COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
ERIC GRZYCH & JOSEPH E.
COLLINS, ESQ., TRUSTEE
FOR IN RE: ERIC GRZYCH,
Complainants

v. DOCKET NO. 08-SEM-00144

AMERICAN RECLAMATION CORP.
& VINCENT IULIANO,
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following an Order by the Superior Court that the Commission allow the presentation of additional evidence, issued after Respondents American Reclamation Corp. ("American Reclamation") and Vincent Iuliano ("Iuliano") (collectively referred to herein as "Respondents"), successfully moved for leave to present to the MCAD additional evidence of Complainant Eric Grzych's ("Grzych") bankruptcy filing. In accordance with the Superior Court Order, and after consideration of the parties' briefs on the effect of the bankruptcy on the MCAD proceedings, the Commission issued the Order of the Hearing Officer on Remand From the Superior Court, dated March 13, 2017 ("2017 Order"). This Decision of the Full Commission addresses Respondents' arguments on appeal of the 2017 Order. We begin with a review of the procedural background.

SUMMARY OF PROCEDURAL FACTS

A. MCAD Proceedings to Public Hearing

On January 24, 2008, Grzych filed a Complaint with the MCAD charging his former employer, American Reclamation, and its president, Iuliano, with discrimination on the basis of race, color, disability and retaliatory termination. On April 14, 2009, the Investigating Commissioner issued a split investigative disposition, finding probable cause to credit the claims of race/color discrimination and retaliatory termination against Respondents and lack of probable cause to credit the disability discrimination claim. On December 31, 2009, the race/color discrimination and retaliatory termination claims were certified to public hearing. On June 23, 2010, Hearing Officer Judith E. Kaplan held a public hearing at which Iuliano represented himself and American Reclamation. The Hearing Officer heard the testimony of Grzych and two corroborating witnesses, but Iuliano himself did not elect to testify. On December 22, 2010, the Commission issued a decision (hereinafter referred to as the "2010 Hearing Officer Decision") finding Respondents liable for unlawful discrimination based on race and color in violation of M.G.L. c. 151B, § 4(1).[1]

The Hearing Officer credited Grzych's testimony that during his employment at American Reclamation, Iuliano subjected Grzych to a barrage of racist epithets and offensive comments in the workplace pertaining to Grzych's black, Jamaican fiancé, with whom he resided and had a child. She also credited the testimony of American Reclamation's former Operations Manager that it was common knowledge at the workplace that Grzych was engaged to a black, Jamaican woman, that he heard Iuliano

[1] Grzych's claim of retaliatory termination was dismissed.

call Grzych a "n***r lover", "porch monkey lover" and told Grzych he was dating a "fat n***r." He also testified that Iuliano made these comments two to three times a week and that Grzych verbally protested. In addition, a Heavy Equipment Operator employed by American Reclamation testified that he heard Iuliano called Grzych a "n***r lover", "fat", "lazy" and "porch monkey lover", and that Grzych verbally protested. Both witnesses corroborated that Iuliano made other racist remarks such as "spook" and "dumb n***r" when referencing African American employees and vendors. Grzych testified that in addition to these egregiously racist terms, Iuliano called him "pork chop", "piglet" and "fat black n***r." Iuliano, who was present throughout the public hearing, did not dispute that the incidents occurred but attempted to demonstrate that he treated Grzych kindly by lending him money. The 2010 Hearing Officer Decision found Respondents liable for subjecting Grzych to a racially hostile work environment based on his relationship with his fiancé.

The Hearing Officer credited Grzych's testimony that he dreaded going to work in the morning, lost sleep, and was often unable to finish his lunch because of Iuliano's remarks. Grzych testified credibly that he suffered from elevated blood pressure and gained thirty-five (35) pounds during his employment due to the stress created by Iuliano's abusive conduct. The Hearing Officer observed that Grzych teared up as he testified about the pain of having to listen to racist references to his fiancé. Based on this testimony, the Hearing Officer awarded Fifty Thousand Dollars ($50,000) in emotional distress damages and Ten Thousand Dollars ($10,000) in a civil penalty due to the egregious nature of the offenses.

B. Grzych's Bankruptcy

On or about November 19, 2009, prior to the MCAD's certification of this matter, Grzych filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court, District of Massachusetts (Docket No. 09-320760). Grzych did not notify the Commission of the bankruptcy filing and did not report to the bankruptcy court that he had a claim pending against the Respondents at the MCAD. On February 26, 2010, after the case was tried before the Hearing Officer and before she issued her decision, Complainant's debts were discharged in bankruptcy. The bankruptcy case was closed on March 2, 2010.

