

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

NICHOLAS K. MERIWETHER,

Plaintiff,

v.

THE TRUSTEES OF SHAWNEE STATE
UNIVERSITY, *et al.*,

Defendants.

Case No: 1:18-cv-00753-SJD

THE HONORABLE SUSAN J. DLOTT

THE HONORABLE KAREN L. LITKOVITZ

PLAINTIFF'S FIRST NOTICE OF SUPPLEMENTAL AUTHORITY
IN OPPOSITION TO MOTION TO INTERVENE

In support of his Response to the Motion to Intervene, Doc. 26, Dr. Meriwether respectfully submits the attached Order on Motion to Intervene (“Order”) issued on February 28, 2019 in *Masterpiece Cakeshop, Inc. v. Elenis*, No. 1:18-cv-02074 (D. Colo.), where the district court denied a motion to intervene in a similar matter.

In that case, an individual, Scardina,¹ requested and was denied a custom cake “with a blue exterior and a pink interior to celebrate her transition from male to female.” Order at 2. He filed a charge of discrimination with the Civil Rights Commission, which issued a probable cause determination that the cake artist, Mr. Jack Phillips, had declined the custom cake request due to Scardina’s transgender status. *Id.* Mr. Phillips, having previously prevailed in a similar matter at the Supreme Court, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018), filed suit in federal district court to enjoin the Commission from proceeding against him on Scardina’s charges of discrimination.

Scardina moved to intervene to oppose Mr. Phillips’ motion for preliminary injunction to enjoin the Commission from pursuing Scardina’s discrimination charge. *Id.* at 3. He alleged the Commission could not adequately represent his interests because it represents the “public interest,” not his “private interests,” and its institutional interests in defending the constitutionality of its actions against Mr.

¹ This notice uses pronouns according to their traditional usage (*i.e.*, based on a person’s sex), except in quotations.

Phillips (including against allegations of bias), may diverge from his. *Id.* at 5.

The court denied this motion to intervene both permissively and as of right, holding that Scardina's interests are adequately represented by the Commission. *Id.* at 8. It concluded that the fact that the Commission instituted proceedings against Mr. Phillips seeking to punish him for the alleged discrimination demonstrated an overlap in interest between the government entity enforcing the non-discrimination provision and Scardina, who alleged discrimination. *Id.* at 6. Further, it noted that Scardina's interests were adequately represented because he sought to oppose a preliminary injunction motion, which the Commission (as defendant) was already opposing. *Id.* at 7. Thus, the defendants adequately represented his interests. *Id.*

The court further denied the motion for permissive intervention because Scardina's interests were already adequately represented and "her input would [be] unlikely [to] add value to the . . . evidentiary hearing." *Id.* at 8.

Respectfully submitted this 8th day of March, 2019.

/s/ Travis C. Barham

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2019, I filed a true and accurate copy of the foregoing document and the accompanying supplemental authority with the Clerk of Court using the CM/ECF system, which automatically sends an electronic notification to the following attorneys of record:

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Respectfully submitted on this the 8th day of March, 2019.

/s/ Travis C. Barham

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Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Wiley Y. Daniel

Civil Action No. 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 capacity;
MIGUEL "MICHAEL" RENE ELIAS, as member of the Colorado Civil Rights Commission, in his official capacity;
CAROL FABRIZIO, as member of the Colorado Civil Rights Commission, in her official capacity;
CHARLES GARCIA, as member of the Colorado Civil Rights Commission, in his official capacity;
RITA LEWIS, as member of the Colorado Civil Rights Commission, in her official capacity;
JESSICA POCOCK, as member of the Colorado Civil Rights Commission, in her official capacity;
AJAY MENON, as member of the Colorado Civil Rights Commission, in his official capacity; and
PHILIP WEISER, Colorado Attorney General, in his official capacity,

Defendants.

