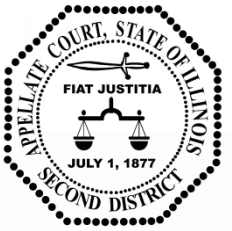

ILLINOIS APPELLATE COURT
SECOND DISTRICT

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June 29, 2021

Evan Gregg Safran Siegel
Office of the Illinois Attorney General
100 West Randolph Street, 12th Floor
Chicago, IL 60601

RE: Hobby Lobby Stores, Inc. v. Sommerville, Meggan, et al.
Appeal No.: 2-19-0362
County: Illinois Human Rights Commission
Trial Court No.: 13-0060C

The court has this day, June 29, 2021, entered the following order in the above entitled case:

On the court's own motion, this court's prior order of December 9, 2019, is hereby vacated, the respondents' motion to dismiss the amended petition for review is granted, and the amended petition for review is dismissed, for the reasons set out below.

More than five months after filing its petition for administrative review of a final order issued by the Human Rights Commission on April 10, 2019, and over a month after filing its opening brief, Hobby Lobby filed in this court an amended petition for administrative review, adding the Commission's enforcement order of September 16, 2019, to the list of orders to be reviewed. The respondents moved to dismiss the amended petition on the grounds that we lacked jurisdiction to review the September 2019 order and that any challenge to the enforcement order was moot anyway, as all relief originally granted by the Commission's April 2019 final order had been stayed and thus could not be "enforced" regardless of the enforcement order. On December 9, 2019, this court denied the respondents' motion. We now reconsider that denial.

At the same time that it filed its amended petition for administrative review, Hobby Lobby filed, before the Commission, a motion for rehearing *en banc* of the Commission's September 2019 enforcement order, pursuant to section 5300.1150 of the Illinois Administrative Code (56 Ill. Admin. Code § 5300.1150 (1996)). The motion for rehearing *en banc* raised two arguments. First, it argued that enforcement of the April 2019 final order was not appropriate, as that order was on appeal and Hobby Lobby had moved for a stay of the order. It also argued that the September 2019 enforcement order was wrongly entered because the underlying order to be enforced—the April 2019 order—should be vacated or reconsidered. In this argument, Hobby Lobby asserted that the professional background of the administrative law judge (ALJ) who heard the case suggested possible bias. It did not argue that the ALJ's handling of the case demonstrated any actual bias or identify any instances of such bias; it simply argued that the ALJ's failure to highlight his prior professional work deprived Hobby Lobby of an opportunity to seek his disqualification or substitution.

On January 24, 2020, the Commission entered an order denying the motion for rehearing. The Commission found that the motion for rehearing *en banc* was procedurally improper. Section

5300.1150 permits parties to file, "[w]ithin 30 days after service of the Commission's Order and Decision," a request for rehearing *en banc*. *Id.* However, the immediately preceding section defines an "Order and Decision" of the Commission as an order that affirms, reverses, or modifies a recommended order from an ALJ. See *id.* § 5300.1140. The Commission found that, because the Commission's September 2019 enforcement order did not "affirm, reverse, or modify" a recommended order by an ALJ, the enforcement order was not subject to rehearing *en banc* under section 5300.1150. Further, to the extent that the motion actually sought rehearing of the "Order and Decision" that was issued in April 2019, the motion was untimely. *Id.* § 5300.1150 (motions for rehearing *en banc* must be filed within 30 days); see also *id.* § 5300.1020 (permitting rehearing by the same or a different ALJ upon "written request therefor at the time of filing exceptions" to the ALJ's recommendation). The Commission also commented that there was no merit to Hobby Lobby's contention that the ALJ violated the ALJ Code of Professional Conduct by not recusing himself or specially disclosing his prior professional experience.

After the Commission denied the motion for rehearing *en banc*, Hobby Lobby supplemented the record in the case before us with the proceedings related to that motion and filed a supplemental brief that raised only the second issue raised in its motion for rehearing (the disqualification argument). However, it did not file any petition for review of the Commission's January 2020 order.

