

COURT OF APPEALS
STATE OF COLORADO
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Denver, CO 80203

COLORADO CIVIL RIGHTS COMMISSION
DEPARTMENT OF REGULATORY AGENCIES
1560 Broadway, Suite 1050
Denver, CO 80202
Case No. CR2013-0008

Respondents/Appellants:

MASTERPIECE CAKESHOP, INC. and JACK C.
PHILLIPS,

v.

Complainants-Appellees:

CHARLIE CRAIG and DAVID MULLINS and
COLORADO CIVIL RIGHTS COMMISSION

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Case No. 2014CA1351

ANSWER BRIEF OF THE COLORADO CIVIL RIGHTS COMM'N

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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It contains 3179 words.

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For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Stacy L. Worthington

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Answer Brief of the Colorado Civil Rights Commission is addressing only the following issues:

1. Did the Commission properly deny Masterpiece Cakeshop's and Jack Phillips's motion to dismiss the Formal Complaints filed against them because the Letters of Probable Cause Determination contained a typographical error?
2. Did the Commission properly add Jack Phillips as a party when he was the individual who refused to bake a wedding cake for the Complainants, he identified himself as the owner of Masterpiece Cakeshop and the person who was responsible for the discriminatory act, he signed documents on behalf of Masterpiece Cakeshop, and he was the only person who was involved in the discriminatory practices at issue here?
3. Did the Commission act within the bounds of its statutory authority when it ordered Masterpiece Cakeshop and Jack Phillips to cease and desist their discriminatory practice of refusing to provide

their full array of goods and services to homosexual couples based upon their sexual orientation?

The Commission joins in the Complainants' Answer Brief on the remaining issues.

STATEMENT OF THE CASE

I. Nature of the case and course of proceedings.

On July 19, 2012, Charlie Craig and David Mullins attempted to order a wedding cake at Masterpiece Cakeshop's store. The owner, Jack Phillips, refused to sell Craig and Mullins a wedding cake and stated that he had a business practice not to sell cakes for same-sex marriages.

Masterpiece Cakeshop, Inc. is a place of public accommodation as defined by § 24-34-601(1), C.R.S. (2012). Jack Phillips is the owner of Masterpiece Cakeshop and was the person who refused, withheld from, or denied to Complainants the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of Masterpiece Cakeshop, in violation of § 24-34-601(2), C.R.S. (2012).

Craig and Mullins filed timely charges of discrimination with the Colorado Civil Rights Division on September 4, 2012. The Division

investigated and found probable cause that Masterpiece Cakeshop had discriminated against them on the basis of their sexual orientation. The Commission filed Notices of Hearing and Formal Complaints on May 31, 2013, and the Complainants intervened.

Respondents filed several motions, including the motions to dismiss that are the subject of this brief. The parties filed cross-motions for summary judgment. An Administrative Law Judge issued an Initial Decision Granting Complainants' Motion for Summary Judgment and Denying Respondents' Motion for Summary Judgment (Initial Decision) on December 6, 2013. (Supp. PR. CF v. I pp. 0710-22.)¹

Respondents filed a Notice of Appeal and Petition for Review by the Colorado Civil Rights Commission, which appealed the Initial Decision and prior rulings on Respondent' Motions to Dismiss and Motion for Protective Order. On May 30, 2014, the Commission entered its Final Agency Order affirming the Initial Decision and the ALJ's

¹ References to the Certificate of Record will be cited as "Supp. PR. CF" followed by the pertinent page and, if applicable, paragraph number. Page numbers are the Bates numbers found in the lower right corner.

Orders on Respondents' Motions. (Notice of Appeal, App. A.) The Commission's Final Order required Respondents to cease and desist from discriminating against same-sex couples and to take remedial measures to ensure that they comply with the public accommodation section of the Colorado Anti-Discrimination Act. Respondents then filed this appeal.

II. Statement of facts

The Initial Decision was based upon these undisputed facts:

1. Phillips owns and operates a bakery located in Lakewood, Colorado known as Masterpiece Cakeshop, Inc. Phillips and Masterpiece Cakeshop are collectively referred to herein as Respondents.
2. Masterpiece Cakeshop is a place of public accommodation within the meaning of § 24-34-601(1), C.R.S.
3. Among other baked products, Respondents create and sell wedding cakes.

4. On July 19, 2012, Complainants Charlie Craig and David Mullins entered Masterpiece Cakeshop in the company of Mr. Craig's mother, Deborah Munn.

5. Complainants sat down with Phillips at the cake consulting table. They introduced themselves as "David" and "Charlie" and said that they wanted a wedding cake for "our wedding."

6. Phillips informed Complainants that he does not create wedding cakes for same-sex weddings. Phillips told the men, "I'll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings."

