

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

PAUL DAVIS,

Relator,

v.

MISSOURI COMMISSION ON
HUMAN RIGHTS, et al.,

Respondents.

Cause No. 05AC-CC00420

Consolidated No. 05AC-CC00659

ORDER AND JUDGMENT

Respondent Missouri Commission Human Rights ("MCHR") and Respondent Donna Cavitts ("Cavitts"), who are collectively referred to herein as Respondents, filed a Motion for Partial Summary Judgment with respect to the Petition for Writ of Mandamus previously filed by Relator Paul Davis ("Davis"). Having received and read the respective briefs and motion exhibits filed by the parties, having heard the oral argument submitted by counsel for the respective parties on the record on or about June 19, 2006, and having received the parties' stipulation on the record during the June 19, 2006 hearing that the Court may properly grant summary judgment to either party based on the undisputed material facts in the record, the Court hereby finds, rules, adjudges and decrees as follows:

FINDINGS OF FACT

The Court finds that the following material facts are undisputed and/or have otherwise been deemed admitted by the parties:

1. Davis dually filed a complaint of discrimination in employment with both the Equal Employment Opportunity Commission ("EEOC") and the MCHR on or about August 31, 2004.
2. Pursuant to a work-sharing agreement between the MCHR and the EEOC, the EEOC investigated the complaint of discrimination.
3. On or about December 14, 2004, the EEOC issued a Dismissal and Notice of Rights to Davis, which read in pertinent part:

Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

4. Between February 8, 2005 and February 14, 2005, the MCHR received filing and closing documents from the EEOC, which consisted of (1) a copy of Davis' complaint of discrimination, (2) a copy of the EEOC's confidential deliberative memorandum, and (3) the EEOC's Dismissal and Notice of Rights.

5. The MCHR administratively closed Davis' complaint of discrimination on February 14, 2005.

6. In an unsigned letter dated February 14, 2005, Cavitte, in her capacity as Executive Director of the MCHR, wrote, in pertinent part:

The Missouri Commission on Human Rights (MCHR) has been informed that the Equal Employment Opportunity Commission (EEOC) has rendered a decision on the above-captioned matter.

Therefore, since this complaint was dual filed with the EEOC and MCHR, this letter shall serve as notice that the Executive Director of the Missouri Commission on Human Rights has rendered a decision of Administrative Closure based on the EEOC's processing.

7. Other than receiving the documents mentioned in paragraph 4 and claiming to have reviewed them, the MCHR undertook no other methods or means to investigate and/or determine the merits of Davis' complaint of discrimination.

8. Respondents admitted in response to Request for Admissions Nos. 5, 6, 7, 8 and 9, respectively, that: (1) the MCHR did not interview Davis or any other witness before administratively closing Davis' complaint of discrimination; (2) the MCHR did not contact any officer, employee or agent of Davis' former employer (the named Respondent in the Complaint of Discrimination) before administratively closing Davis' complaint of discrimination; (3) the MCHR did not request any officer, employee or agent of Davis' former employer to provide any information to the MCHR before administratively closing Davis' complaint of discrimination; and (4) the MCHR did not take any oral or written statement of any officer, employee or agent of Davis' former employer before administratively closing Davis' complaint of discrimination.

9. Respondents stated in answer to Request for Admissions No. 10 that the MCHR did not have the entire EEOC investigative file prior to closing Davis' complaint of discrimination.

10. Respondents twice stated in responses to Davis' written Requests for Admissions Nos. 19 and 20, "The EEOC investigated [Davis'] complaint not the MCHR."

11. Respondents stated in answers to written discovery requests, including Interrogatory Nos. 6 and 7, that the executive director of the MCHR based her decision to administratively close Davis' complaint of discrimination upon the EEOC's investigation and processing pursuant to 8 CSR § 60-2.025.

12. In light of the fact that Regulation 8 CSR § 60-2.025 sets forth a laundry list of the procedures encompassing filing, investigating and conciliating a complaint of discrimination and is in fact composed of no less than fifteen subsections, the Court asked Respondents on the record during oral argument to specify and articulate the particular subsection or subsections upon which the MCHR's decision to administratively close Davis' complaint of discrimination was based. In response, Respondents stated that the administrative closure was based or could have been based upon either 8 CSR § 60-2.025(7)(A), which allows the MCHR's executive director to "dismiss" a complaint due to lack of probable cause, or 8 CSR § 60-2.025(B)(7), which purports to allow the MCHR's executive director to "administratively close" a complaint "in any other circumstance where the executive director deems administrative closure to be appropriate."

