IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-02074-WYD-STV

MASTERPIECE CAKESHOP INCORPORATED,
a Colorado corporation; and
JACK PHILLIPS,

Plaintiffs,

v.

AUBREY ELENIS, Director of the Colorado Civil Rights Division, in her official and individual capacities;
ANTHONY ARAGON, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
MIGUEL "MICHAEL" RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official and individual capacities;
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official and individual capacities;
AJAY MENON, as member of the Colorado Civil Rights Commission, in his official and individual capacities; and
PHIL WEISER, Colorado Attorney General, in his official capacity,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION OF THE ORDER DENYING MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 59(e) AND 60(b)(1)

INTRODUCTION

Less than two months ago, this Court refused to dismiss the Colorado Attorney General from this case because he has the authority to enforce Colorado's Anti-Discrimination Act (CADA), Colo. Rev. Stat. § 24-34-601(2)(a). But Defendants (collectively, Colorado) have asked this Court to reconsider that ruling and to dismiss the Attorney General as a defendant despite no new evidence and no new argument. Colorado's request fails under the high standard for reconsideration motions and is not supported by controlling law or logic. Because the Attorney General is tasked with enforcing CADA, prosecutes administrative cases brought under CADA, and has demonstrated a willingness to enforce CADA against Plaintiffs already, he is a proper defendant in this case. Colorado's motion should be denied.

BACKGROUND

Plaintiffs Jack Phillips and Masterpiece Cakeshop (collectively, Phillips) filed their First Amended Verified Complaint to obtain relief from Colorado's ongoing hostility toward Phillips's religious beliefs. Doc. 51. That complaint alleged violations of various constitutional rights and sought a "preliminary and permanent injunction forbidding Defendants and any person acting in concert with them from enforcing Colo. Rev. Stat. § 24-34-601(2)(a) against Phillips and Masterpiece Cakeshop for declining to create custom cakes that through words, designs, symbols, themes, or images express messages that conflict with their religious beliefs." Doc. 51, Prayer for Relief, ¶ 1. Phillips named various state officials as defendants, including Colorado Attorney General Cynthia H. Coffman in her official capacity. Doc. 51, ¶¶ 19-26.[1]

[1] As noted in Colorado's motion, Phil Weiser was sworn in as Colorado Attorney General on January 8, 2019, replacing former Attorney General Coffman.

Phillips named the Attorney General because that official has the authority and duty to enforce CADA and has demonstrated a past and continued willingness to enforce it. In his complaint, Phillips alleged that the "Colorado Attorney General … has authority to enforce Colo. Rev. Stat. § 24-34-601(2)(a)." Doc. 51, ¶ 23. In that same paragraph, Phillips cited to "Colo. Rev. Stat. § 24-34-306," *id.*, which lays out the procedures for bringing a charge of discrimination, issuing a complaint, and conducting a hearing under CADA. Phillips's complaint further said that "the attorney general … may file a charge alleging a discriminatory or unfair practice with the [Colorado Civil Rights] Division," citing to Colo. Rev. Stat. § 24-34-306(1)(a)-(b). Doc. 51, ¶ 46. Finally, Phillips alleged that at state administrative hearings seeking to enforce CADA, "the [Colorado Civil Rights] Commission's attorney or agent must present the case 'in support of the complaint,'" citing to Colo. Rev. Stat. § 24-34-306(8). Doc. 51, ¶ 58. As the Commission's Rules and Regulations establish, it is the Attorney General's Office that presents and prosecutes the complaint at the hearing.[2]

Colorado then moved to dismiss the Attorney General based on Eleventh Amendment immunity. Doc. 64, 27-29. But this Court rejected that argument because (1) the Attorney General has a statutory duty to enforce CADA and to act as counsel prosecuting formal complaints that the Commission files under CADA; (2) the Attorney General's actions in *Masterpiece I* have shown a willingness to enforce CADA against Phillips; and (3) the Commission has set Phillips's

[2] *See* 3 C.C.R. 708-1:10.8(A)(3) ("The case in support of the complaint shall be presented at the hearing by the attorney general's office as counsel in support of the complaint, pursuant to § 24-34-306(8)."); 3 C.C.R. 708-1:10.8(B) ("The case in support of the complaint shall be presented at the hearing by the attorney general's office as counsel in support of the complaint.").

case for a hearing where the Attorney General's officials will represent the complaint brought against Phillips. Doc. 94 at 44-45.