7. Complainants immediately got up and left the store without further discussion with Phillips.

8. The whole conversation between Phillips and Complainants was very brief, with no discussion between the parties about what the cake would look like.

9. The next day, Ms. Munn called Masterpiece Cakeshop and spoke with Phillips. Phillips advised Ms. Munn that he does not create

wedding cakes for same-sex weddings because of his religious beliefs, and because Colorado does not recognize same-sex marriages.

10. Colorado law does not recognize same-sex marriage.² Colo. Const. art. I, § 31 (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state”); § 14-2-104(1), C.R.S. (“[A] marriage is valid in this state if: ... It is only between one man and one woman.”).

11. Phillips has been a Christian for approximately 35 years, and believes in Jesus Christ as his Lord and savior. As a Christian, Phillips’ main goal in life is to be obedient to Jesus and His teachings in all aspects of his life.

12. Phillips believes that the Bible is the inspired word of God, that its accounts are literally true, and that its commands are binding on him.

13. Phillips believes that God created Adam and Eve, and that God’s intention for marriage is the union of one man and one woman.

² That was the state of the law at the time of the summary judgment ruling. Same-sex marriage is now recognized in Colorado.

Phillips relies upon Bible passages such as Mark 10:6-9 (NIV) (“[F]rom the beginning of creation, God made them male and female, for this reason, a man will leave his father and mother and be united with his wife and the two will become one flesh. So they are no longer two, but one. Therefore, what God has joined together, let not man separate.”)

14. Phillips also believes that the Bible commands him to avoid doing anything that would displease God, and not to encourage sin in any way.

15 Phillips believes that decorating cakes is a form of art and creative expression, and that he can honor God through his artistic talents.

16. Phillips believes that if he uses his artistic talents to participate in same-sex weddings by creating a wedding cake, he will be displeasing God and acting contrary to the teachings of the Bible.

(Supp. PR. CF v. I pp. 0711-12.)

These are the only facts that are relevant to the disposition of this case.³

SUMMARY OF ARGUMENT

The Commission properly followed the law when it denied the Motions to Dismiss filed by Masterpiece Cakeshop and Jack Phillips. One of those Motions argued that the Division's letters of determination did not provide adequate notice of the nature of the charge because in one portion of each letter, the Division cited to an incorrect statute. That typographical error in one sentence of the letter did not deprive Respondents of adequate notice because the remainder of the letter contained many citations to the correct statute and included language from that statute. The Commission therefore correctly denied that Motion to Dismiss.

³ Respondents' Opening Brief attempts to insert irrelevant information, including remarks made by one member of the Commission in a meeting that occurred two months after the Commission entered its Final Agency Order. Several members of the Commission expressed their personal opinions on the case; the personal opinion of one member does not reflect the view of other members, nor of the Commission as a whole.

The other Motion sought to dismiss the charge against Jack Phillips because he was not named as a party in the discrimination charges or in the letters of determination. The Commission properly denied that Motion because throughout the charge and the letters, Phillips was identified as the owner of Masterpiece Cakeshop and as the person who refused service to Craig and Mullins. Moreover, Phillips answered the Division's requests for information and presented himself as the owner and representative of Masterpiece Cakeshop. He therefore had notice that his actions were at issue in this matter.

Finally, the Commission's order requiring Respondents to cease and desist from discriminating against customers based upon their sexual orientation is well within its statutory authority and must be affirmed.

ARGUMENT

- I. The Commission properly denied Respondents' Motion to Dismiss, which was based on a typographical error in the letters of determination.**

Standard of Review: The Commission agrees that this and the following issues present questions of law that are reviewed de novo, and that the issues were preserved for appeal.

Respondents moved to dismiss the Formal Complaint because of a typographical error in the Letters of Probable Cause Determination. The final paragraph of those letters contained an erroneous citation to § 24-34-402, the employment practices statute, instead of § 24-34-601(2), the public accommodations statute. The Commission properly denied that motion.

The purpose of the Letters of Probable Cause Determination is to provide written notice of the “legal authority and jurisdiction of the commission and the matters of fact and law asserted.” C.R.S. § 24-34-306(2)(b)(II) (2012). In this case, the letters repeatedly discuss Respondents’ conduct in terms of discrimination by a place of public accommodation, *e.g.*, Complainants suffered a “denial of full and equal enjoyment of a place of public accommodation based on [Complainants’] sexual orientation. As such, a **Probable Cause** determination is hereby issued.” (Supp. PR. CF v. I pp. 0134, 0139; emphasis in

original.) The letters concluded that Respondents operate a place of public accommodation as defined by C.R.S. § 24-34-601(1), and throughout the letters, the discussion centers on Respondents' operation of a place of public accommodation and denial of the full and equal enjoyment of that place of public accommodation. (Supp. PR. CF v. I pp. 0134-0143.)

