

<p>COLORADO CIVIL RIGHTS COMMISSION DEPARTMENT OF REGULATORY AGENCIES 1560 Broadway, Suite 1050 Denver, CO 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>CHARLIE CRAIG and DAVID MULLINS, Complainants, vs. MASTERPIECE CAKESHOP, INC. and any successor entity, and JACK C. PHILLIPS, Respondents.</p>	
<p>Counsel in Support of the Complaint Stacy L. Worthington, #16270 Senior Assistant Attorney General Civil Litigation and Employment Law Section Employment/Personnel and Civil Rights Unit 1300 Broadway, 10th Floor Denver, CO 80203 720-508-6586 Stacy.Worthington@state.co.us</p>	<p>Case No. CR2013-0008</p>
<p>COUNSEL IN SUPPORT OF THE COMPLAINT'S ANSWER BRIEF</p>	

Counsel in Support of the Complaint, through the undersigned Senior Assistant Attorney General, submits this Answer Brief addressing the following two issues in Respondents' Brief in Support of Appeal: Section II.1 regarding Appellants' Motions to Dismiss, and Section II.3.d. regarding the scope of relief. Counsel in Support of the Complaint joins in the Answer Brief filed by Complainants with respect to all other issues.

ARGUMENT

I. THIS COMMISSION MUST AFFIRM THE ADMINISTRATIVE LAW JUDGE'S (ALJ'S) DENIAL OF RESPONDENTS' MOTIONS TO DISMISS.

A. The ALJ properly denied Respondents' Motion to Dismiss because of a typographical error.

Both respondents moved to dismiss the Complaint because of a typographical error in the Letters of Probable Cause Determination (LOD). 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 purpose of the LOD 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). The LODs repeatedly discuss Respondents' conduct as constituting 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.” (ROA 140, 145) The LODs concluded that Respondents operate a place of public accommodation as defined by C.R.S. § 24-34-601(1), and throughout the LODs 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. (ROA 140-149)

In the penultimate paragraph of the LODs, the Director's Authorized Designee mistakenly stated, “I determine that the Respondent has violated C.R.S. § 24-34-402,

as re-enacted.” (ROA 143, 148) Jennifer McPherson, the Director’s Authorized Designee, swore under oath that the citation to C.R.S. § 24-34-402 was a typographical error, and that the correct statute was § 24-34-601(2). (ROA 158)

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 (Colo. 1987); *Vigil v. People*, 160 Colo. 215; 416 P.2d 376 (1966); *Andersen v. Lindenbaum*, 160 P.3d 237 (Colo. 2007). The totality of the circumstances here establishes that the erroneous recitation to an inapplicable statute was a mere typographical error. Respondents received ample notice of the statutory basis for the Director’s finding of probable cause.

The LOD 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 Complaints in this matter provided notice of the factual allegations, legal claims, and request for relief asserted in this case. Those Complaints did 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 ALJ properly denied their motion to dismiss.

B. The ALJ properly denied respondent Jack Phillips's motion to dismiss.

Phillips was not named as the Respondent in the initial Charges of Discrimination. However, 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." (ROA 8, 9; emphasis added)

Phillips provided Responses to the Civil Rights Division's Requests for Information. (ROA 3-8, 10-11) 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 stated that the policy was based upon his personal religious beliefs. Phillips signed the Responses as "Jack Phillips, Masterpiece Cakeshop." (ROA 11)

The LODs 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." (ROA 12-20)

The purpose of the statutes requiring complainants to file an administrative charge 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 (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 v. Union Pacific Railroad*, 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 of the *Romero* factors is present in this case.

CADA 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. C.R.S. § 24-34-601(1). 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....” C.R.S. § 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.

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

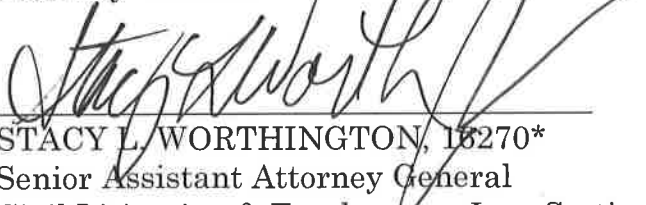
II. THE REMEDY ORDERED BY THE ALJ WAS PROPER AND WITHIN THE SCOPE OF THIS COMMISSION’S AUTHORITY.

The ALJ ordered 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 provide to heterosexual couples, to take such other corrective action as this Commission deems appropriate, and to make compliance reports as this Commission requires. Respondents argue that this exceeds this Commission’s authority because it includes a cease-and-desist order respecting “unidentified non-parties,” namely other same-sex couples.

The Act authorizes this Commission to issue an order requiring Respondents to cease and desist their **discriminatory practices**. C.R.S. § 24-34-306(9) (2012). Remedies that are limited to the individuals named in the Complaints “are only incidental to the Act’s primary purpose of eradicating discriminatory practices....” *Brooke v. Restaurant Servs.*, 906 P.2d 66, 69 (Colo. 1995); *Conners 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 entering the Order described by the ALJ directing 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 provide to heterosexual couples, to take such other corrective action as this Commission deems appropriate, and to make compliance reports as this Commission requires.

Respectfully submitted this 2nd day of May, 2014.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **COUNSEL IN SUPPORT OF THE COMPLAINT'S ANSWER BRIEF** upon all parties herein by email and by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 2 day of May, 2014, addressed as follows:

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