

SC 83704

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI ex rel.
ROMA MARTIN-ERB,

Appellant,

vs.

MISSOURI COMMISSION ON HUMAN
RIGHTS and STERLING ADAMS,

Respondents,

and

WAL-MART STORES, INC.,

Intervener.

SUBSTITUTE BRIEF OF APPELLANT

**Frank E. Wallemann MO# 17935
JON E. BEETEM, P.C.
505 E. State St.
P.O. Box 476
Jefferson City, Missouri 65102
(573) 635-6659
(573) 635-6520 (facsimile)
Attorneys for Appellant**

TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES.	2
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS (PROCEDURAL HISTORY).....	5
POINTS RELIED.	7
ARGUMENT.....	9
POINT I.	9
POINT II.....	16
CONCLUSION	21
CERTIFICATE OF SERVICE	22

TABLE OF CASES

	Page
<i>Cade v. State, 990 S.W. 2d 32 (Mo. App. W.D. 1999)</i>	12
<i>Corvera Abatement Technologies, Inc. v. Air Conservation</i>	
<i>Commission, 973 S.W.2d 851 (Mo. banc 1998)</i>	17
<i>Hagely v. Board of Education of the Webster Groves School</i>	
<i>District, 841 S.W.2d 663 (Mo. banc 1992)</i>	14
<i>Karzin v. Collen, 562 S.W.2d 397 (Mo.App.E.D.1978)</i>	14
<i>Peyton v. Department of Social Services DFS,</i>	
987 S.W.2d 427 (MoApp.W.D.1999)	16
<i>Phipps v. School District of Kansas City,</i>	
645 S.W.2d 91 (Mo.App.W.D.1982)	14
<i>Pollock v. Wetterau Food Distributor Group,</i>	
11 S.W.3d 754 (Mo.App.E.D.1999)	11
<i>State ex rel Nance v. Board of Trustees, Firefighter’s Retirement</i>	
<i>Systems of Kansas City, 961 S.W.2d 90 (Mo.App.W.D.1998)</i>	14
<i>State ex rel Valentine v. Board of Police Commissioners of Kansas City,</i>	
813 S.W.2d 955 (Mo.App.W.D.1991)	11

STATE STATUTES

Chapter 213, RSMo (various sections)	9 through 21
--	--------------

Chapter 536, RSMo (various sections)	10, 12
8 C.S.R. 60-2.025(7)(A) and (E)	10, 11
8 C.S.R. 60-225(9)(C)	20

CONSTITUTIONAL PROVISIONS

Missouri Constitution, Article V, Section 18	9
--	---

JURISDICTIONAL STATEMENT

This action has been transferred from the Court of Appeals, Western District, to the Missouri Supreme Court pursuant to Missouri Supreme Court Order dated August 21st, 2001. *Constitution of Missouri Article V, Section 9*

STATEMENT OF FACTS

On January 21, 1997, Appellant filed a Charge of Discrimination (hereinafter referred to as the “Charge”) with the Missouri Commission on Human Rights (hereinafter referred to as “Respondent Commission” or “Commission”). (TR 42). The Charge alleged certain acts of Wal-Mart Stores, Inc. (hereinafter referred to as the “Intervener”) which took place on January 11, 1997, constituted a violation of Chapter 213 RSMo., the Human Rights Act (hereafter referred to as “Chapter 213”).

On February 4, 2000, the Respondent Commission issued a Determination which stated: “Based on consideration of the evidence, a finding of No Probable Cause has been made.” The letter also advised Appellant of her right to file an appeal of the determination in circuit court. (TR 5). On March 6, 2000, the Appellant filed a Petition for Review and Mandamus Under Section 536.150 RSMo.(The thirtieth day after February 4 was March 5, a Sunday) In said Petition, Appellant requested a review of the February 4, 2000, action of Respondent Commission in making a Finding of No Probable Cause and dismissing Appellant’s complaint. Intervener was designated as a Party of Record on that pleading. (TR 1).

On April 17, 2000, Intervener’s unopposed Motion To Intervene was granted by the Court.

On April 17, 2000, Respondents Commission and Sterling Adams filed a Motion To Dismiss. (TR 7). Intervener filed a separate Motion to Dismiss (TR 16) which although not officially marked as “filed” was referred to and considered by Judge Brown in his Order of May 17, 2000. (TR 20).

On July 14, 2000, the Circuit Court of Cole County issued a Findings Of Facts, Conclusions Of Law, and Judgment sustaining Respondents’ and Intervener’s Motions To Dismiss and quashed the Order in Mandamus.

POINTS RELIED ON

I.

