

Vermont Superior Court
Caledonia Unit

KATHERINE BAKER and
MING-LIEN LINSLEY,
Plaintiffs,

And
Vermont Human Rights Commission,
Intervenor-Plaintiff

Civil Division
Docket No. 187-7-11 CACV

v.

WILDFLOWER INN a/k/a DOR
ASSOCIATES LLP,
Defendant

OBJECTION TO
VERMONT HUMAN RIGHTS COMMISSION'S
RENEWED MOTION TO INTERVENE
(and related INTERVENOR COMPLAINT)

Defendant responds to the Vermont Human Rights Commission's Renewed Motion to Intervene ("Renewed Motion") and related Intervenor Complaint, as follows:

The Human Rights Commission ("HRC") has not met the standards for intervention, has failed to meet statutory requirements for further and expanded involvement in this matter, and is unjustifiably seeking to expand the scope of the litigation beyond the current parties to the case.

Relevant Procedural History:

1. The HRC has been allowed to appear for limited purposes in order to participate on Constitutional issues. (See Order dated November 8, 2011).

2. As such, its involvement in this matter is limited to scenarios where determining the outcome of this case would hinge upon the constitutional issues raised.
3. A Status Conference was held on February 7, 2012 at which the Defendant notified the Court and Counsel that it intended to file a Motion to Dismiss the Plaintiffs' Second Amended Complaint for lack of subject matter jurisdiction and the date for such submission was set as February 23, 2012.
4. At that hearing, the HRC, through Counsel, made no mention of any further pending claims that it believed it might have.
5. With the deadline looming and the reality of seeing the Plaintiffs' attempts at expanding the lawsuit dismissed for lack of subject matter jurisdiction, and thus the HRC's ability to punish the Defendant, the HRC filed on February 22, 2012 its "Renewed Motion" and Intervenor Complaint seeking to, among other things, tack on punitive civil penalties "of up to \$10,000.00 for each violation proven."
6. Defendant also filed on February 22, 2012 its Answer to Plaintiff's Second Amended Complaint and a related Motion to Dismiss. Defendant incorporates herein by reference all of the arguments made in those motions and adds to it only the following additional arguments made herein.
7. Essentially the motions mentioned in paragraphs 5 and 6 "crossed in the mail."
8. Plaintiffs have now also filed yet a Third Amended Complaint (March 5, 2012) in which it too now seeks what it calls "symbolic and punitive damages." This was done at very near the same time the HRC filed for the same type of relief, something that appears to not be coincidental.

The HRC Has No Ground To Intervene As Of Right

9. The HRC claims that it has a right to intervene under V.R.C.P. 24(a)..

However, V.R.C.P. 24(a) allows intervention as of right only when a petition to intervene is timely made, and then only if there is a statutory right to intervene or “when the applicant claims an interest relating to the... transaction which is the subject of the action *and* applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest...” (Emphasis added).

10. First, the HRC’s motion to intervene is not timely. It comes seven months after the Plaintiffs originally filed their action.

11. Second, there is no statutory right to intervene.

12. And third, the HRC cannot satisfy either prong of the second ground for intervention as of right.

13. The HRC’s request fails the first prong because the HRC’s interest in this action does not relate to the... transaction which is the subject of the Plaintiff’s action.

14. Plaintiffs encountered a refusal to host their reception. That has nothing to do with any interpretation of a policy, any alleged intention of the policy or even the policy in a general sense. The Defendant has been willing to accept liability for its employee’s actions and for an appropriate award of damages.

15. Further, the second prong requires that the HRC be so situated that the disposition of the action may, as a practical matter, impair or impede the HRC’s ability to protect its

interest.” However, the HRC’s interest in the action is identical to the Plaintiffs’ interest, namely that the Plaintiffs’ complaint be remedied, and it will be. The identity of the HRC’s interest with the Plaintiffs’ interest is evidenced by the fact that the remedies sought by each are identical.

16. To the extent the HRC seeks to remedy other alleged violations against other same-sex couples, those alleged violations are not part of the Plaintiffs’ Complaint and an intervenor is not allowed to expand the scope of the action in which it seeks to intervene. It may intervene, if at all, only to protect its interests within the parameters of the action in which it seeks to intervene.
17. It cannot be said that the HRC would lose its right to a civil penalty if it is not allowed to intervene, because the HRC has already lost any such right by not bringing an independent action in a timely manner.
18. Therefore, the HRC has no standing to seek intervention as of right.

The HRC Is Not Entitled To Permissive Intervention.

V.R.C.P. 24 (b) provides for permissive intervention when the intervenor’s action “and the main action have a question of law or fact in common.”

Again, the HRC did not make a timely request to intervene. The Plaintiffs’ action has been pending for seven months.

Second, no statute confers a conditional right to the HRC to intervene.

And third, the HRC’s claim does not have a question of law or fact in common with the main action. Indeed, the HRC purports to seek intervention to pursue remedies to “ensure that all who have been harmed by the Defendant’s unlawful discriminatory conduct may achieve the

relief to which they are entitled.” The HRC’s proposed Complaint purports to be on behalf of “at least six different same-sex couples” in addition to the Plaintiff in the main action. But that was not an objective of the Plaintiff’s action. The Plaintiff’s action was filed to remedy the Plaintiffs’ rights and those rights alone. An intervenor is not entitled to intervene in order to expand the scope of the action in which it seeks to intervene. An intervenor may only intervene to protect its rights as such may exist within the four corners of the main action, not to new issues the intervenor desires to bring into the case. 59 Am.Jur.2d Parties, Section 188.