13. Respondents never made any written determination as to whether or not probable cause existed for crediting the merits of Davis' complaint of discrimination before administratively closing Davis' complaint of discrimination.

14. Respondents never notified Davis that they had ever determined that his complaint of discrimination either lacked probable cause, or was dismissed due to lack of probable cause, or was administratively closed due to the lack of probable cause.

15. Respondents' February 14, 2005 letter does not state that the administrative closure was based upon lack of probable cause.

16. When asked in Interrogatory No. 7 whether the MCHR had ever made any determination as to whether or not probable cause exists for crediting the allegations of Davis' complaint of discrimination, and if so, to so state what determination was made, Respondents answered:

"The executive director determined that based upon the EEOC's investigation and processing that administrative closure was appropriate."

17. In response to Request for Admission No. 18, which asked Respondents to admit that the Missouri Commission on Human Rights has never made any determination as to whether or not probable cause exists for crediting the allegations of Paul Davis' complaint of discrimination pursuant to the Missouri Human Rights Act, Respondents stated: "Admit in part. Respondents based their administrative closure decision based (sic) on the EEOC's investigation and processing."

18. The EEOC never determined that Davis' complaint of discrimination lacked probable cause.

19. The Dismissal and Notice of Rights issued by the EEOC on or about December 14, 2002 notified Davis of his right to file a lawsuit against his former employer pursuant to Title VII.

20. The EEOC investigator who investigated Davis' complaint of discrimination averred in an Affidavit that other than interviewing Davis by telephone about his complaint of discrimination, he did nothing else to investigate the merits of Davis' complaint.

21. Specifically, the EEOC investigator admitted that the EEOC did not contact or interview any other witnesses or parties as a part of his investigation and/or administrative processing of Davis' complaint of discrimination.

22. Cavitte testified in a deposition that under the MCHR's definition of an investigation, an investigation cannot constitute of merely a telephone conversation with the complaint. Instead, for purposes of conducting an investigation, the MCHR's standards require the MCHR investigators to request documents from the responding party (i.e. the employer) and analyze those documents and collect any other comparable comparative information to determine if a violation of the statute has occurred.

23. Cavitte testified that her primary duty as executive director of the MCHR is to conduct fact finding investigations for purposes of determining whether or not there is reason to believe a violation of the MHRA has occurred.

24. In response to Request for Admission No. 12, Respondents denied that prior to administratively closing Davis' complaint of discrimination, the MCHR was aware that the EEOC had not interviewed any person identified in Davis' complaint other than Davis, himself.

25. In response to Request for Admission No. 13, Respondents denied that the MCHR was aware that the EEOC had never interviewed any officer, employee or agent of the Davis' former employer regarding Davis' charge of discrimination.

26. In response to Request for Admission No. 14, Respondents denied that the MCHR was aware that the EEOC had never requested Davis' former employer to provide any information in response to Davis' charge of discrimination.

27. The confidential deliberative memorandum does not apprise or state within its four corners: (a) what specifically was done by the EEOC investigator in the way of his investigation into Davis' complaint, (b) what methods or means of investigation the EEOC investigator used to investigate Davis' complaint, (c) the identity of persons, parties and/or witnesses that the EEOC investigator spoke to, if any, in an effort to investigate Davis' complaint, (d) what documents or other factual information the EEOC investigator requested, obtained, and/or reviewed during the course of his investigation, if any, (e) the source of the abbreviated statement of facts purportedly included therein, and (f) whether and how the EEOC investigator was able to verify the accuracy of such purported statement of facts. Instead, the memorandum purports to set forth a legal analysis of an abbreviated statement of assumed facts, the source and accuracy of which the reader has no way of confirming or knowing from the four corners of the document.

28. Respondents have failed and/or refused to issue Davis a letter indicating Davis' right to bring a civil action against his former employer under the Missouri Human Rights Act ("MHRA"), notwithstanding that Davis requested them to vacate their administrative closure pursuant to 8 CSR § 60-2.025(7)(D) and that Davis filed a Petition

for Writ of Mandamus on May 17, 2005, and that the within case has been pending for more than a year.

29. Respondents administratively closed Davis' Complaint one hundred sixty seven (167) days after it had been dually filed with the MCHR and the EEOC.

30. Any complaint of discrimination that is first filed with the EEOC is not assigned an investigator with the MCHR pursuant to the internal policies and practices observed by the MCHR.