ORDER ON MOTION TO INTERVENE

THIS MATTER is before the court on Autumn Scardina's Motion to Intervene Regarding Plaintiffs' Request for Preliminary Injunction, filed on February 8, 2019. (ECF No. 117). Defendants have not taken a position on the motion to intervene. (ECF No. 122). Plaintiffs, Masterpiece Cakeshop Inc. ("Masterpiece") and Jack Phillips, oppose the motion. (ECF No. 123). Scardina filed a reply in support of her motion to intervene on

February 20, 2019. (ECF No. 125). Relatedly, Scardina has also filed a Motion for Expedited Ruling on the Motion to Intervene Regarding Plaintiffs' Request for Preliminary Injunction. (ECF No. 136). For the reasons stated below, Scardina's motions are denied.

BACKGROUND

On June 26, 2017, Scardina called Masterpiece to request a cake with a blue exterior and pink interior to celebrate her transition from male to female. (ECF No. 51 ("Complaint"), ¶¶ 184-86). Scardina planned to display the cake at a party to celebrate her status as a transgender female. (*Id.* at ¶¶ 186, 192). Masterpiece declined to make the cake, citing the religious convictions of its owner, Phillips, who believes gender cannot be changed or chosen. (*Id.* at ¶ 191).

On July 20, 2017, Scardina filed a charge of discrimination against Plaintiffs with the Colorado Civil Rights Division ("Division"). (ECF No. 117-6). The Division issued a probable cause determination that there was probable cause to believe Plaintiffs violated C.R.S. § 24-34-601(2)(a) based on the Division's finding that Plaintiffs refused to make Scardina's requested cake due to her transgender status. (Complaint, ¶¶ 211, 217; ECF No. 51-1). On October 2, 2018, the Colorado Civil Rights Commission ("Commission") voted to notice Scardina's claim for a hearing and to file a formal complaint against Phillips. (Complaint, ¶ 228). A week later, the Commission issued its formal complaint and set the matter for a hearing before an administrative law judge. (ECF No. 117-7).

Plaintiffs filed an Amended Complaint on October 23, 2018, claiming Defendants are violating his First Amendment rights to free exercise of religion and free speech and his Fourteenth Amendment rights to due process and equal protection. I held a hearing on Defendants' motion to dismiss and Plaintiffs' motion for preliminary injunction on

December 18, 2018. (See ECF Nos. 57, 64, 90). I denied Plaintiffs' motion for preliminary injunction without prejudice, and later denied Defendants' motion to dismiss in a written order. (ECF Nos. 90, 94).

Plaintiffs filed an amended motion for preliminary injunction on January 18, 2019. (ECF No. 104). Plaintiffs seek to enjoin Defendants "from taking any steps to pursue the state administrative proceeding caption *Scardina v. Masterpiece Cakeshop* while this case remains pending." (*Id.* at 10).

Scardina filed her motion to intervene on February 8, 2019, which was Defendants' deadline to respond to Plaintiffs' amended motion for preliminary injunction. (ECF No. 117). Autumn seeks a limited intervention, to intervene "with respect to Plaintiffs' motion for preliminary injunction and the related evidentiary hearing." (*Id.* at 9).

ANALYSIS

Scardina contends she meets the requirements for intervention as a matter of right and permissive intervention under Federal Rule of Civil Procedure 24.

I. Intervention as a Matter of Right

Federal Rule of Civil Procedure 24(a)(2) governs intervention of right and provides that courts must permit anyone to intervene if the following requirements are met:

(1) the application is "timely"; (2) "the applicant claims an interest relating to the property or transaction which is the subject of the action"; (3) the applicant's interest "may as a practical matter" be "impair[ed] or impede[d]"; and (4) "the applicant's interest is [not] adequately represented by existing parties.