C. Respondents' Appeal to the Full Commission

On March 29, 2011, Respondents filed a Petition for Review pursuant to 804 Code Mass. Regs. § 1.23(1)(a). Respondents argued that M.G.L. c. 151B, § 4(1) does not encompass associational race discrimination and that there was no direct evidence to support the Hearing Officer's finding that Grzych's fiancé was black and Jamaican.[2] In his opposition, Grzych argued that M.G.L. c. 151B, § 4(1) covers associational race discrimination and that it was proper for the Hearing Officer to rely on the testimony provided at hearing regarding the race and national origin of Grzych's fiancé.

On January 30, 2015, the Full Commission issued a decision ("2015 Full Commission Decision") affirming the 2010 Hearing Officer Decision, noting long-standing MCAD precedent that M.G.L. c. 151B, § 4(1) prohibited associational race discrimination, and a recent SJC decision holding that associational disability discrimination was prohibited by M.G.L. c. 151B. Flagg v. Alimed, Inc., 466 Mass. 23

[2] No argument was made before the Full Commission regarding Grzych's bankruptcy.

(2013). The 2015 Full Commission Decision also concluded that the testimony of Grzych and corroborating witnesses was substantial evidence sufficient to support the conclusion that Grzych's fiancé was black and Jamaican. The 2015 Full Commission Decision ordered Respondents to pay Grzych's attorneys' fees in the amount of $8,550.

D. Superior Court Proceedings

The parties then filed separate superior court actions. On or about February 13, 2015, Grzych filed a contract action against Respondents seeking to collect the victim-specific relief ordered by the Commission (Grzych v. American Reclamation Corp. & Iuliano, Worcester Superior Court, Docket No. 15-0205-A). On or about February 27, 2015, Respondents filed a 30A action (American Reclamation Corp. and Iuliano v. Massachusetts Commission Against Discrimination & Grzych, Worcester Superior Court, Docket No. 15-0283-C) seeking review of the 2015 Full Commission Decision pursuant to M.G.L. c. 30A, § 14(7). The complaint sought judicial review, but made no reference to Grzych's bankruptcy case. On September 30, 2015, pursuant to Superior Court Standing Order 1-96, the Commission filed the administrative record. Respondents then filed Plaintiffs' motion for leave to present additional evidence pursuant to M.G.L. c. 30A, § 14(6), which sought an order requiring the MCAD to allow Respondents to "present evidence of Mr. Grzych's bankruptcy, and his fraud in concealing his assets and a debt to American (Reclamation) in the bankruptcy proceeding . . . " The motion stated that in May 2015, Respondents' counsel discovered that Grzych had filed for bankruptcy and that on May 11, 2015, the trustee in the bankruptcy case filed a motion to reopen the bankruptcy, which was granted by the bankruptcy court on May 29, 2015. The Commission and Grzych separately opposed the motion, arguing that Respondents had

failed to meet the legal standard under M.G.L. c. 30A, § 14(6), because they had not shown that there was good reason for Respondents' failure to present the evidence of Grzych's bankruptcy during the MCAD proceedings. On March 3, 2016, after colloquy with Grzych, the Superior Court amended the case caption to substitute the bankruptcy trustee for Grzych. By endorsement order dated November 23, 2015, the Court allowed the Respondent's motion for leave to present additional evidence. The MCAD then filed a motion for clarification and reconsideration and asked whether the Court was remanding the case to the Full Commission to determine whether additional evidence should be presented, remanding to the hearing officer for a new public hearing or staying the action for judicial review. On March 3, 2016, the Court issued an order staying the matter "pending the presentation of additional evidence before the MCAD."

E. The Commission's 2017 Order

Pursuant to the Superior Court order, the parties briefed the issues to Hearing Officer Kaplan. Respondents argued that the case should be dismissed on the basis of judicial estoppel, and in the alternative, that the Commission should conduct a new public hearing and conciliation conference to remedy the invalid prior public hearing and the substantial prejudice to Respondents. The trustee argued that the 2010 Hearing Officer Decision and the 2015 Full Commission should not be estopped because actions brought pursuant to M.G.L. c. 151B, § 5 are designed to vindicate the public interest and award victim-specific remedies. The trustee further argued that the trustee was not judicially estopped, and the corroborating testimony upon which the fact-finder relied supported the conclusion that Grzych was subjected to a racially hostile work environment and suffered emotional distress damages.