31. If a complaint of discrimination is first filed with the MCHR, it is the internal policy and practice of the MCHR to assign an investigator to the file and to send written interrogatories to the complainant's employer requesting it to provide statements and information in response to the complaint of discrimination.

32. Cavitte testified that she is the only person who is authorized to issue a finding of probable cause on behalf of the MCHR, and on occasion, she may delegate that authority to four of her supervisors, but none of the MCHR investigators may issue a finding of probable cause.

33. If a complainant sends in a request for a right to sue letter prior to the expiration of 180 days from the date the complaint was filed, the MCHR will not grant the right to sue and will not accept the letter.

34. Cavitte testified that as executive director of the MCHR, she does not know what effect an administrative closure of a case, without issuing a right to sue letter, has on individual complainants and their ability to file suit.

35. Cavitte testified that as executive director of the MCHR, she does not know whether an administrative closure of a case, without issuing a right to sue letter, forecloses the individual's right to file a lawsuit.

36. Cavitte testified that as executive director of the MCHR, she does not know what the legislative intent behind the MHRA is.

37. Of the twenty two (22) investigators employed by the MCHR, only twelve (12) of them are designated to handle employment discrimination charges and investigations.

CONCLUSIONS OF LAW

1. "Mandamus is the appropriate action when seeking to require the performance of an official of a ministerial act." State ex rel. Thomas v. Neely, 128 S.W.3d 920, 924 (Mo. App. S.D. 2004). "A ministerial act is one that law directs the public official to perform upon a given set of facts independent of how the official may regard the propriety or impropriety of performing the act in any particular case." Id.

2. To determine whether the right to mandamus is clearly established and exists currently, the court examines the statute under which relators claim the right. Id.

3. The Missouri Supreme Court has specifically recognized that an employee may bring an action for mandamus against the MCHR and its executive director so as to ensure that the executive director complies with the MHRA and the MCHR's promulgated regulations in determining whether or not there is probable cause to believe that discrimination occurred in violation of the MHRA. State ex rel. Martin-Erb v. Missouri Commission on Human Rights, 77 S.W.3d 600, 606 (Mo. banc 2002).

4. More specifically, the Missouri Supreme Court held in Martin-Erb that the executive director's decision that there is no probable cause to believe that discrimination in violation of the MHRA occurred is reviewable as a non-contested case pursuant to Mo. Rev. Stat. § 536.150 for the limited purpose of determining whether the executive director arbitrarily exercised or refused to exercise her statutory and regulatory duties in making that determination.

5. The Missouri Human Rights Act ("MHRA"), which is promulgated at §§ 213.010 through and including Section 213.137, is a remedial statute and must be afforded a broad interpretation "in order to accomplish the greatest public good." Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc., 991 S.W.2d 161, 166 (Mo. App. W.D. 1999).

6. The powers and the duties of the MCHR are set forth at Mo. Rev. Stat. §213.030, and they include, but are not limited to, the power and duty "to receive, investigate, initiate, and pass upon complaints alleging discrimination in employment...because of race, color, religion, national origin, ancestry, sex, age... and to require the production for examination of any books, papers, records, or other materials relating to any matter under investigation."

7. In order to help the MCHR execute and fulfill its function and duty to discourage and stop illegal discrimination, the legislature gave the MCHR authority "to adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of [the MHRA] and the policies and the practices of the commission in connection therewith."

8. Section 213.075.3 specifically requires the executive director of the MCHR to investigate all complaints of discrimination, irrespective of whether or not such complaint has been first filed with the EEOC and/or initially investigated by the EEOC pursuant to a work-sharing agreement or otherwise, and it further requires her to determine whether or not probable cause exists for crediting the allegations of the complaint.

9. Section 213.075.3 provides in pertinent part:

After the filing of any complaint, the executive director shall, with the assistance of the commission's staff, promptly investigate the complaint, and if the director determines after the investigation that probable cause exists for crediting the allegations of the complaint, the executive director shall immediately endeavor to eliminate the unlawful discriminatory practice complained of ... and shall report the results to the commission. The investigation, determination of probable cause and conciliation shall be conducted according to such rules, regulations and guidelines as the commission shall prescribe. [Emphasis supplied]

10. The duties of the executive director, with the assistance of the commission's staff, to investigate and determine whether or not probable cause exists for crediting the allegations of the complaint are statutorily-mandated duties, which the executive director is required to perform.