Coalition of Ariz./N.M. Ctys. for Stable Econ. Growth v. Dep't of Interior, 100 F.3d 837, 840 (10th Cir. 1996) (quoting Fed. R. Civ. P. 24(a)(2)). "Rule 24(a)(2) is not a mechanical rule; it necessitates the exercise [of] judgment based on the specific

circumstances of the case.” *United States v. Colorado Organic Chem. Co., Inc.*, 2015 WL 4932200, at *2 (D. Colo. Aug. 19, 2015) (internal quotation marks omitted).

My analysis focuses only on the fourth requirement because that requirement is dispositive and it is where Scardina’s motion to intervene fails. See *Barnes v. Sec. Life of Denver Ins. Co.*, 2018 WL 6102755, at *3 (D. Colo. Nov. 21, 2018) (assuming without deciding the first three requirements were met but denying intervention as of right for failure to establish inadequate representation). “Even if an applicant satisfies the other requirements of Rule 24(a)(2), it is not entitled to intervene if its ‘interest is adequately represented by existing parties.’” *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007) (en banc) (quoting Fed. R. Civ. P. 24(a)(2)), *abrogated on other grounds by Hollingsworth v. Perry*, 570 U.S. 693 (2013).

An applicant need only make a “minimal” showing to demonstrate that his or her interests are inadequately represented. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Such a showing can be made “where a governmental agency is seeking to represent both the interests of the general public and the interests of a private party seeking intervention.” *Tri-State Generation & Transmission Ass’n, Inc. v. New Mexico Pub. Regulation Comm’n*, 787 F.3d 1068, 1072 (10th Cir. 2015).

But the cases involving public and private interests “are inapplicable where the objective of the applicant for intervention is identical to that of one of the parties.” *Id.* (internal quotation marks omitted). Where the objectives of the party seeking intervention and the governmental intervention are the same, there is a presumption that representation is adequate.¹ *Id.* at 1072-73; *Barnes*, 2018 WL 6102755, at *4. The

¹ Scardina claims “the Tenth Circuit does not apply a presumption of adequate representation.” (ECF No. 125 at 6). The Tenth Circuit does apply this presumption when

presumption of adequacy may be overcome by “a concrete showing of circumstances.” *Tri-State Generation*, 787 F.3d at 1073 (quoting *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir. 1986)). “These circumstances include a ‘showing that there is collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed to represent the applicant’s interest.” *Tri-State Generation*, 787 F.3d at 1073 (quoting *Bottoms*, 797 F.2d at 872-73).

Scardina contends Defendants cannot adequately represent her interests because (1) Defendants represent “the public interest” rather than her private interests; (2) Defendants have an institutional interest because Plaintiffs have accused them of violating their constitutional rights; and (3) Defendants’ interest in defending against allegations of religious bias may diverge from Scardina’s interest “in a just and speedy resolution of her claims” against Plaintiffs. (ECF No. 117 at 7).

I find that Scardina’s interests are adequately protected by Defendants because Scardina and Defendants have an identical interest at the preliminary injunction stage: to prevent a preliminary injunction from issuing and to proceed with the charge of discrimination against Plaintiffs in the state administrative proceeding.

Scardina’s argument that Defendants cannot adequately represent her private interests as a governmental entity is without merit because the public and private interests converge under the unique circumstances of this case. There is certainly a public interest in the appropriate enforcement of C.R.S. § 24-34-306. *See, e.g., Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 294 (Colo. App. 2015) (noting “CADA’s primary purpose of

an applicant for intervention has identical objectives to a party to the suit. *See Tri-State Generation*, 787 F.3d at 1072 n.1.

eradicating discriminatory practices”), *overruled on other grounds by Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S.Ct. 1719 (2018). But the Commission also represents private interests in enforcing the statute. For example, by statutory and regulatory mandate, the Commission’s agents or attorneys—the attorney general’s office—must present the case “in support” of Scardina’s discrimination charge at the state administrative hearing. See C.R.S. § 24-34-306(8); 3 C.C.R. 708-1:10.8(A)(3); 3 C.C.R. 708-1:10.8(B).