In their briefs, the respondents again assert that the amended petition for review was improper and that we lack jurisdiction to hear the arguments raised by Hobby Lobby in its supplemental brief. "We have an independent duty to determine whether we have jurisdiction, and we may reconsider our ruling on a motion to dismiss an appeal [or a portion of it] at any time before the disposition of the appeal." *Stoneridge Development Co, Inc. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 739 (2008). We thus address these arguments.

We begin by noting that the amended petition was filed without leave of court over five months after the original petition for review. In fact, Hobby Lobby had already filed its brief, in which it was required to identify and argue all of the points it wished to raise in the appeal. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). There is substantial doubt about whether such amendment would be proper without leave of court. A petition for administrative review pursuant to Illinois Supreme Court Rule 335 is analogous to a notice of appeal. See Ill. S. Ct. R. 335 (eff. July 1, 2017), Committee Comments (revised Dec. 17, 1993) ("the petition for review serves the function of the notice of appeal"). A notice of appeal may be amended without leave of court only within the same period for the filing of the original notice of appeal, that is, within 30 days of the judgment or order being appealed. Ill. S. Ct. R. 303(b)(5) (eff. July 1, 2017). After that, a notice of appeal may only be amended with leave of court upon motion. *Id.* Thus, the amended petition for review could quite likely have been stricken on that basis alone. We need not resolve this issue, however, as the amended petition was subject to dismissal on other grounds as well.

Here, the amended petition sought to enlarge the scope of our review to address the September 2019 enforcement order as well as the April 2019 Order and Decision originally appealed. It is unclear whether such enforcement orders can be appealed directly to this court at all under the Human Rights Act (Act) (775 ILCS 5/8-111 (West 2018)). Compare *id.* § 8-111(B) (West 2018) (providing for "judicial review of a final order of the Commission" by filing a petition for review in the *appellate court*) and *id.* § 8-111(C) (permitting lawsuits for enforcement of a Commission order to be brought in the *circuit court* upon a finding by the Commission that the order has been violated); see also *id.* § 8-111(D) ("no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act"). However, even if an enforcement order could be appealed directly to this court, and even if the untimely filing of

an amended petition for review were sufficient to initiate such an appeal, we would find the appeal here moot.

The Commission's September 2019 enforcement order did nothing other than authorize the Department to initiate legal proceedings to force Hobby Lobby to comply with the injunctive relief awarded in the April 2019 order. However, on October 30, 2020, this court stayed enforcement of the April 2019 order until we decided Hobby Lobby's appeal of that order. Our entry of that order blocked any enforcement efforts, rendering Hobby Lobby's attempted appeal of the enforcement order moot. "When intervening events preclude a reviewing court from granting effective relief to a complaining party, an appeal is rendered moot." *Holly v. Montes*, 231 Ill. 2d 153, 157 (2008). "The fact that a case is pending on appeal when the events which render an issue moot occur does not alter this conclusion." *Dixon v. Chicago & North Western Transportation Co.*, 151 Ill. 2d 108, 116-17 (1992). Here, appeal of the enforcement order cannot provide Hobby Lobby with any more effective relief than it already has: we have already stayed enforcement of the April 2019 order, and the correctness of that order—which was the only other basis on which Hobby Lobby sought to challenge the enforcement order—will be decided before that stay is lifted. And because of the constitutional requirement that we address only live controversies, we cannot hear moot cases. *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 291 (2005) ("The existence of a real dispute is not a mere technicality but, rather, is a prerequisite to the exercise of this court's jurisdiction.").

It is clear that Hobby Lobby's goal in filing the amended petition for review was to gain our review of the arguments raised in the motion for rehearing that it filed the same day—the only issue raised in its supplemental brief was the ALJ's professional background, and Hobby Lobby could not have raised that argument at all under the original petition for review, as the argument would have been deemed forfeited. However, Hobby Lobby still cannot achieve this goal, as it

did not seek review of the January 2020 order denying the motion for rehearing. Thus, we have no jurisdiction to consider the arguments raised by Hobby Lobby in that motion. 775 ILCS 5/8-111(B), (D) ("judicial review of a final order of the Commission" may only be had by filing a petition for review with the appellate court); *Moren v. Illinois Department of Human Rights*, 338 Ill. App. 3d 906, 908 (2003) (the filing of a petition for review of an order within the 35-day statutory time limit "is jurisdictional and a complaint must be dismissed for lack subject matter jurisdiction if a petition for review is not *** filed" within that time).

