No. 16-2424

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Equal Employment Opportunity Commission

Plaintiff-Appellant,

v.

R.G. & G.R. Harris Funeral Homes, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 2:14-cv-13710-SFC-DRG

MOTION TO INTERVENE AS PLAINTIFF-APPELLANT

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24 and this Court's inherent authority, Aimee Stephens respectfully moves for intervention on the side of Plaintiff-Appellant. Ms. Stephens has significant claims at stake in this litigation, which may be precluded if the district court's grant of summary judgment for Defendant R.G. & G.R. Harris Funeral Homes ("Funeral Home") is upheld. Ms. Stephens had a statutory right to intervene before the district court but believed at that time that the EEOC would adequately represent her interests, which it has done up until now. However, based on the change of federal administration as well as the federal government's actions over the past few days, Ms. Stephens is reasonably concerned that the EEOC may no longer adequately represent her interests going forward. After conferring with counsel, who was finally granted leave by an EEOC trial attorney to contact Ms. Stephens on January 20, Ms. Stephens has decided that intervention is now necessary to protect her interests in this appeal and in any future proceedings. In order to adequately prepare her opening brief on appeal, Ms. Stephens requests 21 days to file her brief in support of her appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Aimee Stephens is a transgender woman who served as a funeral director and embalmer at the Funeral Home. Mem. in Supp. of Pl.'s Mot. for Summ. J. ("Pl.

Mem."), RE 51, PAGE ID # 605. On July 31, 2013, Ms. Stephens wrote her coworkers a letter informing them about her transition from male to female, and explaining that she intended to dress in appropriate business attire as a woman. *See* Stephens Letter, RE 51-2. The Funeral Home's owner, Thomas Rost, responded two weeks later by handing Stephens a severance agreement. Mr. Rost has said that the "specific reason" he terminated Ms. Stephens was because Stephens "was no longer going to represent himself as a man" but "wanted to dress as a woman." Pl. Mem., RE 51, PAGE ID ## 605–606.

The EEOC brought a sex discrimination lawsuit against the Funeral Home, alleging that its termination of Ms. Stephens violated Title VII's prohibition on sex discrimination. The Funeral Home moved to dismiss the case on the ground that gender identity is not protected by Title VII; however, the district court concluded that the EEOC had properly alleged a sex discrimination claim by asserting that Ms. Stephens was fired for failing to conform to Mr. Rost's sex-based stereotypes. Op. & Order, RE 12, PAGE ID # 178. After its motion to dismiss was denied, the Funeral Home amended its Answer to raise defenses under the Free Exercise Clause and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). Answer to Am. Compl., RE 22, PAGE ID # 254.

On cross-motions for summary judgment, the district court granted summary judgment to the Funeral Home on its RFRA defense. The court held that the EEOC

failed to demonstrate that allowing Ms. Stephens to dress in accordance with her gender identity was not the least restrictive means for advancing the government's compelling interest in eliminating gender stereotypes in the workplace with respect to clothing. Op & Order, RE 76, PAGE ID ## 2181–2183. The EEOC appealed.

ARGUMENT

I. Ms. Stephens Satisfies the Standard for Intervention As Of Right Under Rule 24(a).

Although the Federal Rules of Appellate Procedure do not expressly address intervention in a pending appeal, this Court has the authority to grant such intervention. *See Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1006 (6th Cir. 2006); *see also Drywall Tapers & Pointers of Greater N.Y. v. Nastasi & Assocs.*, 488 F.3d 88, 94 (2d Cir. 2007); *Alstom Caribe, Inc. v. George P. Reintjes Co.*, 484 F.3d 106, 111 (1st Cir. 2007) ; *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997); *United States v. Bursey*, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975); *Atkins v. State Bd. of Educ.*, 418 F.2d 874, 876 (4th Cir. 1969) (per curiam); *Hurd v. Ill. Bell Tel. Co.*, 234 F.2d 942, 944 (7th Cir. 1956).

