemnation and trespass under Missouri law. Illig alleged that Union's use of and presence on Illig's property exceeded the scope of the easements "created by the Trails Act." Further, Illig alleged [**9] that Trailnet did not own an interest in Illig's land that would allow it to sell Union a right to use Illig's land for electrical transmission lines. Illig also alleged that Union never obtained an easement or license from Illig or any previous landowner. As a result, Illig alleged that "Plaintiffs' property has been damaged since January 6, 1993, by the unauthorized and unlawful presence of high-voltage electrical transmission lines and other structures placed on and across the Plaintiffs' land by [Union]."

Union subsequently moved to dismiss the complaint on several grounds, arguing, *inter alia*, that federal law preempted Illig's inverse condemnation and trespass claims and that the applicable statutes of limitations barred the claims. The district court granted Union's motion to dismiss, concluding that although federal law did not preempt the claims, they *were* time-barred. The court determined that Illig's claims accrued on March 25, 1992, when the STB issued the NITU. The court dismissed **[*976]** the claims as time-barred because Illig failed to commence the action within the ten- and five-year limitations periods, respectively, for her inverse condemnation and trespass claims.

II. *Discussion*

Illig **[**10]** argues that the district court erroneously concluded that the statute of limitations had expired on her claims for inverse condemnation and trespass. Specifically, she contends that the court applied the proper statutes of limitations but incorrectly determined when her claims accrued. First, Illig maintains that she could not have brought her claims while Union was using the land under the license that Missouri Pacific had granted it. Thus, she could not have ascertained her damages for this claim before January 6, 1993, when Missouri Pacific "first publically alienated its interest" in the land via the quitclaim deed. Prior to that date, Illig "had no knowledge or notice [that] the NITU had issued and affected [her] land," and even if she did, "the NITU's effect upon [Union's] license [from Missouri Pacific] was still unknown and unknowable." Second, Illig contends that the district court did not consider her continuing-trespass allegation that would have allowed her to recover damages for Union's ongoing trespasses in the five years preceding her filing of the instant suit. Finally, Illig asserts that the district court confused the property interest taken from Illig under the Trails **[**11]** Act--the right-of-way easement for the rail/trail corridor--with Union's use of the land under the license. She argues that Union's license was a distinct property interest that was "taken" at a different time than the easement. Accordingly, the fact that a federal taking occurred upon issuance of the NITU has no effect on when Missouri Pacific's license to Union terminated. Again, she maintains that the license did not terminate until the quitclaim deed was recorded on January 6, 1993.

[HN4] "We review *de novo* the district court's dismissal of an action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)" and "accept the factual allegations of the complaint as true." *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009). [HN5] In addressing a motion to dismiss, "[t]he court may consider the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record." *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010) (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (noting that the same standard applies to a Rule 12(b)(6) motion to dismiss)). [HN6] A court may dismiss a claim under **[**12]** Rule 12(b)(6) as barred by the statute of limitations if the complaint itself establishes that the claim is time-barred. *Jessie v. Potter*, 516 F.3d 709, 713 n.2 (8th Cir. 2008).

A. *Accrual*

The parties agree that Missouri's statutes of limitations govern Illig's Missouri claims for inverse condemnation and trespass. The parties also agree that [HN7] a ten-year statute of limitations applies to Illig's inverse condemnation claim, *Shade v. Mo. Highway & Transp. Comm'n*, 69 S.W.3d 503, 512-13 (Mo. Ct. App. 2001), and a five-year statute of limitations applies to her trespass claim, Mo. Rev. Stat. § 516.120(3). Both causes of action accrue when the damage is "capable of ascertainment." *Shade*, 69 S.W.3d at 514 ("A cause of action for inverse condemnation accrues once the fact of damage is capable of ascertainment."); *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94, 103 (Mo. Ct. App. 2005) (noting that an action for trespass accrues "when the damage resulting therefrom is sustained and is capable of ascertainment" **[*977]** (quotation and citation omitted)). Under Missouri law, "'capable of ascertainment' . . . mean[s] capable of being ascertained by a reasonable person using reasonable diligence." *Cook*, 169 S.W.3d at 103 **[**13]** (quotation and citation omitted). The test is objective and "is met when the plaintiffs' right to sue arises and they could have first maintained the action successfully." *Id.*

