Vermont Superior Court
Filed 12/12/22
Washington Unit

STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 22-CV-2333
MAPLE RUN UNIFIED SCHOOL DISTRICT, Plaintiff, v. VERMONT HUMAN RIGHTS COMMISSION, Defendant.	

RULING ON THE HRC'S MOTION TO DISMISS

The Vermont Human Rights Commission (HRC) received a complaint against the Maple Run Unified School District (District) asserting that a former student of the Bellows Free Academy (part of the District) experienced sex discrimination and retaliation in violation of the Vermont Public Accommodations Act (VPAA), 9 V.S.A. §§ 4500–4507, arising out of the District's slow, insufficient, and retaliatory response to the student's allegations of multiple incidents of student-on-student sexual harassment. The District responded with a written "answer," essentially arguing that the HRC lacked "jurisdiction" over the complaint. The executive director of the HRC then issued a written decision declining to dismiss the case, effectively an interlocutory decision to proceed with an investigation by the HRC based on the allegations of the complaint. The District then initiated this case, asking the court, pursuant to Rule 75, to reverse that decision or otherwise prohibit the HRC from conducting any investigation into whether it violated the VPAA.

The HRC has filed a motion to dismiss. It argues that the District has failed to exhaust administrative remedies, the HRC has primary jurisdiction, and there is no relief available under Rule 75. In the District's view, recent changes in the law have made a violation of the VPAA impossible in the circumstances of this case. There is, the District concludes, nothing proper for the HRC to do but to dismiss the complaint before it. These circumstances, the District argues, should be redressable by relief in the nature of mandamus or prohibition. For the following reasons, the court declines to intervene in the proceeding before the HRC.

This case largely is about the HRC's "jurisdiction." Jurisdiction in relation to an administrative agency such as the HRC (and as opposed to a court) refers exclusively to the extent of the agency's statutory authority. See *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013). As relevant here, the HRC is authorized "to investigate and enforce complaints of unlawful discrimination in violation" of the VPAA. 9 V.S.A. § 4552(b)(1). There can be no doubt that the VPAA extends to claims of sex discrimination in schools. See 9 V.S.A. §§ 4501(1), 4502(a), 4506(e). The VPAA expressly says that a "person

aggrieved by a violation of this chapter may file a charge of discrimination with the Human Rights Commission." 9 V.S.A. § 4506(a).

When such a complaint is filed with the HRC, the HRC has discretion to conduct an investigation if it believes a "prima facie case" has been asserted. 9 V.S.A. § 4554(a). After an investigation, the HRC determines whether there are "reasonable grounds" to believe a violation occurred. If not, it dismisses the case. 9 V.S.A. § 4554(d). If so, it typically attempts to negotiate an informal resolution. 9 V.S.A. § 4554(e). Failing that, it either dismisses the case or files a lawsuit against the respondent to vindicate the claimed violation. 9 V.S.A. §§ 4553(a)(6)(A), 4554(e). While the HRC can encourage a respondent to voluntarily settle a dispute during the administrative proceeding, it has no authority to make any sort of binding and enforceable determination as to any violation of the VPAA except by filing a lawsuit and litigating the matter in court. The HRC is empowered to investigate and to prosecute. It has no power to adjudicate. The respondent in an HRC proceeding has no statutory right to appeal *any* of the HRC's decisions or actions in court.

Based on the above, it would seem obvious that the HRC is acting within its statutory authority by determining to investigate the District following a complaint that, in its view, asserts a "prima facie case" of a violation of the VPAA. The District's argument to the contrary is novel and complex.

Briefly, the District argues as follows. To properly assert a violation of the VPAA by a school for its response to a student's claim of sexual harassment, the student must first exhaust the school's harassment policy adopted under 16 V.S.A. § 570. 16 V.S.A. § 570f(b). Such policies "shall be at least as stringent as model policies developed by the" Secretary of Education. In 2020, the federal Department of Education adopted regulations (largely procedural) applying to the circumstances at issue here. See 34 C.F.R. 106.30, 106.44, 106.45. Conflicting state policies are expressly preempted. 34 C.F.R. 106.6(f). The new federal procedures conflict in many ways with Vermont's procedures, which thus are preempted. The complainant in the HRC proceeding exclusively asserts violations of preempted Vermont procedures while the District, so it alleges, scrupulously complied with the new federal procedures.[1] Therefore, the District concludes, there cannot be a violation of the VPAA in this case—there was no way to comply with the Vermont procedures, a necessary predicate to a VPAA claim.

Exhaustion and primary jurisdiction

The HRC argues that this case should be dismissed because either the District has failed to exhaust available administrative remedies or the court should recognize the HRC's primary jurisdiction to determine the matters that the District has asserted here. Neither argument appears to be well suited to the circumstances.