To intervene as of right under Rule 24(a)(2), a party must satisfy "four elements: (1) timeliness of application; (2) a substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already

before the court." *Blackwell*, 467 F.3d at 1007. "Failure to meet [any] one of the [four] criteria will require that the motion to intervene be denied." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000) (citation and internal quotation marks omitted) (alterations in original). But Rule 24 as a whole is "broadly construed in favor of potential intervenors." *Id.* (citation and internal quotation marks omitted). Here, Ms. Stephens satisfies all four elements.

A. Ms. Stephens Has Legally Protectable Interests at Stake, Which May Be Impaired by the Disposition of This Case.

Consistent with its generally liberal approach to Rule 24, the Sixth Circuit applies a "rather expansive notion of the interest sufficient to invoke intervention of right." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). But even under the most stringent standard, Ms. Stephens has a legally cognizable interest that may be impaired by the disposition of this case. The EEOC has requested various forms of relief on Ms. Stephens's behalf, including backpay, compensation for pecuniary and nonpecuniary losses, and punitive damages. First Am. Compl. ¶¶ C–F, RE 21, PAGE ID ## 246-247.

Title VII itself explicitly provides that "[t]he person or persons aggrieved [by an unlawful employment action] shall have the right to intervene in a civil action brought by the Commission . . . ." 42 U.S.C. § 2000e-5(f)(1). If the district court's summary judgment for the Funeral Home on the EEOC's wrongful termination claim is upheld, Ms. Stephens may well be precluded from ever

obtaining relief for the discrimination she suffered. *See EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 466 (6th Cir. 1999) ("[W]hile Title VII affords recovery through private action or an action by the EEOC, it does not allow both."); *id.* at 462 ("[T]he lawsuit of one will preclude the lawsuit of another."). Although the statute does not expressly discuss intervention on appeal, the right of intervention should be held to apply with full force here, particularly given the unusual change in circumstances confronting Ms. Stephens. *See Triax Co. v. TRW, Inc.*, 724 F.2d 1224 (6th Cir. 1984) (holding that a patent owner was entitled to intervene as of right for purposes of appealing a district court's summary judgment order in a patent infringement action, because the order would have deprived him of royalties and collaterally estopped him from seeking damages from other potential infringers of the patents).

B. The EEOC May Not Adequately Represent Ms. Stephens's Interests in the Appeal and Subsequent Proceedings.

Rule 24(a)'s inadequacy requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *accord, e.g., Linton v. Comm'r of Health & Env't*,

973 F.2d 1311, 1319 (6th Cir. 1992).[1] To satisfy this burden, a proposed intervenor "is not required to show that the representation will in fact be inadequate." *Mich. State AFL-CIO*, 103 F.3d at 1247. Rather, it may be enough to show, for example, "that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.* By the same token, a decision not to appeal by an original party to the action—or to limit the scope of an appeal—can also constitute inadequate representation of another party's interest. *Id.* at 1248 (citing *Am. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990)).

Ms. Stephens passes this low threshold. The change in presidential administration and the government's actions over the last several days raise serious questions as to whether Ms. Stephens's interests will be adequately represented by the EEOC in this appeal and any subsequent proceedings. In particular, on the day of President Trump's inauguration, the White House removed its webpage dedicated to LGBT rights. Colby Itkowitz, *LGBT Rights Page Disappears from White House Web Site*, Wash. Post (Jan. 20, 2017).[2] Additionally, the federal government's requests for extensions of time in other civil rights cases suggest the

[1] This Court has "declined to endorse a higher standard for inadequacy [of representation] when a government entity is involved." *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999).

[2] https://www.washingtonpost.com/local/2017/live-updates/politics/live-coverage-of-trumps-inauguration/lgbt-rights-page-disappears-from-white-house-web-site.

possibility that the EEOC may change its position in the current case as it proceeds.[3] Finally, the President has the authority to appoint a new general counsel for the EEOC, who has authority for the EEOC's litigation, as well as members of the Commission itself, 42 U.S.C. § 2000e-4, all of whom may influence the EEOC's representation of Ms. Stephens' interests going forward. Because Ms. Stephens may well be precluded from seeking independent relief if the district court's grant of summary judgment is upheld, she should be allowed to intervene to ensure that her interests are adequately protected throughout the rest of this litigation.