Illig's claims allege that Union is present on Illig's land and using it without Illig's consent. [HN8] Under Missouri law, a landowner may bring a claim of inverse condemnation against an entity with condemning authority[5] when the condemnor invades or appropriates a valuable property right, causing injury to the landowner. *Clay Cnty. Realty Co. v. City of Gladstone*, 254 S.W.3d 859, 864 (Mo. 2008). Similarly, [HN9] under Missouri law, "[o]ne can commit the tort of trespass either by unauthorized entry on land or by exceeding the scope of any license to enter upon the land." *Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801, 809 (Mo. Ct. App. 2004) (quotation and citation omitted).

5 The district court noted, and the parties do not dispute, that Union "has the power of eminent domain under Missouri law" pursuant to Missouri Revised Statutes § 523.010.

Illig acknowledges, however, that Missouri Pacific, as the holder of a right-of-way easement over her property, granted Union a valid license to enter the land and erect electrical lines **[**14]** in 1972. [HN10] Under Missouri law, because Missouri Pacific held its easement "for railroad purposes," Union's license remained valid as long as it, too, was used "for railroad purposes." *See St. Louis, I.M. & S. Ry. Co. v. Cape Girardeau Bell Tel. Co.*, 134 Mo. App. 406, 114 S.W. 586, 589 (Mo. Ct. App. 1908) (observing that a railroad company holding an easement may contract with another to construct and maintain telephone line "for railroad purposes"; but noting that "the consensus of opinion is to the effect that the railroad company is not permitted to use, sell, or incumber the easement for other than railroad purposes"); *see also Eureka Real Estate & Inv. Co. v. S. Real Estate & Fin. Co.*, 355 Mo. 1199, 200 S.W.2d 328, 332 (Mo. 1947) ("It is true that the owner of an easement may, in some circumstances, license or authorize third persons to use its right[-]of[-]way for purposes not inconsistent with the principal use granted . . . ."). In other words, Union's license was entirely derivative of Missouri Pacific's right-of-way. Illig agrees, arguing that when Missouri Pacific "abandoned" its railroad right-of-way, Missouri Pacific's "interest was terminated and the license [Missouri Pacific] had granted [Union] was also **[**15]** terminated." Illig, however, disputes the date when Missouri Pacific actually terminated its interest in the right-of-way.

The Federal Circuit's decision in *Caldwell* provides some help in determining when Missouri Pacific's interest in the right-of-way terminated, despite addressing a different type of claim than Illig's present claims. In *Caldwell*, the Federal Circuit was asked to consider when a claim for a taking, under the Trails Act, accrued. 391 F.3d at 1228. The court concluded that such a taking occurs on the date that the STB issues the NITU. *Id.* at 1233. [HN11] When a NITU is issued, the court explained, "state law reversionary property interests that would otherwise vest in the adjacent landowners are blocked from so vesting." *Id.* Although the NITU does not signal a final agreement between a railroad and a trail operator, the court held that the NITU nevertheless triggers a taking, even if the resulting taking is ultimately temporary. *Id.* at 1234. Once the NITU has been issued, the railroad's right-of-way will either be assumed by the trail operator (indefinitely blocking the **[*978]** landowners' state-law reversionary interests) or, if no agreement is reached, abandoned (allowing the landowners' **[**16]** state-law interest to revert). *See id.* In either case, once the STB issues the NITU, the railroad has relinquished its interest in and discontinued its involvement with the property. *See id.* at 1230 (noting that the "NITU permits the railroad to discontinue service, cancel tariffs, and salvage track and other equipment").