Hobby Lobby argues that we should permit its amended petition for review of the September 2019 to substitute for a timely petition for review of the Commission's January 2020 order, arguing that its motion for rehearing is analogous to a "postjudgment motion." Under Illinois Supreme Court Rule 303(a)(2) (eff. July 1, 2017), when a notice of appeal is filed before the resolution of a "timely postjudgment motion" (and thus is technically premature), the notice of appeal will become effective upon the denial of the postjudgment motion and the appellant need not file a new notice of appeal. Hobby Lobby argues that, in the same way, it did not need to file a new petition for review after the Commission denied its motion for rehearing *en banc* in January 2020. Hobby Lobby's analogy lacks merit, however, because its motion for rehearing *en banc* was not a proper motion, for the reasons noted by the Commission in its January 2020 order: nothing in the Illinois Administrative Code permitted the filing of such a motion. On appeal, Hobby Lobby does not argue that this conclusion was erroneous. Thus, it is undisputed that Hobby Lobby's

"motion for rehearing" was a legal nullity, not a valid "postjudgment motion."[1] Accordingly, the amended petition for review did not preserve Hobby Lobby's ability to appeal the Commission's denial of the motion for rehearing, and the arguments raised in that motion for rehearing are not properly before us.

Before concluding we briefly note that, even if this court had jurisdiction to consider the arguments Hobby Lobby raised in its motion for rehearing, we would find that they lack merit. Hobby Lobby argued that the ALJ should have disqualified himself from hearing this case because his "impartiality might reasonably be questioned" on the basis that, in the past when he was in private practice, he had advocated "eliminating sexual orientation-based discrimination." Such advocacy is hardly suspect, given that the elimination of discrimination based on sexual orientation is the public policy of this State, as reflected in the Act itself. See 775 ILCS 5/1-103(Q) (2018) ("unlawful discrimination" includes "discrimination against a person because of his or her *** sexual orientation"). Hobby Lobby's argument is akin to the argument that judges should disqualify themselves from hearing criminal cases if they formerly served as prosecutors, seeking to uphold the criminal laws of this State. Moreover, there is a presumption that ALJs are fair and unbiased, regardless of their prior professional experience. *Abrahamson v. Department of*

[1] In its reply brief, Hobby Lobby argues that, under Rule 303(a)(2), it could not wait to file a petition seeking review of the Commission's September 2019 until after the Commission ruled on its motion for rehearing. This is either an implicit admission that the motion for rehearing was not in fact a valid "postjudgment motion" (as that term is used in the rule), or a misreading of the rule. Under section (a)(1) of the rule, "if a timely postjudgment motion directed against the judgment is filed," an appellant has "30 days after the entry of an order disposing of [that] postjudgment motion" in which a notice of appeal may be filed. Ill. S. Ct. R. 303(a)(1) (eff. Jul. 1, 2017).

Professional Regulation, 153 Ill. 2d 76, 95 (1992) (state administrators such as ALJs are assumed to be persons "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances"). Hobby Lobby has offered no evidence whatsoever that would overcome this presumption here.

For all of these reasons, we hereby vacate our prior order of December 9, 2019, grant the respondents' motion to dismiss, and dismiss the amended petition for review. Thus, our future consideration of this case will not encompass the issue of whether the September 2019 order was correctly entered or the arguments raised by Hobby Lobby in connection with its motion for rehearing *en banc* of that order. Nothing in this order is to be construed as determining any other issue raised in this appeal.

Appellate court order of December 9, 2019, vacated. Motion to dismiss amended petition for review granted upon reconsideration; amended petition for review dismissed.

Jeffrey H. Kaplan
Clerk of the Court

cc: Ameri Rose Klafeta
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Carolyn Marguerite Wald
Diana Katherine Flynn
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