Neither the statutes controlling the HRC nor its rules give a respondent any meaningful administrative remedy. They make an administrative process available to a complainant, and it is not a mandatory one. 9 V.S.A. § 4554(f) ("Failure to file a complaint

[1] Though unnecessary to dwell on for purposes of this decision, the District's characterization of the complaint before the HRC is unfairly narrow and self-serving. It is not at all clear that the complainant is objecting solely to mandatory, federal requirements that the District claims it complied with.

under this section shall not affect any other remedies available under any other provision of State or federal law, unless the other provision of law specifically so provides."). As far as respondents go, getting investigated and then finding out what the HRC does next is not any sort of administrative remedy as far as the exhaustion doctrine goes. To the extent that asking the HRC to voluntarily dismiss the case itself could be considered an administrative remedy, the District already tried that.

The doctrine of primary jurisdiction applies where an agency and a court both have jurisdiction to resolve an issue, a party has attempted to bring the issue to court first, and the court exercises its discretion to give the agency the first chance to decide the matter. "The doctrine of primary jurisdiction does not cover every situation in which an agency may have jurisdiction but only those cases in which an agency's initial determination is required to provide expertise and uniformity in administration." 4 Admin. L. & Prac. § 12:23 (3d ed.). There is no issue of agency expertise or uniformity of administration at issue, and the District did not choose to bring an action in court that it could have brought before the HRC. The HRC's role is to investigate and litigate when it chooses to. When it chooses to litigate, decisions made and actions taken by the HRC during the HRC proceeding are not binding on the court; they are irrelevant. Rather, the HRC must come to court to establish the violation in the first instance. The doctrine of primary jurisdiction has no clear application here.

Mandamus

The question thus turns to whether there is some cognizable basis for review under Rule 75. The District argues that mandamus is the most obvious candidate. "A court can issue a writ of mandamus . . . only under certain circumstances: (1) the petitioner must have a clear and certain right to the action sought by the request for a writ; (2) the writ must be for the enforcement of ministerial duties, but not for review of the performance of official acts that involve the exercise of the official's judgment or discretion; and (3) there must be no other adequate remedy at law." *Petition of Fairchild*, 159 Vt. 125, 130 (1992).

The District argues that the HRC is required to dismiss a complaint whenever it determines that it "does not state a prima facie case." 9 V.S.A. § 4554(b). There is no prima facie case of any violation of the VPAA here, so the argument goes, leaving the HRC with no choice but to dismiss.

The court understands the reference in the HRC statutes to a "prima facie case" to be intended to accomplish two goals. It ensures that the HRC will not *initiate* an investigation unless it first believes that some sort of VPAA violation is being asserted, and that it will cease any ongoing investigation as soon as it concludes that no violation in fact occurred. In other words, it has no roving writ to investigate without some good reason to do so.

The answer to the District's mandamus argument therefore is quite simple. The HRC genuinely believes that the allegations warrant an investigation. There is no duty to dismiss.

Otherwise, the HRC's assessment of whether a "prima facie case" has been asserted is anything but ministerial in this case. A ministerial duty for mandamus purposes is,

among other things, one that is "simple and definite." *Bargman v. Brewer*, 142 Vt. 367, 369 (1983). There is nothing simple and definite about the complex, novel legal issues presented by potential conflicts between the new federal regulations and their Vermont counterparts, and the implications of any such conflicts on whether a school's conduct ultimately violates the VPAA and can be investigated by the HRC, as well as the HRC's judgment as to whether to do so. Mandamus is ill suited to this case.

Prohibition

Whereas mandamus is available to command one to do something, the writ of prohibition is available to order one to stop doing something. The purpose of prohibition is "to prevent the unlawful assumption of jurisdiction, either of the entire subject matter or of something collateral or incidental thereto, contrary to common law or statutory provisions." *Petition of Raymo*, 121 Vt. 246, 248 (1959). It is invoked "to control the use of judicial power and assure the regularity of its exercise." *Hatley v. Lium*, 126 Vt. 385, 386 (1967). It is far from clear to the court that judicial power is at issue in the HRC proceeding. However, even if it were, prohibition would be inappropriate in this case regardless. The writ issues "only in cases of extreme necessity." *Petition of Green Mountain Post No. 1., Am. Legion, Dep't of Vt.,* 116 Vt. 256, 258 (1950).

The only asserted need for relief here is that the District would like to avoid the inconvenience of being investigated because, it argues, it has not violated the VPAA. Delighted respondents to HRC investigations surely are few and far between. In this the District is not exceptional. To the extent that the District claims that it will be left with no remedy without relief in the nature of prohibition, the court notes that the HRC has no authority to adjudicate anything, and no respondent to any HRC proceeding has any remedy for having been investigated.

The HRC clearly has statutory authority to investigate a school when it believes a VPAA violation has been asserted against it. And if it errs in its judgment or its analysis, that error can be ironed out in court if a lawsuit is filed. Any such error does not diminish the breadth of the HRC's statutory authority. This is the process that the legislature has created.

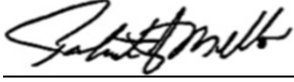
Any other review available under Rule 75

No other form of review available under Rule 75 has been asserted, and none is apparent. Because there is no statutory right to review, and no one can identify any other basis for Rule 75 review, the court concludes that no review is available in these circumstances and declines to intervene in the ongoing administrative proceeding.

Order

For the foregoing reasons, the HRC's motion to dismiss is granted.

SO ORDERED this 12th day of December, 2022.



Robert A. Mello
Superior Judge