C. The Motion to Intervene Is Timely Under the Circumstances.

"The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances." *Stupak-Thrall*, 226 F.3d at 472–73 (citation and internal quotation marks omitted). This Court has held that the following factors should be considered in determining timeliness:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

[3] https://www.nytimes.com/2017/01/24/us/politics/civil-rights-trump-administration-sessions.html?_r=0

Id. at 473 (citation and internal quotation marks omitted). The timeliness requirement is liberally construed. *See, e.g.*, *Cook v. Bates*, 92 F.R.D. 119, 122 (S.D.N.Y. 1981) ("In the absence of prejudice to the opposing party, even significant tardiness will not foreclose intervention.").

As particularly relevant here, courts have recognized that timeliness is measured "from the time [prospective intervenors] became aware that [their interest] would no longer be protected by the existing parties to the lawsuit." *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996). For example, in *United Airlines, Inc. v. McDonald*, the Supreme Court held that a class member's motion to intervene filed after judgment, for purposes of appeal, was timely because she "promptly" moved to intervene "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representatives." 432 U.S. 385, 394–96 (1977); *see also, e.g.*, *Dow Jones & Co. v. U.S. Dep't of Justice*, 161 F.R.D. 247, 252–53 (S.D.N.Y. 1995) (Sotomayor, J.) (finding intervention timely because movant intervened only after "she realize[d] that the [defendant] might not fully exercise its right to appeal").

As set forth above, recent actions by the government have given Ms. Stephens significant cause for concern that the EEOC will not continue to adequately represent her interests on appeal. Based on these developments, Ms. Stephens is reasonably concerned that the EEOC may not adequately represent her

interests in this appeal or in possible future proceedings. *Cf.* 28 U.S.C. § 518(a) ("Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . .").

Moreover, until recently, counsel for the EEOC requested that the undersigned counsel—who represented Ms. Stephens in filing a charge with the EEOC and the investigation of that charge—not contact Ms. Stephens during the pendency of this appeal. On January 20, however, the EEOC consented to allowing counsel to contact Ms. Stephens. After counsel spoke with Ms. Stephens, she expressed interest in intervening in this lawsuit to protect her interests. Since then, Ms. Stephens has moved as quickly as possible to intervene in this lawsuit. Even if Ms. Stephens could be accused of delay, allowing intervention now would not impose any significant prejudice on the parties, given that Ms. Stephens requests only an additional 21 days to prepare her opening brief on appeal.

II. Alternatively, This Court Should Grant Permissive Intervention Under Rule 24(b).

In the alternative, Ms. Stephens should be granted permissive intervention under Federal Rule of Civil Procedure 24(b). "To intervene permissively, a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact." *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005). "Once these two requirements are established,

the district [or appellate] court must then balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." *Id.*

These circumstances merit permissive intervention. As discussed above, Ms. Stephens's motion to intervene is timely under the circumstances, and the wrongful termination claim she seeks to vindicate lies at the heart of these proceedings. Although Ms. Stephens requests a 21-day delay in the briefing schedule, so that she may file a separate opening brief on appeal, this delay will not significantly prejudice the existing parties.

III. Ms. Stephens Requests a 21-Day Extension to Prepare a Separate Opening Brief on Appeal.

For substantially the same reasons that intervention should be granted, the Court should grant Ms. Stephens leave to file separate briefs, including a separate opening brief on appeal. Given the recent change in presidential administration, Ms. Stephens may bring a different perspective to the sex discrimination and religious exercise issues at stake in this appeal. She should not be left to rely on the arguments made by the government, which may now decide to change its position on the issues under review. In order to adequately prepare her opening brief on appeal, Ms. Stephens respectfully requests a 21-day extension on the briefing deadline.

CONCLUSION

For the foregoing reasons, the Court should grant Ms. Stephens's motion to intervene, with leave to file separate briefs. The Court should also grant Ms. Stephens's request for a 21-day extension to prepare her opening brief on appeal.

Dated: January 26, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Fed. R. App. P. 27(d)(2) because it contains 2,425 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: January 26, 2017

/s/ Daniel S. Korobkin
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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

/s/ Daniel S. Korobkin

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