Colorado seeks reconsideration of that ruling on the theory that the Attorney General's "provision of legal counsel to prosecute the *Commission's* administrative charge challenged by Plaintiffs in this case does not show a 'willingness' on the Attorney General's part to independently enforce [CADA]." Doc. 107 at 5. Colorado also argues that the Attorney General cannot be considered a proper defendant because he did not "exercis[e] any independent discretion or judgment about whether to prosecute the charge filed by the Commission against Mr. Phillips." *Id*. These arguments are unpersuasive.

ARGUMENT

Colorado seeks reconsideration under both Federal Rules of Civil Procedure 59(e) and 60(b)(1). But these rules "govern a district court's reconsideration of its final judgments," not interlocutory orders like denial of a motion to dismiss. *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1023-24 (10th Cir. 2018) (noting that "[t]he Federal Rules of Civil Procedure do not recognize a 'motion for reconsideration,'" but confirming that "a district court [still] has the inherent power to reconsider its interlocutory rulings before final judgment is entered").[3] For interlocutory orders, "motions for reconsideration fall within a court's plenary power to revisit and amend interlocutory orders as justice requires." *Spring Creek Expl. & Prod. Co., LLC v. Hess Bakken Inv. II, LLC*, 2015 WL 3542699, at *2 (D. Colo. June 5, 2015).

[3] *See* Steven Baicker-McKee et al., *Federal Civil Rules Handbook* 1203 (2019) ("The Rules do not expressly recognize motions for 'reconsideration' …. When 'reconsideration' is sought from an interlocutory order (*e.g.*, a denial of a motion to dismiss or for summary judgment), that motion is not properly considered under Rule 59(e) but, instead, as simply a request for the district court to revisit its earlier ruling.").

Under this plenary power, a motion for reconsideration is "generally an inappropriate vehicle to advance 'new arguments, or supporting facts which were available at the time of the original motion.'" *Id.* (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). "Regardless of the analysis applied, the basic assessment tends to be the same: courts consider whether new evidence or legal authority has emerged or whether the prior ruling was clearly in error." *Id*. Colorado fails under this high standard because it has marshalled no new evidence or new legal authority to support its request. And this Court's earlier ruling was not clearly in error. Far from it. The ruling was correct.

I. The Attorney General is a proper defendant because of his authority to enforce CADA and his duty to prosecute Colorado's CADA claims.

To overcome Eleventh Amendment immunity and sue a state official for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908), Phillips need only show that an official has "some connection" to the alleged unconstitutional act. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 827-28 (10th Cir. 2007). Phillips need not establish any "special connection" between officials and the unconstitutional conduct. *Id*. Nor must the officials be "specifically empowered to ensure compliance with the statute at issue." *Id.* (finding state officials who lacked specific statutory empowerment to be proper parties). It is enough that the officials "currently assist in giving effect to the law." *Id.*; *see also Finstuen v. Crutcher*, 496 F.3d 1139, 1151 (10th Cir. 2007) ("So long as there is [some] connection [with enforcement of the law], it is not necessary that the officer's enforcement duties be noted in the act." (quotation omitted)). Of course, a plaintiff may establish the requisite connection by pointing to a statute that specifically assigns enforcement authority to a particular official. *See Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1203 n.4 (10th Cir. 2009) (noting that the attorney general was a proper party because Oklahoma law granted

him authority to enforce the challenged statutes). But that is not the only way to establish the connection necessary under *Ex Parte Young*.