On March 13, 2017, the Hearing Officer issued an Order of the Hearing Officer on Remand from the Superior Court ("the 2017 Order") concluding that Grzych's failure to inform the bankruptcy court of the MCAD action did not judicially estop the Commission's administrative proceedings and that a new hearing was not required in this matter. In her 2017 Order, the Hearing Officer took note of all relevant additional facts: On November 18, 2009, Grzych filed a Chapter 7 Bankruptcy Petition in the U.S. Bankruptcy Court, District of Massachusetts (Springfield), Docket No. 09-32060. Grzych did not inform the Commission of the bankruptcy and he did not inform the bankruptcy court of the MCAD proceeding.

After consideration of these additional facts related to Grzych's bankruptcy, the Hearing Officer declined to reopen the hearing or to alter the findings of fact with respect to liability or damages. The Hearing Officer concluded that the MCAD was not judicially estopped from proceeding with its prosecution of this matter to remedy employment discrimination in the public interest. She rejected as speculative Respondents' argument that had Iuliano been aware of the bankruptcy, he might have hired counsel and settled the matter. This conclusion was based on Iuliano's decisions not to participate in mandatory conciliation or testify at the hearing, despite the opportunity to do so. She remained persuaded, based on the corroborating testimony, that the racially hostile conduct did occur and that her credibility findings should not be altered by Grzych's failure to disclose his bankruptcy to the Commission and the MCAD proceedings to the bankruptcy court. Based on her observation of the witnesses and review of the facts, she did not find Grzych's testimony regarding emotional distress suspect because of his failure to be forthcoming about the bankruptcy proceeding.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 Code Mass. Regs. § 1.00 *et seq.*), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "....such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A. The role of the Full Commission is to determine whether the decision under appeal was based on an error of law, or whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. 804 Code Mass. Regs. § 1.23.

BASIS OF THE APPEAL

Respondents appeal the 2017 Order arguing that: (1) M.G.L. c. 151B, § 4(1) does not prohibit associational racial discrimination; (2) Grzych failed to establish that he was in a protected class; (3) the hearing was invalid because Grzych did not have standing or authority to proceed with this matter; (4) the MCAD should be prevented from pursuing this claim based on judicial estoppel and equitable considerations; (5) Grzych was judicially estopped from pursuing this claim due to his fraud on the bankruptcy court; and (6) Grzych's fraud has substantially prejudiced Respondents. We have carefully reviewed Respondents' grounds for appeal and the record in this matter and have weighed all the objections to the 2017 Order in accordance with the standard of review herein. We properly defer to the Hearing Officer's findings of fact that are supported by substantial evidence in the record. Quinn v. Response Electric Services, Inc., 27 Mass.

Discrimination L. Rep. 42 (2005). Substantial evidence is such evidence that a "reasonable mind" would accept as adequate to form a conclusion. M.G.L. c. 30A, § 1(6); Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 509 (1988). The standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984). We find that the 2017 Order is supported by the substantial evidence, and does not contain any material errors of law or constitute an abuse of discretion.

I. The issues of whether M.G.L. c. 151B prohibits associational race discrimination and whether the substantial evidence in the record supports the conclusion that Grzych's fiancé is black are not properly before the Full Commission

We reject on procedural grounds Respondents' first two bases for appeal: (a) whether associational race discrimination is covered by M.G.L. c. 151B and (b) whether the substantial evidence in the record supports the conclusion that Grzych's fiancé is black. These two arguments are identical to those fully briefed and addressed by the 2015 Full Commission Decision, which remains pending before the Superior Court pursuant to M.G.L. c. 30A, § 14(7).[3] This appeal, however, results from the Superior Court's order to allow the presentation of additional evidence relating to Grzych's bankruptcy leading to the 2017 Order and does not require reconsideration of the issues that Respondents have previously briefed, the Full Commission decided in 2015, and are before the Superior Court pursuant to M.G.L. c. 30A, § 14(7). Commercial Wharf East

[3] Where a motion for leave to present additional evidence is allowed, as it was here, all further proceedings shall be stayed until the administrative agency has complied with the provisions of M.G.L. c. 30A, § 14(6). Superior Court Standing Order 1-96: Processing and hearing of complaints for judicial review of administrative agency proceedings, January 1, 2017.

Condominium Ass'n v. Dep't of Envtl. Protection, 93 Mass. App. Ct. 425, 432 (2018), rev. denied 480 Mass. 1104 (2018). The vehicle through which this matter is before us, M.G.L. c. 30A, § 14(6), is not "an alternative means of obtaining review of an agency ruling or decision. Rather, it is a mechanism for supplementing the original agency record, in narrow circumstances, before the court completes its review of the agency's decision under § 14(7)." Id. at 432. The 2017 Order supplemented the original agency record by taking note of those facts pertaining to Grzych's bankruptcy, as the Superior Court ordered, and evaluating whether these facts should alter the 2010 Hearing Officer Decision. After careful analysis, the Hearing Officer issued the 2017 Order, concluding that the facts pertaining to Grzych's bankruptcy did not alter the conclusions made in the 2010 Hearing Officer Decision. It is the 2017 Order that is properly before the Commission and as such, we decline to address objections which remain properly before the Superior Court pursuant to M.G.L. c. 30A, § 14(7).