In the penultimate paragraph of the letters, the Director's Authorized Designee mistakenly stated, "I determine that the Respondent has violated C.R.S. § 24-34-402, as re-enacted." (Supp. PR. CF v. I 137,142.) Jennifer McPherson, the Director's Authorized Designee, signed a sworn affidavit that the citation to C.R.S. § 24-34-402 was a typographical error, and that the correct statute was § 24-34-601(2). (Supp. PR. CF v. I p. 164.)

A mere typographical error, which did not mislead Respondents as to the nature of the case or the basis for the probable cause finding, does not require or even permit dismissal of the case. *See, e.g., People v. Lubben*, 739 P.2d 833, 835 (Colo. 1987) (probable cause is assessed based on the totality of the circumstances); *Vigil v. People*, 160 Colo.

215; 416 P.2d 376, 376 (1966) (slight variance caused by typographical error is not prejudicial to defendant); *Andersen v. Lindenbaum*, 160 P.3d 237, 241-42 (Colo. 2007) (typographical error was reasonable explanation for incorrect date). The totality of the circumstances here establishes that the erroneous recitation to an inapplicable statute was a mere typographical error, and that Respondents received ample notice of the statutory basis for the Director’s finding of probable cause.

The letter of determination is not a final agency action; it “is merely preparatory to further proceedings. If the [Commission] finds that probable cause to charge discrimination exists, the rights and obligations of the parties are fixed by *de novo* proceedings....” *Demetry v. Colo. Civ. Rts Comm’n*, 752 P.2d 1070, 1072 (Colo. App. 1988). The Formal Complaints in this matter provided notice of the factual allegations, legal claims, and request for relief asserted in this case. Those Complaints set forth the statutes that governed the Court’s consideration of the case in this *de novo* proceeding. Respondents thus had ample notice of the proper legal authorities and the statute they

were charged with violating, and the Commission properly denied their motion to dismiss.

II. The Commission properly denied Jack Phillips’s motion to dismiss because he was the individual who committed the discriminatory practice and he had ample notice that his actions were the basis for the complaint.

Phillips was not named as Respondent in the initial Charges of Discrimination. Respondents argue that the Charges of Discrimination “alleged that Masterpiece alone violated Colorado’s public accommodations statute.” (Appellants’ Opening Brief p. 37.) That is not correct. The Charges of Discrimination alleged that “the Owner” of Masterpiece Cakeshop stated that “**his** policy is to deny service to individuals of our sexual orientation based on **his** religious beliefs.” (Supp. PR. CF v. I pp. 0001-02, emphasis added.)

Phillips provided Responses to the Division’s Requests for Information. (Supp. PR. CF v. I pp. 0003-11.) Throughout those Responses, Phillips identified himself as the person who denied services to Complainants and the person responsible for the policy that was the basis of the complaint. Phillips identified himself as the person who

made the business decision that led to the complaint (Supp. PR. CF v. I pp. 0005, 0009), and stated that no one else was involved in the business decision. (Supp. PR. CF v. I pp. 0006, 0010.) Phillips also stated that the policy was based upon his personal religious beliefs. (Supp. PR. CF v. I pp. 0007, 0011.) Phillips signed the Responses as “Jack Phillips, Masterpiece Cakeshop.” (Supp. PR. CF v. I pp. 0008, 0012.)

The letters of determination refer to Phillips by name, identify him as the owner of Masterpiece Cakeshop, identify him as the person who said “his standard business practice is to deny service to same-sex couples based on his religious beliefs,” and repeatedly refer to statements by Phillips as statements by “The Respondent.” (Supp. PR. CF v. I pp. 0012-20.)

The Colorado Anti-Discrimination Act defines “place of public accommodation” as “any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public...,” other than

places used principally for religious purposes. § 24-34-601(1), C.R.S. (2012). The Act further states, “It is a discriminatory practice and unlawful for a **person** ... to refuse, withhold from, or deny to an individual or a group, because of ... sexual orientation, ... the full and equal enjoyment of the goods [and] services ... of a place of public accommodation....” § 24-34-601(2) (emphasis added). The Act therefore assumes that a place of business acts through persons, and defines the unlawful discriminatory practices as actions by a person.