Illig, however, argues that Union's license remained valid--and thus, her cause of action could not accrue--until Missouri Pacific formally transferred its right-of-way easement to Trailnet with a quitclaim deed. We disagree. Illig's claims depend on whether Union had a valid license to be on her land--not upon who owned the easement or underlying land. As noted, under Missouri law, Union's license remained valid as long as it was used "for railroad purposes." *St. Louis, I.M. & S. Ry. Co.*, 114 S.W. at 589; *see also Eureka Real Estate & Inv. Co.*, 200 S.W.2d at 332. The Federal Circuit's decision in *Caldwell* instructs that, once the STB issued the NITU, on March 25, 1992, Missouri Pacific no longer retained an interest in the easement; as of that date, the federal government had "taken" the interest, and the right-of-way subsequently would either be transferred to Trailnet **[**17]** or would revert to Illig. *See* 391 F.3d at 1234. Further, the NITU permitted Missouri Pacific "to discontinue service, cancel tariffs, and salvage track and other equipment." *Id.* at 1230. In other words, as of March 25, 1992, even though Missouri Pacific had not yet deeded the right-of-way to Trailnet, Union's licenses--as a matter of law--could no longer be used "for railroad purposes" and, thus, would no longer be valid under Missouri law. *St. Louis, I.M. & S. Ry. Co.*, 114 S.W. at 589; *see also Eureka Real Estate & Inv. Co.*, 200 S.W.2d at 332. Accordingly, Illig could have asserted her Missouri claims for inverse condemnation and trespass as of this date.

Knowing when Illig could have asserted her claim, however, does not end the inquiry. Illig *could* have brought her suit as of March 25, 1992, but that does not necessarily mean that her damage was objectively capable of ascertainment on that date. To that end, Illig argues that neither Missouri Pacific, the STB, nor Trailnet provided any notice of the NITU to her. The *Caldwell* court, however, noted that [HN12] "[i]f the STB approves a request for an exemption, it will publish a notice of exemption in the Federal Register." *Id.* at 1230 (citing **[**18]** 49 C.F.R. § 1121.4(b) (2004)). Further, the documents incorporated into Illig's own complaint reveal that Missouri Pacific *did*, in fact, publish a notice of abandonment of the Carondelet Branch on January 29, 1992--before the STB issued the NITU--in the "*Watchman-Advocate*, in Clayton, Missouri, [a] newspaper in general circulation in St. Louis County, Missouri[,] where the rail line is located." *Cf. Legal Commc'ns Corp. v. St. Louis Cnty. Printing & Publ'g Co.*, 24 S.W.3d 744, 748 (Mo. Ct. App. 2000) (noting that, under certain conditions, publication in a newspaper may provide constructive notice of a foreclosure sale to those with an interest in the property). Taken together, we conclude that these actions were sufficient to give notice to "a reasonable person using reasonable diligence," *Cook*, 169 S.W.3d at 103, to ascertain that Union no longer had a valid license because it could no longer use the license "for railroad purposes," *St. Louis, I.M. & S. Ry. Co.*, 114 S.W. at 589; *see also Eureka Real Estate & Inv. Co.*, 200 S.W.2d at 332. Thus, Illig's claims for inverse condemnation and trespass accrued no later than March 25, 1992, the date the STB issued the NITU. Because Illig did **[**19]** not file her suit until December 23, 2002, both claims are time-barred, absent a tolling **[*979]** provision or some exception to the statute of limitations.

