

No. 16-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Equal Opportunity Employment 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
Civil Case No. 2:14-cv-13710 (Honorable Sean F. Cox)

**R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S MEMORANDUM OF
LAW IN OPPOSITION TO CHARGING PARTY'S MOTION TO
INTERVENE AS PLAINTIFF-APPELLANT**

INTRODUCTION

Over four years have passed since the charging party, Aimee (formerly Anthony) Stephens, filed a charge of discrimination with the Equal Employment Opportunity Commission (the “EEOC”) against Defendant-Appellee R.G. & G.R. Harris Funeral Homes, Inc., (“RG”). Nearly two and a half years have elapsed from the time that the EEOC commenced litigation against RG. Since the inception of the action, Stephens was on notice that he had the right to intervene. Now, more than five months after that action was dismissed on summary judgment and over three months after the EEOC noticed its appeal, Stephens moves this Court to intervene as a Plaintiff-Appellant. Stephens’s motion is untimely, and allowing intervention at this late date would severely prejudice RG. Stephens has also failed to make any showing that would overcome the presumption that the EEOC’s representation is adequate. Consequently, Stephens’s motion to intervene should be denied in its entirety.

ARGUMENT

I. Stephens Should Not Be Allowed To Intervene as a Matter of Right.

To intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2),¹ an intervention applicant must demonstrate (1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4)

¹ Because no specific rule governs intervention as a matter of right on appeal, we look to the Federal Rules of Civil Procedure.

inadequate representation of that interest by parties already before the court. *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). “[F]ailure to meet [any] one of the criteria will require that the motion to intervene be denied.” *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989). Because Stephens’s application is untimely, and because Stephens has made no demonstration of inadequate representation by the EEOC, Stephens is not entitled to intervene as a matter of right.

A. Stephens’s Motion to Intervene Should Be Denied as Untimely.

A motion to intervene may not be granted if it is untimely. “Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be ‘timely.’ If it is untimely, intervention must be denied.” *Nat’l Ass’n for Advancement of Colored People v. New York*, 413 U.S. 345, 365 (1973); accord *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000). Timeliness is a “threshold requirement” that must be met to warrant consideration of the other factors. *Sales v. Marshall*, 873 F.2d 115, 121 (6th Cir. 1989).

This Circuit considers several factors to determine whether a motion to intervene is timely, including:

- (1) the point to which the suit had progressed;
- (2) the purpose for which intervention is sought;
- (3) the length of time preceding the application during which the proposed intervenor knew or reasonably should have known of his interest in the case;
- (4) the prejudice to the original parties due to the proposed intervenor's failure after he knew or reasonably should have known of his interest in the case to apply promptly for intervention; and
- (5) the existence of unusual circumstances militating against or in favor of intervention.

Triax Co. v. TRW, Inc., 724 F.2d 1224, 1228 (6th Cir. 1984) (citing *Mich. Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981)). Considered in light of the totality of the circumstances, these factors demonstrate that Stephens has failed to meet the threshold requirement of timeliness—sufficient reason to reject Stephen's tardy request without consideration of the remaining Rule 24(a)(2) factors.

The point to which the suit has progressed. In the two years and four months that have elapsed since the EEOC filed its complaint on September 25, 2014, this litigation progressed in the District Court through a motion to dismiss, discovery, and cross-motions for summary judgment, culminating in the entry of judgment dismissing the case on August 18, 2016. The EEOC filed its notice of appeal two months later, on October 13, 2016. This “extensive progress in the district court before the proposed intervenor[] filed [its] motion to intervene counsels against intervention.” *Blount-Hill v. Zelman*, 636 F.3d 278, 285 (6th Cir. 2011) (denying motion to intervene where litigation had progressed beyond decision on motion to dismiss, completion of pretrial conference, filing of a third amended complaint, and filing of a second motion to dismiss).

The length of time during which the intervenor knew of an interest in the case. The advanced stage to which this litigation has progressed is even more problematic considering the length of time preceding the application to intervene during which Stephens knew of his interest in the case. Stephens filed a charge alleging discrimination with the EEOC

in late 2013. In the months that followed, the EEOC conducted an investigation, during which Stephens was represented by the same counsel that represents Stephens now.

The EEOC's litigation manual states that “[p]rior to filing suit under any of the statutes the Commission enforces, a legal unit attorney should notify the charging party(ies) by telephone.” It further provides that, “[w]ithin a week of filing suit in Title VII . . . cases,” a letter should be sent to the charging party “enclosing a copy of the filed complaint and explaining their statutory right to intervene in the action.” In addition to explaining that a charging party who intervenes “will be able to pursue individual relief separately if at any point in the litigation the agency’s interests do diverge from theirs,” the letter also explains that “although [the charging party has] a statutory right to intervene, the court could deny intervention if their request is made too long after the Commission’s suit is filed.” EEOC Regional Attorney’s Manual, Pt. II.2.E (Notice to Charging Parties of Commission Suits), available at <http://bit.ly/2kreD1D> (last visited February 1, 2017). Accordingly, unless the EEOC failed a basic duty to notify Stephens of his right to intervene prior to the EEOC filing its claim, Stephens knew, from day one of the lawsuit, of his interest in the case, that the EEOC was a representing that interest, and that he nonetheless had a right to intervene.