Here, Phillips has established a sufficient connection between CADA and the Attorney General in at least two ways. First, Colo. Rev. Stat. § 24-34-306(1)(b) empowers the Attorney General to file a charge accusing Phillips of illegal discrimination and to begin CADA's enforcement process.[4] Colorado admits this. Doc. 107 at 7-8. But the state says that is not enough because "the Attorney General has shown no willingness to independently enforce CADA against Mr. Phillips" by filing his own charge. *Id*. Under this theory, Phillips can name the Attorney General as a defendant only if the Attorney General had filed a charge against Phillips in the past or sent him a letter threatening to do so.

But that is not the law. Plaintiffs can name state officials even if they have "taken no action to enforce that statute against" a particular plaintiff. *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (finding attorney general to be a proper party even though "his office played no part in Wilson's arrest, did not threaten Wilson with enforcement of the statute, and allegedly did not intend to enforce the statute against him.").[5] It is enough that a state law forbids a plaintiff's desired actions, that the plaintiff names a state official with enforcement authority, and that the official fails to disavow enforcement. *See Cressman*, 719 F.3d at 1144-46, 1146 n.8 (relying on these factors to conclude that a plaintiff named proper officials, particularly because the complaint

[4] As the Supreme Court made clear in *Susan B. Anthony List v. Driehaus*, these "costly" administrative proceedings by themselves inflict harm in addition to any penalties assessed at the end of them. 573 U.S. 149, 165, 168 (2014).

[5] Although *Wilson* addressed standing, standing analysis substantially overlaps *Ex Parte Young* analysis. *See Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013) (noting "the common thread" between these doctrines).

alleged that two officials were "charged with enforcing the [challenged] provision" and governing statutes gave other defendants "authority" to enforce the law in a way that would affect plaintiff); *Kitchen v. Herbert*, 755 F.3d 1193, 1201-02 (10th Cir. 2014) (plaintiffs named proper officials because those officials were "responsible under Utah law for issuing marriage licenses and recording marriage certificates" and thus the denial of those licenses was caused by those officials "and would be cured by an injunction prohibiting the enforcement of" the challenged law).

Phillips easily meets this standard. The Attorney General has statutory authority to file a complaint and has not disavowed an intent to use that power against Phillips. On the contrary, the Attorney General has shown every indicia of aggressively enforcing CADA against Phillips—by helping to prosecute Phillips in *Masterpiece I*, by defending Colorado's authority to enforce CADA against Phillips in *Masterpiece I*, and by doing the same in this case. *See* Doc. 94 at 45 ("The Attorney General has also demonstrated a willingness to enforce the statute, which is evident from the current complaint against Phillips and *Masterpiece I*.").

To be sure, Colorado tries to cast doubt on the Attorney General's willingness to enforce CADA, saying Phillips never alleged the Attorney General's willingness to file a complaint against him. Doc. 107 at 8. But that ignores that Phillips's complaint singled out the Attorney General's authority to file a complaint under CADA and his willingness to enforce CADA against Phillips generally. *See* Doc. 51, ¶¶ 23, 46, 58, 142-44, 253; Doc. 51-2 (setting Phillips's case for a formal hearing during which Attorney General officials will act as the prosecutors).[6] These

[6] In fact, the Attorney General has already begun its prosecution of Phillips in that matter, having delivered an opening statement on February 4, 2019. *See* Doc. 92-1 at 1 (directing counsel, which included lawyers from the Attorney General's office, to "present brief opening statements" on February 4, 2019).

allegations are sufficient, particularly at the motion-to-dismiss stage when all facts and inferences must be taken in Phillips's favor and the Attorney General has not disavowed enforcement. In light of this, the Attorney General cannot seriously dispute his authority or willingness to enforce CADA against Phillips.

Second, the Attorney General's office has both the legal authority and the *legal obligation* to assist the Colorado Civil Rights Division and Commission in prosecuting Phillips for allegedly violating CADA. Colorado readily concedes this. *See* Doc. 107 at 6-7 (admitting that the Attorney General must "act as counsel in support of the complaint in these matters and prosecute the commission's complaint" and that the Attorney General's role "is as statutory counsel for the *Commission*'s complaint against" Phillips in the ongoing Commission proceeding); *id.* (admitting that the Colorado Rules of Professional Conduct require the Attorney General's office to "prosecute the Commission's complaint").