The Circuit Court erred in quashing its preliminary Order in Mandamus because it is an appropriate form of review of a “finding of no probable cause” under Chapter 213.085 in that it is an appeal of a noncontested administrative decision as set forth under 8 CSR 60-2.025(7)(A) and (E) and Chapter 536.150 RSMo.

Missouri Constitution, Article V, Section 18

Chapter 213, RSMo (various sections)

Chapter 536, RSMo (various sections)

8 C.S.R. 60-2.025(7)(A) and (E)

Cade v. State, 990 S.W. 2d 32 (Mo. App. W.D. 1999)

Pollock v. Wetterau Food Distributor Group, 11 S.W.3d 754 (Mo.App.E.D.1999)

State ex rel Nance v. Board of Trustees, Firefighter's Retirement Systems of Kansas City, 961 S.W.2d 90 (Mo.App.W.D.1998)

Hagely v. Board of Education of the Webster Groves School District, 841 S.W.2d 663 (Mo. banc 1992)

Karzin v. Collen, 562 S.W.2d 397 (Mo.App.E.D.1978)

Phipps v. School District of Kansas City, 645 S.W.2d 91 (Mo.App.W.D.1982)

State ex rel Valentine v. Board of Police Commissioners of Kansas City, 813 S.W.2d 955 (Mo.App.W.D.1991)

II.

The Circuit Court erred in applying the two year limitation for the filing of a civil action within Section 213.111 to actions for judicial review under Chapter 213.085 because statutory interpretation does not justify such a result in that the Legislature and the Commission on Human Rights established different occasions when legal actions may be filed in court, and the clear intent was for each to be separate and distinct.

Chapter 213, RSMo (various sections)

8 C.S.R. 60-225(9)(C)

Peyton v. Department of Social Services DFS, 987 S.W.2d 427

(MoApp.W.D.1999)

Corvera Abatement Technologies, Inc. v. Air Conservation Commission, 973

S.W.2d 851 (Mo. banc 1998)

ARGUMENT

POINT I

The Circuit Court erred in quashing its preliminary Order in Mandamus because it is an appropriate form of review of a “finding of no probable cause” under Chapter 213.085 in that it is an appeal of a noncontested administrative decision as set forth under 8 CSR 60-2.025(7)(A) and (E) and Chapter 536.150 RSMo.

Since this is an appeal of the review of the Circuit Court of an administrative decision, the Supreme Court is reviewing the Circuit Court’s judgment and not the Agency’s determination. *State ex rel Valentine v. Board of Police Commissioners of Kansas City*, 813 S.W.2d 955, 957 (Mo.App.W.D. 1991)

One of the principal functions of the Respondent Commission under the Act and its Rules and Regulations is to conduct investigations. The executive director is responsible for determining if “Probable Cause” exists that Chapter 213 was violated.

The Constitution of Missouri, Article V, Section 18, states

All final decisions, findings, rules and orders on(sic) any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, **shall be subject to direct review by the courts** as provided by law...(emphasis added)

Chapter 213 states at Section 213.085 RSMo:

.2 Any person who is aggrieved by a final decision, finding or order of the commission may obtain judicial review by filing a petition in circuit court...

.3 Judicial review shall be in the manner provided by chapter 536...

Rules and Regulations 8 CSR 60-2.025(7) states:

(A) If the executive director or his/her designee shall determine, either upon the face of the complaint or after investigation, that the complaint shall be dismissed due to lack of probable cause the same shall be dismissed.

(E) Any person aggrieved by dismissal of a complaint may obtain judicial review by filing a petition in the circuit court ... **Judicial review shall be in the manner provided by Chapter 536, RSMo for noncontested cases** (emphasis added).

Since the Respondent Commission established its Procedural Rules in 1988, it has considered the review of a finding of no probable cause to be a review of a noncontested case. The letter sent by the Commission informing parties of a Finding of No Probable Cause advises them of their right to file an appeal in Circuit Court and the Appellant herein was so advised. The Agency took the position that it could not be appealed, only after the appeal was filed in Circuit County.

Multiple reviews over multiple years have been undertaken under the Procedural Rules of the Respondent Commission and the directions which they furnish to the public for their appeal of a finding

of no probable cause determination. The action of the lower court in this case strikes down or severely restricts this long recognized right to review.

In *Pollock v. Wetterau Food Distributor Group*, 11 S.W.3d 754 (Mo.App.E.D.1999), the court emphasized the great deference which must be given by the courts to the Respondent Commission's broad rule making power. The court cannot substitute its judgment as to the meaning of the statute for that of the agency when the agency has exercised its rule making authority. Such rules are binding on the court. The language of 8 CSR 60-2.025(7)(E) is clear on its face and must bind the court. The proper form of review for the dismissal of the complaint through a determination of no probable cause is as a noncontested case under Chapter 536.