B. *Continuing Trespass*

Illig argues that, even if her claims accrued on March 25, 1992, the continuing nature of Union's trespass would allow her to recover damages for the five years preceding the commencement of this action. [HN13] Missouri law recognizes "continuing trespass" theory. *See, e.g., Cook*, 169 S.W.3d at 104-06. The Missouri Court of Appeals has explained the distinction between a single trespass and a continuing trespass as follows:

> [W]hen there is only *one wrong* that results in continuing damage, the cause of action accrues once that wrong has been committed and the resulting damage becomes capable of ascertainment. But when there are *continuing or repeated wrongs* that are capable of being terminated, successive causes of action accrue every day the wrong continues or each time it gets repeated, the end result being that the plaintiff is only barred from recovering those damages that were ascertainable prior to the statutory period immediately preceding the lawsuit.

Id. at 105 (internal citation omitted).

In *Cook*, the plaintiffs claimed **[**20]** a continuing trespass caused by a leak at a neighboring gas station. *Id.* Because the plaintiffs' complaint referred to "the releases" of contaminants onto their property, the court concluded that the plaintiffs had alleged "a continuous or repeated migration of contaminants onto their property." *Id.* at 105-06. Thus, the court concluded that the plaintiffs had "adequately presented a continuing trespass claim." *Id.* at 106.

Unlike the plaintiff in *Cook*, however, Illig has not alleged *repeated* intrusions onto her property that would support a claim for a continuous trespass. Her trespass claim only alleges that Union's "presence" on her land has caused and will cause damage. Although she alleges that Union's presence "will continue to cause damage in the future," she has not alleged "a continuous or repeated" trespass. In her brief, she claims that "the repeated flow of electricity over [her] property . . . constitutes a continuing trespass." No such allegation appears in her amended complaint. As a result, she did not allege a continuous trespass, and her trespass claim is barred by the applicable five-year statute of limitations.

III. *Conclusion*

Accordingly, we affirm the judgment of the **[**21]** district court.

JESSIE v. POTTER

United States Court of Appeals,Eighth Circuit.

Vicky E. JESSIE, Plaintiff-Appellant, v. John E. POTTER, Postmaster General, Defendant-Appellee.

No. 07-1050.

Decided: February 20, 2008

Before WOLLMAN, JOHN R. GIBSON, and BENTON, Circuit Judges. David C. Knieriem, St. Louis, MO, for appellant. Ray E. Donahue, U.S. Postal Service, Washington, DC, for appellee.

Vicky E. Jessie appeals from the district court's [1] dismissal of her Title VII complaint alleging discrimination by her employer, the United States Postal Service, in connection with its response to her work-related injuries. The district court held that Jessie's Title VII claim against a federal agency was barred by her failure to contact an Equal Employment Opportunity Counselor within forty-five days of the action of which she complains, see 29 C.F.R. § 1614.105(a)(1) (forty-five day requirement); Bailey v. United States Postal Serv., 208 F.3d 652, 654-55 (8th Cir.2000) (failure to comply with requirement fatal to Title VII suit against federal agency). Jessie contends that the deadline was tolled because she was "physically and emotionally incapacitated," she was under the influence of prescription narcotics, and she was "unable to take care of herself." Because the record does not substantiate her claim of mental incapacitation, we affirm the district court's entry of judgment for the Postal Service.

Jessie was a letter carrier in St. Charles, Missouri, until she injured her knees on the job in separate incidents in 1997 and 1998. In 1999, she filed a claim for compensation under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193. The Office of Workers' Compensation Programs, which administers the Act, authorized surgeries and paid her compensation for total disability.

Under the Federal Employees' Compensation Act, if the government offers a partially disabled employee a job suitable in light of the employee's disability, the employee must accept the job or lose his disability benefits. [2] 5 U.S.C. § 8106(c)(2). On February 2, 2000, the Postal Service offered Jessie a position as a modified letter carrier. Jessie declined the position as incompatible with her disabilities. Although the Office of Workers' Compensation Programs terminated her compensation benefits, Jessie was vindicated on appeal when an Office hearing representative reversed the initial determination and reinstated her benefits. On July 27,