19. The HRC should not be allowed to intervene in order to expand the scope of the case beyond the main action.
20. The prior, limited intervention was allowed because V.R.C.P. 24(d) provides for intervention by the state in order to defend against a constitutional challenge to the law at issue. But now the HRC seeks intervention, not to defend against a constitutional challenge, but to purportedly protect the rights of persons who are not even parties to this action. Intervention for such a purpose is improper and should not be allowed.
21. Further, allowing the HRC to intervene in the manner it proposes would unduly delay and prejudice the rights of the Defendant as it would expand the matter beyond the two individual parties by bringing in non-parties and also by expanding the factual and legal issues involved in the litigation, all while ignoring the statutory failures of the HRC under 9 V.S.A. 4554, as described below.

The HRC Failed To Comply With Procedural Requirements That Must Be Met Before The HRC Is Allowed To File Suit.

22. As justification for its Motion to be let in as a full party without limitation, the HRC claims that “the individual Plaintiffs cannot adequately represent the interests of the Commission” and makes claims of “flagrant violations” of the Public Accommodations Act.
23. It also claims, in “belt and suspenders” fashion, that it needs to participate in the “remedial phase of litigation in order to protect a “direct, substantial, and legally protectable” interest.”
24. The HRC then cites certain portions of statutory authority, such as but not limited to 9 V.S.A. 4553(a)(6)(A)(i)-(ii) and claims that since “the Commission has been legislatively granted the ability to obtain broader relief than the relief available to the individuals like the Plaintiffs” that it should be allowed to participate in a much more expanded way.”
25. The HRC’s argument, in addition to ignoring the fact that the only evidence it has to point to is the testimony from a disgruntled, former employee whose actions were unauthorized and who acted in a way that violated her non-compete promises, and in a way so as to solicit business away from her employer, also ignores certain statutory realities that result in the HRC not being allowed to enter this action as it desires to do.
26. The Rules of the Vermont Human Rights Commission and 9 V.S.A. 4554 (entitled “Complaint, investigation and conciliation”) do not grant the HRC the ability to enter as a full Plaintiff and seek the remedies it seeks.

27. Specifically, 9 V.S.A. 4554 requires:

- a- Section 4554 requires that someone must file a complaint with the HRC before the HRC may file suit. That has not occurred.
- b- Section 4554 requires that the HRC make certain procedural inquiries prior to filing suit. The HRC did not do that.
- c- Section 4554 requires that the HRC investigate and make preliminary recommendation before filing suit. The HRC did not do that.
- d- Section 4554 requires that the HRC attempt to resolve the matter by informal means before filing suit. The HRC has not done that.
- e- 9 V.S.A. Sec. 4554(e) sets forth how the HRC is to proceed. It provide: “ If the commission finds reasonable grounds to believe that unlawful discrimination has occurred, but does not find an emergency, it shall make every reasonable effort to eliminate the discrimination by informal means such as conference, conciliation and persuasion. If the case is not disposed of by informal means in a manner satisfactory to a majority of the commission within six months, it shall either bring an action in superior court as provided in section 4553 of this title or dismiss the proceedings, unless an extension is necessary to complete ongoing good faith negotiations and all parties consent to the extension.” The statute, therefore, contemplates that after six months the HRC is to file suit if it intends to do so. In this case, the HRC did not do so. Therefore, it lost its right to file suit.
- f- Also, 4554(g) provides that the HRC “shall not represent the charging party... nor shall it favor any party in its handling of a complaint.”, However, the

HRC has done exactly that, thereby violating its statutorily required neutral role.

- g- Sec. 4554(h) also imposes other procedural requirements on the HRC, which the HRC has not met.
- h- Therefore, the HRC has not satisfied the precedent procedural requirements necessary to file suit and should, on account of such failure, not be allowed to intervene so as to file suit now.

Other Reasons to Deny the HRC's request:

- 28. Robert Appel, HRC Executive Director and counsel in this action for the HRC, sits on the ACLU-Vermont Board of Directors. (see <http://www.acluvt.org/about.us/directors.php>)
- 29. This calls into question Attorney Appel's and the HRC's objectivity in this matter and thus his/its ability to honor its statutory obligations.
- 30. Said affiliation gives rise to the appearance of the use of a governmental agency's litigation decisions to benefit private parties due to personal links.
- 31. Said affiliation has thus compromised the HRC's involvement and serves to give rise to the concerns raised above in paragraph 32, in general, and particularly paragraph 32(e), which describes that statutory requirement under 9 V.S.A. 4554(e) that the HRC "shall not represent the charging party... *nor shall it favor any party in its handling of a complaint.*" (Emphasis added.)
- 32. Defendant has honorably offered to become legally responsible for the unauthorized actions of its rogue employee. Defendant is no longer in the wedding business and it

has agreed to an appropriate level of relief given the facts and circumstances of the case.

33. In response, Defendant has only been met with more requests for not only the appropriate and limited relief to which the Plaintiffs are entitled, but with a piling on of requests for punitive damages that can only be designed to pressure, harass and unnecessarily burden Defendant.
34. It would be highly inequitable to allow the HRC full intervention as it proposes. This matter is close to settlement which provides Plaintiffs full relief and the HRC seeks to remedy what might have happened under non-existent circumstances by requesting punitive damages and acting in concert with the Plaintiffs.

[END OF PAGE]

WHEREFORE, Defendant prays for the following relief:

- A. Deny the HRC's request to become involved as a full party;
- B. Deny the HRC's request for punitive damages;
- C. Deny the HRC's request to file its Complaint;
- D. Deny all other requests of the HRC.

Dated at Hampton, NH this 9th day of March, 2012.



John Anthony Simmons, Sr., Esq.
Attorney for Defendant
886 Lafayette Road
Hampton, NH 03842
603-929-9100