However, determination of whether a particular case is noncontested is not left exclusively to the discretion of the agency, but is determined as a matter of law. *State ex rel Valentine v. Board of Police Commissioners of Kansas City*, 813 S.W.2d 955 (Mo.App.W.D.1991). A review of the statute and the process involved shows that the Agency's Regulation that a finding of no probable cause should be appealed as a noncontested case is correct.

The language of Chapter 213, when considered with Chapter 536 as the legislators specifically instructed, is just as clear in stating that an appeal of a finding of no probable cause is an appeal of a noncontested case.

Section 536.150.1 RSMo. 1994 sets forth in a very specific manner the requirements for a noncontested review. First, the decision is not subject to administrative review. No administrative review exists for a determination of no probable cause by the executive director. Second, the decision must determine legal rights, duties, or privileges of a person. Appellant's right to a cause of action (an

administrative hearing) was denied when the determination was issued, obviously affecting her legal rights. Third, the decision is not subject to legal review under any other provisions. No other judicial method exists for reviewing the executive director's February 4, 2000 Determination.

Section 536.010(2) is specific in stating that a contested case is one in which rights are decided "after hearing". In *Cade v. State*, 990 S.W. 2d 32 (Mo. App. W.D. 1999), the court determined that a disciplinary process within a state agency was a noncontested case because the individual employee was not entitled to a hearing.

The finding of the lower court that the mere right to request a Right to Sue Letter early in the process turns the entire process into a contested case, (even if there is no request for a Right To Sue, no hearing or no right to a hearing) is not supported by the history or language of Chapter 213 or any existing case law. Chapter 213 was first enacted in 1959. When the law was amended in 1986, a private cause of action was established in §213.111. Additional remedies including punitive damages and attorneys' fees were added under and limited to this section to encourage attorneys to represent litigants in such private law suit. However, recognizing the difficulties of individual complainants in obtaining representation, the legislature left, **as an alternative**, the process whereby complainants could obtain relief through administrative hearings. The clear intent is that the administrative hearing process be a strong and viable option available to the public. For the Complainant there is no cost involved and no requirement to obtain legal representation. (Even for a Respondent, an administrative hearing can and should provide a less expensive method of resolving a legal dispute). But it is also evident that the legislature did not wish to allow every case to go to an administrative hearing. It established a minimal prerequisite for a hearing, i.e , that the executive director, after an investigation,

determine probable cause to believe the act was violated. Although the term “probable cause” is not defined in either the statute or the Commission’s Rules and Regulations, the context in which the term appears makes it plain that it is intended to and does mean more than a mere complaint but something less than a preponderance of the evidence or a winnable case.

The lower court herein concluded that the failure to request a Right to Sue Letter on a date prior to January 11, 1999, made all decisions made by the executive director after that date virtually final and unappealable. The concept is clearly contrary to normal principals of laws that reviews and appeals take place after events occur. Such a requirement destroys the administrative hearing as a viable option under Chapter 213 and penalizes those citizens who elect (whether for financial or practical reasons) to have the agency complete its statutory function of conducting investigations. The decision, if left standing, would force individuals, in order to have a right of appeal, to give up their option for an administrative investigation and hearing and obtain file suit in court. This is especially true in cases such as this where the commission’s investigation took years to complete. This would destroy the balance which the Legislature clearly intended to establish between discrimination cases tried in courts and those tried in administrative agencies.

Review of noncontested cases are a creation of the legislature. Whether they are titled review, injunction or mandamus has no real significance. *Hagely v. Board of Education of the Webster Groves School District*, 841 S.W.2d 663, 670 (Mo. banc 1992)

In reviewing a noncontested case, the evidence is to be considered de novo regardless of how the pleadings are titled. *State ex rel Nance v. Board of Trustees, Firefighter’s Retirement Systems of Kansas City*, 961 S.W.2d 90, 93 (Mo.App.W.D. 1998). The court is to make the same

kind of record that the agency would have made had it held a hearing. *Karzin v. Collett*, 562 S.W.2d 397, 399 (Mo.App.E.D. 1978)

The lower court was faced with the issue of the exact form or scope the de novo appeal hearing should take. The de novo hearing must always be weighed against the fact that the Circuit Court cannot substitute its discretion for the discretion vested with the agency. *Phipps v. School District of Kansas City*, 645 S.W.2d 91, 96. Chapter 213 requires the executive director to determine if probable cause exists. This is an extremely important decision for the members of the public who have placed their confidence in the state government. The Complainant is entitled to an appeal to make certain that the executive director is properly performing the vital decision making process relating to a finding of probable cause. Was an “investigation” conducted? What standard was used in determining “probable cause”? Did the executive director make credibility resolutions? If so, how was credibility determined? These are matters which cannot be left solely to the determination of an agency or executive director, regardless of the dedication and good will of that agency or director. Since they cannot be reviewed in any other manner, they must be reviewed de novo as a noncontested case.