2001, the Postal Service offered Jessie a new position of "modified clerk," based on restrictions outlined by her attending physician. Almost immediately thereafter, on July 31, 2001, Jessie pursued a different remedy by applying for disability retirement from the Postal Service, which was ultimately approved on May 23, 2002. Even after applying for retiremeut, however, Jessie continued to argue that the Postal Service had not offered her a suitable job. On September 25, 2001, the Office of Workers' Compensation Programs again terminated Jessie's workers' compensation benefits on the ground that she had refused an offer of suitable work. This time, Jessie lost her appeal to the Employees' Compensation Appeals Board, and her workers' compensation benefits were finally terminated on September 13, 2005.

On October 18, 2005, shortly after the adverse decision of the Employees' Compensation Appeals Board, Jessie contacted the Postal Service's EEO office for the first time. She alleged discrimination on the bases of race, sex, physical disability, and retaliation, which she alleged occurred on September 13, 2005, when she received the Employees' Compensation Appeals Board's decision denying her claim for compensation. The Postal Service EEO office denied her claim on the ground that it was a collateral attack on the Office of Worker's Compensation decision and therefore did not state a claim cognizable under Title VII.

After the dismissal of her EEO claim, on March 3, 2006, Jessie filed a Title VII complaint in the district court against the Postal Service and John E. Potter, as Postmaster General. Jessie appeared pro se, and her complaint consisted of about three pages of allegations, followed by twenty-eight pages of evidentiary materials. Most of the substantive allegations were iu paragraph eight of the complaint, in which she alleged that on and around May 15, 2000, she ueeded crutches, grab bars, and a wheelchair, bnt she was told by Postal Service employees that she could not have them at her Post Office branch. She further alleged that this decision was reversed by the Office of Worker's Compensatiou hearing officer, but that the Postal Service then "hought an opinion from an alleged health care provider." She does not plead what the "alleged health care provider" said in his opinion, but the implication is that he opined that she could work. Paragraph ten listed her injuries, which included "chronic and acute clinical depression, anxiety, post traumatic stress, and eating disorders."

The Postal Service moved to dismiss the complaint under Federal Rnles of Civil Procedure 12(b)(1) and 12(b)(6) and for summary jndgment. Jessie filed a response including more than fifty pages of evidentiary material, and the district court granted both the motion to dismiss and the motion for summary judgment. The district court held,

It is undisputed that Plaintiff did not initiate contact with a[n EEO] Counselor in a timely fashion. Plaintiff retired from the Postal Service in May of 2002, but did not initiate contact with the EEO until October of 2005.

The court rejected Jessie's argument that the period for contacting an EEO counselor was tolled because she was meutally incapacitated, holding, "Plaintiff's condition was not sufficiently dire to excuse a three year lapse." Accordingly, the court granted the summary judgment and dismissed the complaint.

On appeal, Jessie argues that she was "physically aud emotionally incapaeitated" during the time when she shonld have contacted the EEO conuselor, and therefore the district court erred in entering judgment against her on limitations grounds. Instead, she contends, the district court should have held an evidentiary hearing.

At the outset, we must clarify the procedural question of what kind of order we are reviewing-dismissal for lack of subject-matter jurisdiction, dismissal for failure to state a claim, or summary judgment. Jessie argues that she is entitled to an evidentiary hearing, relying on Briley v. Carlin, 172 F.3d 567, 570-71 (8th Cir.1999), in which a plaintiff suing a federal agency relied on equitable tolling to obviate the forty-five-day deadline for contacting an EEO counselor. In Briley, the district court considered the motion to dismiss under Fed.R.Civ.P. 12(b)(1), which governs dismissal for lack of subject-matter jurisdiction. Id. at 570. Motions to dismiss for lack of subject-matter jurisdiction can be decided in three ways: at the pleading stage, like a Rule 12(b)(6) motion; on undisputed facts, like a summary judgment motion; and on disputed facts. Osborn v. United States, 918 F.2d 724, 728-30 (8th Cir.1990). When a Rule 12(b)(1) ruling resolves disputed facts, the