These concessions are decisive. Because state laws and regulations require the Attorney General's office to act as the prosecutor in the ongoing proceeding against Phillips, and because the Attorney General's office is currently doing so, that creates a sufficient connection to name the Attorney General as a defendant. Binding authority dictates that result. *See Chamber of Commerce of the United States v. Edmondson*, 594 F.3d 742, 758 (10th Cir. 2010) (Oklahoma Attorney General was a proper defendant because he had a statutory duty to "bring[] civil actions against businesses that violate state law and defend[] state agencies sued by their contractors," and thus an "injunction would prevent him from filing lawsuits or defending against suits on the basis of" the challenged law); *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1203 n.4 (10th Cir. 2009) (noting that the Attorney General was a proper party because Oklahoma law "conferr[ed]

authority to [him] . . . to appear for the state in criminal appeals and in all cases of particular interest to the state"). In this respect, Colorado's argument has it exactly backwards—a duty to prosecute specific cases does not cut against naming the Attorney General; that duty bolsters doing so.

In sum, Colorado's motion does not cite a single case where a court dismissed state officials with enforcement authority under state law, much less an official with enforcement authority who is specifically charged with the duty to prosecute the plaintiff. That silence is telling.

II. This Court should reject Colorado's motion because the ruling under review will not realistically increase the burdens on the Attorney General or his officials.

With the relevant legal authority against it, Colorado resorts to the policy argument that allowing the Attorney General to remain a defendant here would allow any plaintiff "to name the Attorney General in every other state or federal court challenge to a pending administrative enforcement action that is being prosecuted by the Attorney General's office at the direction of a state agency client." Doc. 107 at 9. This, according to Colorado, will supposedly expose officials in the Attorney General's office to too much "discovery" and force them to "expend" too many resources. *Id*. at 9-10. That fear is overblown for at least three reasons.

First, state officials can only be named as defendants if they are actively assisting in enforcing a statute or have specific legal authority to do so (e.g., if a statute names the Attorney General as an official with enforcement authority). A general duty to enforce all state law is not enough. *Bishop v. Oklahoma*, 333 F. App'x 361, 365 (10th Cir. 2009) (explaining that "officials' generalized duty to enforce state law, alone, is insufficient to subject them to a suit challenging a

constitutional amendment they have no specific duty to enforce"). That narrows at the outset the field of cases in which the Attorney General may be named as a defendant.

Second, with respect to lawsuits challenging pending administrative actions, those cases will stay in court only if they overcome *Younger* abstention. But that is not common. Indeed, Colorado cites no proof that it has faced, currently faces, or will face many challenges to pending administrative actions *in which state officials are acting in bad faith*. Colorado will continue to do what it does in the vast majority of lawsuits seeking to enjoin pending administrative actions: file a motion to dismiss based on abstention grounds and get the case resolved quickly. So this Court's ruling will not create any more work for the Attorney General or his office.

Third, Colorado's argument also fails because if a plaintiff challenges the constitutionality of a particular application of state law—like Phillips does here—the Attorney General's office will already have a role in defending against it. Nothing about this Court's ruling changes that. And the Attorney General never explains why he would do more work defending a state law when named in his official capacity than he would when he is not. Notably, naming the Attorney General in his official capacity does not automatically subject him to discovery. *See, e.g., State of Oklahoma ex rel Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2007 WL 649335, at *3-4 (N.D. Okla. Feb. 26, 2007) (forbidding deposition of Oklahoma Attorney General because he was an apex employee and top government executive). Colorado has already invoked that principle in this case. *See* Doc. 113 at 27 (arguing that "high-ranking government officials" should not be subject to discovery). In sum, the burdens that Colorado claims are both unsubstantiated and unlikely.

CONCLUSION

Colorado's Attorney General has the authority and duty to enforce CADA against Phillips. The Attorney General has exercised this authority and fulfilled this duty against Phillips in the past and is doing so again. This more than suffices to keep the Attorney General as a named defendant and deny Colorado's motion for reconsideration.

Respectfully submitted this 22nd day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2019, the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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