In addition, the case at hand presents a novel (perhaps first impression) situation because the Respondent Commission, under Chapter 213, engages in both administrative and judicial functions. In its administrative function, Respondent Commission has been receiving reports in closed session about the status of the appeal of this case within the court system. This presents a conflict of interest which would disqualify any commissioner who has heard a report of the status of this appeal from acting on a panel which might eventually make a final findings on the merits of the case if the case were returned to that agency for a hearing. To return the case to the agency where the final decision makers cannot take

part in making a decision would be an exercise in futility. Because of these very peculiar facts, it was suggested to the Circuit Court that there should be a full hearing on the merits of the complaint. Certainly the appellant is entitled to have a hearing as to what, if any, reports were made to the quasi-judicial decision makers during the pending of this appeal which might require them to be disqualified as a decision maker if the case were returned to the agency for a hearing. **Such an argument goes to the scope and procedural form of the de novo hearing and not to the statutory right to have one.**

The agency herein has argued against its published Rules and Regulations. Its legal position taken herein is substantially unjustified.

POINT II

The Circuit Court erred in applying the two year limitation for the filing of a civil action within Section 213.111 to actions for judicial review under Chapter 213.085 because statutory interpretation does not justify such a result in that the legislature and the Commission on Human Rights established different occasions when legal actions may be filed in court, and the clear intent was for each to be separate and distinct.

The primary rule of statutory construction is for the court to ascertain what the General Assembly intended and to give effect to that intent. The intent is arrived at by looking at the plain and ordinary meaning of the words the General Assembly used in a statute and by making certain that we

comprehend the statute in context. *Peyton v. Department of Social Services DFS*, 987 S.W.2d 427 (Mo.App.W.D.1999)

The key sentence in Section 213.111 is “Any action brought in court **under this section** shall be filed within ninety days from the date of the commission’s notification letter to the individual but no later than two years after the alleged cause occurred...” (Emphasis added) The plain language of “under this section” shows the intention of the legislature to limit the effect of the sentence. The clear and unambiguous language of the statute shows that the provisions of Section 213.111 apply only to that section. It is a distinct cause of action with separate rules, separate remedies and separate requirements for court filing. One of these separate requirements for court filing includes time limitations. When the language of a statute is clear and unambiguous and admits to only one meaning there is no need or requirement for construction. *Corvera Abatement Technologies, Inc. v. Air Conservation Commission*, 973 S.W.2d 851 (Mo. banc 1998)

Even if the language is found not to be clear, a review of Chapter 213 in context would cause the court to reach the same conclusion. Chapter 213 is a multipurpose statute. Included within its text are at least five separate and distinct functions relating to employment cases. These are: 1) investigation by the agency, 2) administrative hearings by the agency, 3) enforcement of commission Orders, 4) litigation in the court system by private parties, and 5) decisions of local commissions. For each of the five functions, separate provisions exist within the statute for the filing of civil actions in Circuit Court. (Additional forms of court actions are allowed under Chapter 213 for housing cases.)

Under Chapter 213.075.3, the commission’s staff is required to promptly investigate complaints. At the completion of the investigation, the executive director determines that 1) “Probable

Cause” exists to believe the statute was violated, or 2) a Finding of “No Probable Cause” has been made. If the determination is “No Probable Cause,” the complaint is closed and the party is issued a letter notifying them of the determination and of their right to file an appeal (TR 5). The dismissal of the complaint without a hearing is a determination of a person’s rights and is a noncontested case. Civil court action is authorized in Circuit Court after the dismissal of the Complaint (a form of appeal).

If the Determination is “Probable Cause”, the case may proceed through a hearing process (as set forth in Section 213.075). The final step of the hearing process is an Order issued by a panel of commissioners, which may be appealed (Section 213.075.16). Since the hearing has been conducted, such an action constitutes a contested case. Civil court action is authorized in Circuit Court at the end of the administrative hearing process (a form of appeal).