court can take evidence at a hearing, and we review the judge's findings for clear error. Id. at 730. In contrast, a dismissal for failure to state a claim must be decided on the pleadings, Fed.R.Civ.P. 12(b), and a motion for summary judgment may not resolve disputed fact issues, Fed.R.Civ.P. 56(c), and both the latter type of rulings are reviewed de novo on appeal. Mattes v. ABC Plastics, Inc., 323 F.3d 695, 697-98 (8th Cir.2003) (Rule 12(b)(6)); Green v. City of St. Louis, 507 F.3d 662, 666 (8th Cir.2007) (summary judgment). In Briley, the district court held a hearing and resolved disputed facts; we affirmed the district court's dismissal under Rule 12(b)(1), reviewing for clear error, but without discussing whether the question was properly one of subject matter jurisdiction. See 172 F.3d at 570-71. However, more recently in Coons v. Mineta, 410 F.3d 1036, 1038-40 (8th Cir.2005), we considered another case in which the district court had dismissed a federal employee's Title VII claim for failure to contact an EEO counselor within forty-five days. There, we observed that in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), the Supreme Court held that the requirement of timely filing an EEOC charge was not a jurisdictional prerequisite under Title VII. 410 F.3d at 1040. Accordingly, in Coons we applied the de novo standard of review appropriate for a Rule 12(b)(6) motion, id. at 1039, and we reversed because the complaint stated facts that supported the inference that the plaintiff did not know a discriminatory action had been taken against him and therefore was entitled to equitable tolling. Id. at 1040-42. We held that the district court could not dismiss such a complaint on the pleadings, but would have to resolve disputed facts. Id. at 1042.

In this case, unlike Briley, the district court did not purport to decide the motion to dismiss under Rule 12(b)(1). There is some ambiguity as to whether the district court dismissed the case under Rule 12(b)(6) for failure to state a claim or entered a Rule 56 summary judgment against Jessie. The opinion states only the standard for a Rule 12(b)(6) motion to dismiss, but the final paragraph purports to grant both the motion to dismiss and the summary judgment motion. Because there are complexities [2] lurking in the question of whether dismissal under Rule 12(b)(6) would be appropriate for a plaintiff's failure to plead tolling, and because the district court entered summary judgment for the Postal Service as well as the Rule 12(b)(6) dismissal, we will review this case as a summary judgment and leave to another day the question of whether a Rule 12(b)(6) dismissal would also be proper when a plaintiff fails to plead a basis for tolling in the complaint.[3]

Under the summary judgment standard, the district court could enter judgment for the Postal Service only if, on the record before it, there was no genuine question of material fact and the Postal Service was entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

The same regulation that imposes the requirement of contacting an EEO counselor provides that the time limit shall be extended when the complainant was prevented by circumstances beyond his or her control from contacting the counselor within the specified time. 29 C.F.R. § 1614.105(a)(2); Miller v. Runyon, 77 F.3d 189, 191 (7th Cir.1996). The majority of circuits to consider the question have concluded that mental disability can be a ground for equitable tolling generally in federal law. Barrett v. Principi, 363 F.3d 1316, 1319-21 (Fed.Cir.2004) (collecting cases). In particular, courts have held that mental disability can toll the time in which an employment discrimination claimant must file a discrimination suit, Brown v. Parkchester S. Condos., 287 F.3d 58, 60 (2d Cir.2002); Smith-Haynie v. Dist. of Columbia, 155 F.3d 575, 579 (D.C.Cir.1998); file an administrative complaint, Melendez-Arroyo v. Cutler-Hammer de P.R. Co., 273 F.3d 30, 37-39 (1st Cir.2001); or contact an EEO counselor, Miller, 77 F.3d at 191; Boos v. Runyon, 201 F.3d 178, 184 (2d Cir.2000).