11. Section 213.010 of the MHRA specifically defines "commission" as that term is used Chapter 213 to mean the Missouri commission on human rights.

12. Pursuant to Section 213.030, the MCHR is allowed to promulgate rules and procedures for investigating and determining complaints of discrimination so long as such rules do not relieve the MCHR and/or its executive director from performing its statutorily mandated duties to receive, investigate, initiate, and pass upon complaints, and so long as the rules and procedures promulgated do not conflict with the MHRA. Missouri Div. of Family Services v. Patterson Schools, Inc., 772 S.W.2d 823, 825 (Mo.

App. E.D. 1989); Johnson v. Labor and Industrial Relations Cmms'n., 591 S.W.2d 241, 244 (Mo. App. W.D. 1979).

13. Regulation 8 CSR 60-2.025(9) is the regulation promulgated by the MCHR which sets forth the procedures for conducting investigations into complaints of discrimination, and it provides in pertinent part:

...Investigations shall be accomplished by methods including, but not limited to, fact-finding conferences, personal interviews, written interrogatories, tests, requests for production of documents, books or papers, or other materials and reviews of investigations of other civil rights agencies. If a respondent refuses to cooperate with the investigation, information needed may be subpoenaed.

14. Although the MHRA does not specifically state what the MCHR or the executive director must do upon determining that no probable cause exists for crediting the allegations of a complaint, Regulation 8 CSR 60-2.025(7)(A), as promulgated by the MCHR, provides that such complaint "shall be dismissed due to lack of probable cause."

15. In contrast to a dismissal of a complaint due to lack of probable cause, Regulation 8 CSR 60-2.025(7)(B) addresses the circumstances under which a complaint of discrimination may be "administratively closed" by the executive director. Notably, all such circumstances describe situations in which the MCHR is prevented from making a determination as to whether or not probable cause exists.

16. Regulation 8 CSR 60-2.025(7)(B) reads in pertinent part:

A complaint may be administratively closed by the executive director or his/her designee at any stage prior to setting the case for public hearing—

1. For failure of the complainant to cooperate with the commission;
2. Upon the commission's inability to locate the complainant;
3. For lack of jurisdiction;
4. In the absence of any remedy available to the complainant;
5. When the complainant files a suit in federal court on the same issues against the respondent named in the commission complaint;
6. When the commission has not completed its administrative processing within one hundred eighty days from the filing of the complaint and the person aggrieved requests in writing a notice of the right to bring a civil action in state court, the executive director or his/her designee will administratively close the complaint and issue the notice; or

7. In any other circumstance where the executive director deems administrative closure to be appropriate.

17. Respondents have not claimed that the administrative closure of Davis' complaint of discrimination was based in whole or in part upon 8 CSR 60-2.025(7)(B)(1)-(6).

18. Respondents have asserted that the decision to administratively close Davis' complaint was based upon the EEOC's processing. However, the "EEOC's processing" is not one of the enumerated bases under the promulgated agency regulations for which the MCHR may either dismiss or administratively close a complaint of discrimination.

19. To the extent that Respondents rely upon Regulation 8 CSR 60-2.025(7)(B)(7) for asserting that the executive director accepted the EEOC's processing in lieu of performing her statutorily mandated duties under Section 213.075.3, to investigate and determine whether or not probable cause exists for crediting the allegations of Davis' complaint, the executive director arbitrarily failed and/or refused to perform her statutory and regulatory duties under the MHRA.

20. To the extent that Respondents assert at the last minute in the litigation that the administrative closure of Davis' complaint was based upon a de facto determination of no probable cause, which has never heretofore been reduced to writing and communicated to Davis, this Court finds that such assertion is not supported by the record, that such assertion is in fact contrary to Respondents' previously submitted discovery answers and responses, that Respondents' own agency rules and procedures distinguish dismissals due to lack of probable cause from administrative closures, and therefore, if such assertion were to be accepted by the Court, the Court would necessarily be compelled to find that Respondents did not follow its own agency rules which compel a complaint to be "dismissed due to lack of probable cause" and not "administratively closed."

21. The Court concludes as a matter of law that Respondents did not investigate Davis' complaint before administratively closing it.

22. The Court concludes as a matter of law that Respondents did not make any determination as to whether or not probable cause exists to credit the allegations of Davis' complaint before administratively closing it.

23. The Court cannot find authority within the plain language of the MHRA which would permit Respondents to administratively close complaints without first completing an investigation and making a determination as to whether or not probable cause exists for crediting the allegations of the complaint.