Rule 24(a)(2) requires that proposed intervenors apply to intervene “promptly after discovering their interest in the litigation.” *Zelman*, 636 F.3d at 285-86; *see also U.S. v. Tennessee*, 260 F.3d 587, 594 (6th Cir. 2001) (“An entity that is aware that its interests

may be impaired by the outcome of the litigation is obligated to seek intervention as soon as it is reasonably apparent that it is entitled to intervene”). But even though Stephens was aware of his interest in this litigation from the outset, and despite the fact that Stephens had a right to intervene in the district court action under 42 U.S.C. § 2000e-5(f)(1),² Stephens opted not to do so. Instead of applying to intervene promptly after becoming aware of this litigation and his interest in it, Stephens waited more than two additional years—over four years from the time he filed his initial charge and after the District Court entered judgment dismissing the action—to apply for intervention. Stephens’s failure to apply promptly for intervention renders Stephens’s motion untimely. *See Zelman*, 636 F.3d at 286 (holding that intervention applicant’s delay in seeking intervention, when the applicant discovered its interest in a lawsuit against the state government at the outset of the litigation but waited to move for intervention until after the results of the 2008 state attorney general election in the hope that the lawsuit would be resolved, “plainly ma[de] their motion untimely”) (citing *Stotts v. Memphis Fire*

² In relevant part, 42 U.S.C. § 2000e-5(f)(1) provides that “[t]he person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission” Notably, the text of the statute limits the right to intervene to the “civil action brought by the Commission.” Nothing indicates that the statutory right extends beyond the entry of judgment and termination of the civil action. Moreover, while an aggrieved employee has a right to intervene in a civil action brought by the EEOC, it has been held that Rule 24(a) “interposes as a condition precedent that the application to intervene must be timely.” *Nevilles v. Equal Emp’t Opportunity Comm’n*, 511 F.2d 303, 305 (8th Cir. 1975).

Dep't, 679 F.2d 579, 584 n.3 (6th Cir. 1982) (stating that intervention applicants “should have attempted to intervene when they first became aware of the action, rather than adopting a ‘wait-and-see’ approach”).

Stephens argues that, based on “recent actions by the government,” Stephens became “reasonably concerned that the EEOC may not adequately represent [Stephens’s] interests in this appeal” Motion to Intervene, R.E. 19, at Page ID 9-10. Stephens’s argument fails. As discussed in more detail below, Stephens’s concerns are based entirely on speculation related to the recent change of Presidential administrations. In reality, the EEOC has taken no action that even suggests that it will fail to continue pursuing this appeal. Stephens’s speculations about the new President’s administration do not change the fact that Stephens knew of his interest in this litigation as soon as it commenced over two years ago but chose not to intervene. Resting intervention on an advisory web page appearing or disappearing is the epitome of flimsiness—and when President Trump announced that he *would not* rescind an Executive Order enforcing the very type of protections, the motion to intervene now verges on the frivolous. *See* Juliet Eilperin and Sandhya Somashekhar, *White House Says LGBT Protections For Federal Workers Will Remain*, The Washington Post (Jan. 31, 2017), available at <http://wapo.st/2l0QShp> (last visited Feb. 3, 2017).

Stephens also attempts to excuse a portion of the delay by explaining that counsel for the EEOC requested that Stephens’s counsel—the same counsel that represented Stephens in the filing of a charge with the EEOC and the subsequent investigation—

not contact Stephens during the pendency of this appeal, and consented to allow contact on January 20 of this year. Motion to Intervene, R.E. 19, at Page ID 10. But this is no excuse for delay: the EEOC cannot preclude a charging party's attorney from consulting with his client, nor preclude the client—who was advised of his intervention rights years ago—from maintaining an ongoing relationship with his independent counsel.

Prejudice to original parties. The prejudice to RG due to the Stephens's failure after he knew of his interest in the case to apply promptly for intervention buttresses the conclusion that Stephens's motion should be rejected as untimely. If Stephens is allowed to come into this case now as an Intervenor-Plaintiff-Appellant, Stephens will necessarily bring new arguments and legal theories into the appeal (if he failed to do so, then his argument that the EEOC was not representing his interests would instantly fail, revealing this motion to be frivolous). And notably, Stephens has never objected to the adequacy of the EEOC's representation. Granting intervention would severely prejudice RG by introducing legal arguments and facts not tested in the extensive proceedings below. This would broaden the scope of the appeal beyond the issues litigated below, deprive the defendant of the ability to develop a record, and deprive this Court of the benefit of having Plaintiff's theories tested in the District Court.

Moreover, in the event the case were to be remanded for further proceedings, Stephens would essentially be allowed a second bite at the apple (or perhaps more accurately, be allowed to replant the orchard) some four and a half years after the alleged

offense occurred. The facts would be stale, the passage of time would undoubtedly have caused memories to fade, and RG would be deprived of the opportunity to develop a contemporaneous record to effect a proper defense.