The circuits have differed somewhat in the standards they apply to decide when tolling is warranted on the basis of mental disability. The Second Circuit has declined to formulate a rule, but instead holds that the question is "highly case-specific." Boos, 201 F.3d at 184 & n. 7. This emphasis on equitable discretion is consistent with our approach to equitable tolling in general in Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1330 (8th Cir.1995), where we said, "It would . be inconsistent with the concept of equity to lay down hard and fast rules governing when [tolling] relief would be available." However, despite our emphasis on discretion, we do not read Dring as eschewing the adoption of a standard altogether, but only as advocating flexibility.

Other circuits have developed a federal standard analogizing from state law regarding tolling for mental incapacity. See generally Barrett, 363 F.3d at 1320-21; Smith-Haynie, 155 F.3d at 579; Nunnally v. MacCausland, 996 F.2d 1, 5 (1st Cir.1993). Under these cases, the "hurdle is high." Smith-Haynie, 155 F.3d at 579. Tolling is appropriate only if the mental illness actually prevents the plaintiff from understanding his or her legal affairs and from complying with the time limit. Miller, 77 F.3d at 191. A diagnosis of mental illness is not enough to justify tolling without evidence that the illness actually prevented the plaintiff from complying with the deadline. Id. at 191-92 (reasoning that even serious mental illnesses are treatable); Nunnally, 996 F.2d at 5; see also Dautremont v. Broadlawns Hosp., 827 F.2d 291, 296 (8th Cir.1987) (in action under 42 U.S.C. § 1983, no tolling where the plaintiff was "cognizant of his rights" even though he was a patient in a mental hospital, with a diagnosis of schizophrenia). While we have emphasized that state tolling standards are not applicable when there is a federal statute of limitations, see Garfield v. J.C. Nichols Real Estate, 57 F.3d 662, 665-66 (8th Cir.1995), in light of other circuits' reliance on state law, we observe that Missouri law is consistent with the federal standard that has emerged. Missouri law tolls statutes of limitations if the plaintiff was mentally incapacitated at the time the cause of action accrued. Mo.Rev.Stat. § 516.170. "Mentally incapacitated" means that the person was "deprived of his reasoning faculties" or that he was "incapable of understanding or acting with discretion in the ordinary affairs of his life." Kellog v. Kellog, 989 S.W.2d 681, 685 (Mo.Ct.App.1999). To warrant tolling under Missouri law, the plaintiff must show that the disability in fact prevented him from bringing suit. Id. We conclude that a plaintiff seeking tolling on the ground of mental incapacity must come forward with evidence that a mental condition prevented him from understanding and managing his affairs generally and from complying with the deadline he seeks to toll.

The record before us does not substantiate Jessie's contention that she suffered from a mental disability that prevented her from managing her own affairs generally or specifically from contacting an EEO counselor within forty-five days from May 15, 2000, the date she identified in her complaint as the time when the alleged instances of discrimination by the Postal Service occurred. Nor, indeed, does she establish mental incapacitation at any other time. One of the medical opinions describing her disabilities mentions "depression," but it gives no further information that would shed light on whether the depression affected her ability to understand her legal rights or act upon them. See Miller, 77 F.3d at 191 (diagnosis of mental illness not sufficient to warrant tolling without evidence of actual effect on ability to manage affairs). Although she filed one letter in which she herself opined that she lacked "mental capacity" to pursue a worker's compensation hearing, she has filed no medical records or opinions indicating that she was deprived of her reasoning faculties or was incapable of understanding or managing her affairs. See Vance v. Stevens, 930 F.2d 661, 662 (8th Cir.1991) (affirming summary judgment for defendant on tolling issue where plaintiff "failed to provide the affidavits of his treating physicians or other experts to establish a genuine issue of material fact for trial as to his mental disability.").