24. The Missouri Supreme Court has consistently and unwaveringly recognized that the executive director has a duty to investigate complaints of discrimination and determine whether or not probable cause exists for crediting the allegations of the complaint. See e.g. State ex rel. Martin-Erb v. Missouri Commission on Human Rights, 77 S.W.2d 600, 603-604 (Mo. banc 2002); State ex rel. Diehl v. O'Malley, 95 S.W.3d 82, 89-90 (Mo. banc 2003); and Igoe v. Dept of Labor and Industrial Relations, 152 S.W.3d 284, 287 (Mo. banc 2005).

25. Furthermore, this Court gives particular heed and deference to the dicta of the Missouri Supreme Court in Igoe v. Dept of Labor and Industrial Relations, 152 S.W.3d 284, 287 (Mo. banc 2005), which acknowledges that Respondents may lawfully terminate its administrative proceedings at any time *sua sponte* by issuing a right to sue letter to the complainant, and that the use of the right-to-sue letter to terminate administrative proceedings so as to conserve the commission's limited resources is permissible.

26. The Court also finds the recent decision of the Western District Court of Appeals in Public School Retirement System of the School District of Kansas City v. Missouri Commission on Human Rights, --S.W.3d--, 2006 WL 325374 (February 14, 2006) to be instructive to the extent that it recognized that Respondents have the duty to investigate a complaint of discrimination for purposes of determining whether or not probable cause exists to find discrimination, and that until such investigation is completed and such determination is made, Respondents may not lawfully terminate its administrative proceedings unless it issues a right to sue letter to the complainant,

27. The MHRA does not allow Respondents to delegate or avoid their statutory duties to investigate and determine complaints of discrimination whether by ostensible aid of a work-sharing agreement or otherwise.

28. Respondents may be compelled to issue a complainant a letter indicating his right to bring a civil action when the commission has not completed its administrative processing within 180 days from the filing of a complaint of discrimination and complainant submits a written request for the same. Mo. Rev. Stat. § 213.111.1

29. As a matter of law, Respondents are required to issue a right to sue letter to complainant, upon written request of complainant, after 180 days from the date of filing a complaint if Respondents have not yet completed their investigation into the complaint and the executive director has not yet made a determination as to probable cause.

30. As a matter of law, Respondents are not prohibited by the MHRA from issuing a right to sue letter to complainant at any time before the 180th day after a complaint of discrimination is filed with the MCHR.

31. As a matter of law, Respondents terminated their administrative proceedings prior to completing an investigation of Davis' complaint and prior to making a determination as to whether or not probable cause exists for crediting the allegations of Davis' complaint, and therefore, Respondents should have issued a right to sue letter to Davis upon Davis' written request.

32. Respondents' failure and/or refusal to issue a right to sue letter to Davis is and was unlawful, unreasonable, arbitrary, capricious and/or constitutes an abuse of discretion within the meaning of Mo. Rev. Stat. § 536.150, and mandamus is therefore an appropriate remedy.

33. It has been well more than 180 days from the date that Davis filed his complaint of discrimination, and given the fact that Respondents have not heretofore completed an investigation and have not heretofore made a determination that Davis' complaint lacks probable cause, Davis' request for a right to sue letter is considered timely and must be granted pursuant to Mo. Rev. Stat. § 213.111.1 as a matter of law.

34. Because the Court finds that Respondents' actions and omissions in failing and refusing to investigate and determine Davis' complaint and in failing and refusing to issue a right to sue letter to Davis are in violation of the plain language of the MIRA and do not otherwise comply with the MCHIR's own agency rules and standards, this Court does not seek to address or determine the merits of Davis' additional arguments that Respondents' actions and omissions also violate the open courts provision of the Missouri State Constitution and/or wrongfully deprive Davis' right under the Missouri State Constitution to have a jury to determine the merits of his claim for damages.

WHEREFORE, THE COURT HEREBY RULES, ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

A. Respondents' Motion for Partial Summary Judgment is hereby denied; AND

B. Based upon the undisputed facts in the record, the Court hereby enters summary judgment in favor of Relator Paul Davis and against Respondents on Relator's Petition for Writ of Mandamus; AND

C. This Court issues its Preliminary Writ of Mandamus against Respondent Cavitts and hereby orders her to immediately and forthwith provide a right-to-sue letter to Relator Paul Davis.

SO ORDERED:

Richard J. Callahan
 The Honorable Richard Callahan
 Circuit Judge

Date: July 17, 2006