The purpose of the statutes requiring complainants to file charges with the Commission “is to provide the charged party with notice of the type of discrimination alleged and to give that party and the administrative agencies an opportunity to work on conciliation or voluntary compliance.” *Mawson v. U.S. West Bus. Resources*, 23 F. Supp. 2d 1204, 1215-16 (D. Colo. 1998). The Commission’s procedures are similar to those governing the Equal Employment Opportunity Commission (EEOC). In *Romero v. Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980), the court held that omission of a party’s name from an EEOC Charge did not require dismissal of a Title VII action

against that party when (1) the Charge identified the role of the unnamed party; (2) the interests of the unnamed party and the named party are similar; (3) the unnamed party did not suffer actual prejudice by being absent from the EEOC proceedings; or (4) the unnamed party represented to the complainant that its relationship to the complainant is through the named party. *Romero*, 615 F.2d 1303, 1312 (10th Cir. 1980), quoting *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3rd Cir. 1977).

In this case, Phillips's role in the events that gave rise to the discrimination charge was easily ascertainable from the Charge of Discrimination. Phillips's interests were identical to those of Masterpiece Cakeshop. Phillips suffered no prejudice from not being named; he responded to the Request for Information and has been the only person actively involved in representing Masterpiece Cakeshop's interests. Finally, Phillips identified himself to the Complainants as the owner of Masterpiece Cakeshop, the person who implemented Masterpiece Cakeshop's policy not to provide wedding cakes to same-sex

couples, and the person whose religious beliefs led to that policy. Each *Romero* factor is present in this case.

Respondents argue that Phillips was prejudiced “because of his exposure of up to \$500 in personal liability for each offense” and that he was subject to a two-year jail sentence. (Appellants’ Opening Brief pp. 38-39.) Respondents are wrong. The public accommodations statute, § 24-34-602, did provide for those penalties, but not in a proceeding before the Commission. The civil fines are only available if the complainant brings suit in court. Section 24-34-602(3) stated, “the relief provided by this section shall be an alternative to that authorized by section 24-34-306(9), and a person who seeks redress under this section shall not be permitted to seek relief from the commission.”⁴ The jail sentence also was not available except in an action filed in court. Moreover, that provision was repealed before the Commission filed its Notices of Hearing and Formal Complaints against Phillips and Masterpiece

⁴ That paragraph has since been amended, but the amendments do not affect this argument.

Cakeshop. Respondents' argument on this point is specious and fails to demonstrate any prejudice to Phillips.

Phillips had ample notice that his decisions and actions were the basis for the Charges of Discrimination, Letters of Probable Cause Determination, and the Commission's Complaints. He is an appropriate respondent in this case, and Respondent's Motion was properly denied.

III. The Commission's governing statute specifically gives it authority to enter cease-and-desist orders.

The Colorado Anti-Discrimination Act states that if the Commission finds "that a respondent has engaged in or is engaging in any discriminatory or unfair practice ..., the commission shall issue and cause to be served upon the respondent an order requiring such respondent to cease and desist from such discriminatory or unfair practice...." Section 24-34-306(9), C.R.S. (2012). The Commission found that the Respondents had discriminated against the Complainants based upon their sexual orientation. It then ordered Respondents to "cease and desist from discriminating against

Complainants and other same-sex couples by refusing to sell them wedding cakes or any product Respondents would sell to heterosexual couples....” (Notice of Appeal App. A p. 2.) Respondents now make the puzzling argument that the Commission’s cease-and-desist order exceeded its statutory authority. (Appellants’ Opening Brief, pp. 40-41.)

The Act explicitly authorizes the Commission to issue orders requiring Respondents to cease and desist their **discriminatory practices**. C.R.S. § 24-34-306(9) (2012). The Act’s statutory scheme provides the Commission with the mechanism to accomplish its primary purpose, the elimination of discriminatory practices. *Agnello v. Adolph Coors Co.*, 689 P.2d 1162, 1165 (Colo. App. 1984). The Commission is not limited to ordering Respondents to cease discriminating against the Complainants; in fact, individual remedies “are only incidental to the Act’s primary purpose of eradicating discriminatory practices....”

Brooke v. Restaurant Servs., 906 P.2d 66, 69 (Colo. 1995); *Connors v.*

City of Colorado Springs, 962 P.2d 294, 298 (Colo. App. 1997)

(individual remedies are “merely secondary and incidental” to primary purpose of eradicating discrimination). The primary purpose of

eradicating discrimination can only be achieved by ordering Respondents to cease and desist from discriminating against complainants and other same-sex couples by refusing to sell them wedding cakes or other products that they would sell to heterosexual couples.

CONCLUSION

The Colorado Civil Rights Commission respectfully requests this Court to affirm the Commission's Final Agency Order.

Respectfully submitted this 13th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2015, a true and correct copy of the **ANSWER BRIEF OF THE COLORADO CIVIL RIGHTS COMM’N** was filed using the Court’s ICCES electronic filing system and/or served via email and/or U.S. Mail, First Class, postage paid, on the following:

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