Jessie's own evidence disproves the notion that she could not manage her business, since she filed exhibits showing that she pursued her workers' compensation claim pro se and requested disability retirement from the Postal Service. Moreover, with her opposition to the summary judgment motion, she filed a letter she sent to the Office of Workers' Compensation Programs, dated May 23, 2001, in which she described her ongoing efforts to apply for suitable jobs and stated that she had returned to college to update her job skills. See Miller, 77 F.3d at 192 (plaintiff's attendance at college during relevant time rebutted claim of incapacity).

Because of the lack of medical or other evidence showing her to be mentally incapacitated and the evidence positively showing that she actively managed her own affairs, this record would not support an inference that Jessie was mentally disabled or that any such disability kept her from contacting an EEO counselor. The district court did not err in entering summary judgment against Jessie on the ground that she had failed to contact an EEO counselor within the specified time.

Because we affirm on the ground cited by the district court, we need not consider the Postal Service's alternative argument that this Title VII case is an impermissible collateral attack on the Office of Workers' Compensation's decision under the Federal Employees' Compensation Act.

The judgment of the district court is affirmed.

FOOTNOTES

1. The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

2. Bar by a statute of limitation is typically an affirmative defense, which the defendant must plead and prove. See John R. Sand & Gravel Co. v. United States, --- U.S. ----, 128 S.Ct. 750, 753, 169 L.Ed.2d 591 (2008); Fed.R.Civ.P. 8(c). A defendant does not render a complaint defective by pleading an affirmative defense, Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980), and therefore the possible existence of a statute of limitations defense is not ordinarily a ground for Rule 12(b)(6) dismissal unless the complaint itself establishes the defense. See Varner v. Peterson Farms, 371 F.3d 1011, 1017-18 (8th Cir.2004) (dismissal proper because complaint ruled out tolling of statute of limitations).However, these principles may be misleading in a Title VII case. The Tenth Circuit has recently held that compliance with Title VII's time limit for filing a charge with the EEOC is a condition precedent to suit, which must be pleaded and proved by the plaintiff, rather than an affirmative defense, which must be pleaded and proved by the defendant. Montes v. Vail Clinic, Inc., 497 F.3d 1160, 1167 (10th Cir.2007) (citing Lawrence v. Cooper Cmties., Inc., 132 F.3d 447, 451 (8th Cir.1998)). But see Payan v. Aramark Mgmt. Servs. Ltd P'ship, 495 F.3d 1119, 1122-23 (9th Cir.2007) ("[B]ecause the statute of limitations is an affirmative defense, the defendant bears the burden of proving that the plaintiff filed beyond the limitations period."); Colbert v. Potter, 471 F.3d 158, 165 (D.C.Cir.2006) ("[A] statute of limitations defense under Title VII is an affirmative defense. Therefore, [the defendant] bears the burden of pleading and proving it.") (internal citations and quotation marks omitted). One of the cases on which the Tenth Circuit relies in Montes, Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992, 1010 (11th Cir.1982), explains that conditions precedent must only be averred generally in a complaint and that a defendant must deny satisfaction of such conditions specifically and with particularity. The question of which party has what burden of pleading has not been briefed before us, and we express no opinion on it because we treat the case as a summary judgment.

3. We will also leave to another day the question of how a disputed fact question relating to the tolling question would be resolved. In Smith-Haynie v. District of Columbia, 155 F.3d 575, 578-79 (D.C.Cir.1998), the D.C. Circuit raised the possibility that equitable tolling should be decided by a judge, not a jury, even if there are disputed questions of fact. The First Circuit held that the question of equitable tolling is for a judge, and therefore the court instructed the district court to hold a hearing before trial to resolve the disputed tolling issues. Melendez-Arroyo v. Cutler-Hammer de P.R. Co., 273 F.3d 30, 38-39 (1st Cir.2001). We express no opinion on this issue because we ultimately decide there was no disputed issue of fact.

JOHN R. GIBSON, Circuit Judge.