Here, the Commission filed a notice of hearing and formal complaint against Plaintiffs, alleging Plaintiffs violated C.R.S. § 24-34-601(2)(a) by denying Scardina service based on her transgender status. The Commission’s complaint seeks to enforce this statute by imposing certain penalties on Plaintiffs, and several of those penalties directly benefit Scardina. (ECF No. 117-7 at 4-5). Thus, by enforcing Colorado’s anti-discrimination laws in the state proceeding through Scardina’s discrimination claim, Defendants are simultaneously representing the indistinguishable interests of the public and Scardina. That overlap in interest carries over to Plaintiffs’ motion for preliminary injunction because the only way the Commission can move forward with the formal complaint against Plaintiffs is by successfully opposing the preliminary injunction.

Scardina’s arguments about Defendants’ desire to refute Plaintiffs’ allegations of constitutional violations are similarly unpersuasive. For Plaintiffs’ motion for preliminary injunction to succeed, Plaintiffs must demonstrate they are likely to succeed on their claims that Defendants violated their constitutional rights. Defendants oppose the motion, and are therefore motivated to prove that they did not violate Plaintiffs’ constitutional rights. If they can make this showing, Defendants can defeat Plaintiffs’ motion for

preliminary injunction by establishing Plaintiffs' constitutional claims are unlikely to succeed. In other words, by defending themselves against Plaintiffs' claims that Defendants infringed on their First and Fourteenth Amendment rights, Defendants concurrently oppose the motion for preliminary injunction. This aligns perfectly with Scardina's interest in intervening, and in fact repeats an argument Scardina claims she would make at the preliminary injunction hearing. (See ECF No. 117 at 8 ("Ms. Scardina, like Defendants, intends to argue that the State Civil Rights Proceeding does not infringe on any of Plaintiffs' rights.")).

Accordingly, because Scardina has not established that Defendants do not adequately represent her interests as to Plaintiffs' request for preliminary injunction, she cannot intervene as a matter of right.

II. Permissive Intervention

Federal Rule of Civil Procedure 24(b)(1)(B) governs permissive intervention, and provides that, on timely motion, the court may permit intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact." In exercising its discretion whether to allow intervention, the court must "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Once the threshold requirement of a common question of law or fact is satisfied, courts may also consider: (1) whether the would-be intervenor's input adds value to the existing litigation; (2) whether the applicant's interests are adequately represented by the existing parties; and (3) the availability of an adequate remedy in another action. See *Tri-State Generation*, 787 F.3d at 1075 (affirming denial of permissive intervention based on trial court's finding that the applicant's interests were

adequately represented); *City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996) (same); *Lower Arkansas Valley Water Conservancy Dist. v. United States*, 252 F.R.D. 687, 690-91 (D. Colo. 2008).

I find that permissive intervention is inappropriate in this case. Defendants adequately represent Scardina's interests for the reasons discussed above. Because Defendants already adequately represent Scardina's interests, her input would unlikely add value to the motion for preliminary injunction or evidentiary hearing. See *PDC Energy, Inc. v. DCP Midstream, LP*, 2014 WL 2892415, at *3 (D. Colo. June 26, 2014) ("In light of plaintiff's 'adequate representation' as discussed above, the court finds [the applicant's] input would not add any value."). Accordingly, Scardina's request for permission intervention is denied.

CONCLUSION

Based on the foregoing, it is

ORDERED that Non-Party Autumn Scardina's Motion to Intervene Regarding Plaintiffs' Request for Preliminary Injunction (ECF No. 117) is **DENIED**. It is

FURTHER ORDERED that Non-Party Autumn Scardina's Motion for Expedited Ruling on the Motion to Intervene Regarding Plaintiffs' Request for Preliminary Injunction (ECF No. 136) is **DENIED AS MOOT**.

Dated: February 28, 2019.

BY THE COURT:

s/ Wiley Y. Daniel
WILEY Y. DANIEL,
SENIOR UNITED STATES DISTRICT JUDGE