On the other hand, if Stephens is allowed to intervene and Stephens does not introduce new theories or arguments, then the intervention serves only one purpose: allowing Appellants to bring forward (and requiring RG to respond to) two briefs instead of one—and that is also manifestly unfair and as mentioned above, would immediately demonstrate that Stephens' interests are in fact fully protected by the EEOC. The high likelihood of significant prejudice to RG under each of the foregoing scenarios counsels strongly against allowing intervention.

At bottom, Stephens is not entitled to sit on the right to intervene for over two years, only to apply for intervention long after the appeal of the summary judgment order was filed. Accordingly, Stephens's motion to intervene should be rejected for failure to satisfy the threshold requirement of timeliness. *See In re Troutman Enterprises, Inc.*, 286 F.3d 359, 365 (6th Cir. 2002) (reorganized company's motion to intervene was untimely when company waited a year and a half to pursue intervention in action commenced by trustee against insurer to recover policy proceeds, during which time bankruptcy courts rendered two decisions).

B. Stephens Has Not Shown Inadequate Representation of His Interests by the EEOC.

A second, independently sufficient reason requires denial of Stephens's motion to intervene as a matter of right: Stephens has utterly failed to demonstrate that Stephens's interests will not be adequately represented by the EEOC.

To determine the adequacy of representation, this Circuit considers (1) whether there is collusion between the representative and an opposing party; (2) whether the representative fails in the fulfillment of his duty; and (3) whether the representative has an interest adverse to the proposed intervenor. *Triax*, 724 F.2d at 1227–28. “[P]roposed intervenors bear the burden of demonstrating inadequate representation.” *Purnell v. City of Akron*, 925 F.2d 941, 949–50 (6th Cir. 1991). While the inadequacy requirement is “satisfied if the applicant shows that representation of his interest ‘may be’ inadequate,” *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972), the proposed intervenor must nonetheless make some showing that sustains its burden.

“When a proposed intervenor and an existing party to the suit share the same ultimate objective in the litigation, courts presume that the existing party adequately represents the intervenor's interests.” *State v. U.S. Env'tl. Prot. Agency*, 313 F.R.D. 65, 68–69 (S.D. Ohio 2016) (citing *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987)). Here, the EEOC and Stephens share the same ultimate objective: the EEOC commenced litigation on the basis of Stephens's charge of discrimination, seeking relief for Stephens. Consequently, to demonstrate inadequacy of representation by the EEOC, Stephens must “overcom[e] the presumption of adequacy of representation” that arises

“when the proposed intervenor and a party to the suit have the same ultimate objective.”
Purnell, 925 F.2d at 949-50.

But Stephens has not made any showing that the EEOC’s representation may be inadequate, let alone a showing sufficient to overcome the presumption of adequacy. Stephens merely speculates that the EEOC might not vigorously represent Stephens’s interests based on the White House’s removal of a webpage dedicated to LGBT issues from its website and the fact that the President has the authority to appoint a new general counsel for the EEOC. Motion to Intervene, R.E. 19, at Page ID 6-7. This is sheer speculation. The removal of a webpage from the White House website concerning LGBT issues generally does not suggest anything about the EEOC’s prosecution of a particular case involving a person who claims to be transgender. Certainly, counsel for RG has not been colluding with the EEOC to scour government websites of LGBT advice pages. And the appointment of a new general counsel for the EEOC—an event that has not even occurred—offers nothing to Stephens beyond fodder for more speculation. Indeed, even if some day there is some change in litigation tactics related to a new general counsel being appointed, it would not be grounds for intervention. *See U.S. Emvtl. Prot. Agency*, 313 F.R.D. at 69 (“A disagreement over litigation strategy . . . does not establish inadequate representation.”) (citing *Bradley*, 828 F.2d at 1192).

Summarizing the factors considered in this Circuit to determine adequacy, nothing suggests that there is collusion between the EEOC and RG; Stephens can point to no failure on the part of the EEOC to fulfill its duty; and the EEOC does not have

an interest adverse to Stephens. Stephens has thus failed to demonstrate inadequacy of representation, and Stephens is not entitled to intervention as a matter of right.

II. Stephens Should Not Be Granted Permissive Intervention.

To obtain permissive intervention, 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). If these requirements are met, the court “must then balance undue delay and prejudice to the original parties” as well as “any other relevant factors” to determine whether to allow intervention. *Id.*

As discussed in detail above, Stephens’s motion to intervene is untimely, and allowing intervention would severely prejudice RG. Consequently, Stephens’s motion for permissive intervention should be denied.

CONCLUSION

For all of the foregoing reasons, Defendant-Appellee respectfully requests that this Court deny Charging Party Stephens’s Motion to Intervene as Plaintiff-Appellant.

Dated this 6th day of February, 2017.

Respectfully submitted,

s/ Douglas G. Wardlow

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2017, I filed the foregoing document, entitled R.G. & G.R. Harris Funeral Homes, Inc.'s Memorandum of Law in Opposition to Charging Party's Motion to Intervene as Plaintiff-Appellant, through the Court's ECF system, which will effectuate service on all parties. I certify that a copy will also be mailed and e-mailed to counsel for Proposed Intervenor as follows:

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