In certain instances, the commission may seek enforcement of its Orders under Section 213.085.4. Persons entitled to relief under a commission Order may file for enforcement under Section 213.085. Civil court action is authorized in Circuit Court for enforcement.

Provisions are written into Section 213.111 to encourage plaintiff, through enhanced remedies, to obtain a “Right To Sue Letter” and seek a judicial hearing on the merits. Limitations are written into this section of Section 213. The court action must be filed within 90 days of the date of the commission’s “right to bring a civil action letter,” but no later than two years after the alleged cause occurred. Civil court action is authorized in Circuit Court to seek a judicial hearing on the merits and to seek the enhanced remedies.

In certain situations, local commissions may issue decisions under Section 213.135. Under this Section, these decisions “may be appealed in the same manner as any other decision of the commission

as set forth in section 213.085". Civil court actions are authorized in Circuit Court to seek review of the decisions starting with local commissions (a form of an appeal).

Nothing in Section 213.111 states that the two year statute of limitation applies to any other section or to any other form of judicial action authorized under Chapter 213. In Section 213.135 when the legislature intended to apply provisions to another section, specific reference was made to Section 213.085. In fact, the statute makes frequent cross references to other sections of the law to show the interrelationship of the provisions.

The lower Court's determination in this case (FN 2, TR 5) is that statutory construction makes it clear that the two year limitation set forth in Section 213.111 applies to two of the civil court actions (one an appeal and one an action seeking a judicial hearing) set forth in the law, but presumably does not apply to the remaining forms of civil court actions (two forms of an appeal and one form of enforcement). An understanding of the multiple actions set forth in the statute and the lack of mention of any other section of the law in Section 213.111, together with the very specific limiting language of the section, requires a finding that the limitation set forth in Section 213.111 was intended to apply to that section only. The Court cannot pick and choose for the sake of its own convenience which sections the language will apply to.

In addition, the interpretation of the Circuit Court that the two year limitation applies to the right to appeal a Finding of No Probable Cause would be public encouragement to a state agency to procrastinate, stall and refuse to perform its statutory function. In this case a period of three years passed from the date of the filing of the complaint until the date of the determination arising from the investigation. It is hoped that the time period present in the case at hand is not typical of the Agency. 8

CSR 60-225(9)(C) of the commission's rules states that "unless it is impracticable to do so, the commission shall make final disposition of a complaint within (1) one year of the date of receipt of a complaint." Under the interpretation of the lower Court, if the commission completes the investigation in less than two years from the date of the alleged act of discrimination, it will face a review of its action. If, however, it violates its own rules and delays its action to a period beyond two years, a situation exists where its decision would not be subject to any form of review by any administrative or judicial method. (It must be remembered that complainants have 180 days after the act of discrimination in which to file their complaint with the agency. Therefore six month of the limitation period adopted by the lower court might have occurred even before the commission has a complaint to investigate). The interpretation of the Circuit Court would encourage already over worked public employees to postpone the performance of their statutory duties. A delay would result in an unappealable decision, thus covering up any deficiency. Such an encouragement to public employees to procrastinate and delay, should be found to be against public policy. The legal position taken herein by the Agency in attempting to limit the ability of the court to review the Agencies actions and to make many of their most important decisions final and unappealable is substantially unjustified.

The two year limitation set forth in Section 213.111 applies only to civil actions filed in court under the provisions of that section.

CONCLUSION

The Appellant respectfully requests that this case be remanded to the Circuit Court with an Order that the Petition for Review and Mandamus be reinstated, that a de novo hearing be held in Circuit Court and that guidance be given to the Circuit Court as to the scope or extent of the evidence

to be heard by the Circuit Court at a de novo hearing of the appeal of a Finding of No Probably Cause.

Respectfully submitted,

Frank E. Wallemann #17935
Jon E. Beetem, P.C.
505 E. State Street, P.O. Box 476
Jefferson City, Missouri 65102-0476
Telephone (573) 635-6659
Facsimile (573) 636-6520
Attorney for Appellant Roma Martin-Erb

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one true and correct copy of the foregoing instrument was served via United States Mail, first class, postage prepaid on the ____ day of September, 2001, addressed to the following:

Keith D. Halcomb
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102-0899
(Attorney for Missouri Commission on Human Rights and Sterling Adams)

Lowell D. Pearson
Husch & Eppenberger
235 High Street, Suite 200
P.O. Box 1251
Jefferson City, Missouri 65102-1251

Alan L. Rupe
Epic Center, Suite 1400
301 North Main
Wichita, Kansas 67202
(Attorneys for Wal-Mart Stores, Inc.)

Frank E. Wallemann