II. The Hearing Officer did not abuse her discretion when she concluded that the 2010 Hearing Officer Decision should not be invalidated or estopped due to Grzych's failure to disclose the MCAD proceeding to the bankruptcy court and the bankruptcy proceeding to the MCAD

Respondents argue that Grzych, the trustee in bankruptcy and the MCAD are judicially estopped from pursuing claims brought pursuant to M.G.L. c. 151B. In addition, Respondents argue that Grzych lacked standing and authority to proceed through the MCAD public hearing. Based on these arguments, Respondents ask that the Commission vacate the final decision and order a new hearing, remand the matter and require a conciliation conference, and/or reverse the 2010 Hearing Officer Decision and dismiss the complaint. We decline to reverse, remand or vacate for the reasons set forth below.

A. Judicial estoppel is an equitable and discretionary doctrine, which is disturbed on appeal only when there has been an abuse of discretion

Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it previously asserted in another. Murphy v. Wachovia Bank of Delaware, 88 Mass. App. Ct. 9, 16 (2015). Because it is an equitable doctrine, no rigid framework governs a court's application of judicial estoppel. New Hampshire v. Maine, 532 U.S. 742, 750 (2001). Whether the doctrine should be applied to particular facts is committed to the discretion of the fact-finder who weighs the equities and determines whether application of judicial estoppel would serve an equitable purpose. Murphy v. Wachovia Bank of Delaware, 88 Mass. App. at 16. When the court, or in this case, the Hearing Officer, determines the propriety of applying judicial estoppel in a particular case, the appellate standard of review is abuse of discretion. Id. Unless the reviewing body concludes that the judge made a "clear error of judgment in weighing the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives," the reviewing body should defer to the fact-finder. Id. at 16, citing L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

B. The Hearing Officer did not abuse her discretion when she concluded that the MCAD is not judicially estopped by Grzych's failure to disclose the MCAD proceeding to the bankruptcy court and the bankruptcy proceeding to the MCAD

As the Hearing Officer noted, a public MCAD enforcement action pursuant to M.G.L. c. 151B, § 5 is not a private right of action but a "state-centric" proceeding "aimed at sanctioning the [responding parties] for wrongful conduct." Sirva Relocation v. Richie, 794 F.3d 185, 194 (1st Cir. 2015). This case was filed pursuant to G.L. c. 151B, § 5 and, consistent with M.G.L. c. 151B and MCAD regulations, proceeded at

public hearing in the MCAD's own name seeking to rectify violations of G.L. c. 151B in the public interest. Joulé v. Simmons, 459 Mass. 88, 93 (2011); 804 Code Mass. Regs. § 1.20(3). The primary purpose of the relief sought in such a hearing is to "vindicate the public interest in reducing discrimination in the workplace, by deterring and punishing instances of discrimination by employers against employees." Stonehill College v. Massachusetts Commission Against Discrimination, 441 Mass. 549, 562-63 (2004), cert. denied sub nom Wilfert Bros. Realty Co. v. Massachusetts Comm'n Against Discrimination, 543 U.S. 979 (2004) (hereinafter referred to as Stonehill). Due to the prosecutorial and public interest nature of a Section 5 proceeding, the charging party's actions do not restrict or deter the Commission from proceeding with public hearing and holding employers responsible for violations of M.G.L. c. 151B. Joulé v. Simmons, 459 Mass. 88, 94-96 (2011). Even if in other types of lawsuits, the actions of the charging party would prevent him/her from proceeding with a private lawsuit, such action would not prevent a proceeding brought pursuant to G.L. c. 151B, § 5 from going forward. Id.

In Joulé v. Simmons, the Court concluded that even if the Complainant entered into a valid and binding agreement requiring her to resolve her dispute through an arbitrator, that agreement would not prevent the Commission from proceeding to public hearing and awarding victim-specific relief. Id. at 96, citing 804 Code Mass. Regs. § 1.13(4) (1999) ("[n]o waiver agreement signed by any individual shall affect the Commission's right and statutory duty to enforce M.G.L. c. 151B . . . or to investigate any complaint filed before it."). Similarly, the United States Supreme Court has held that the Equal Employment Opportunity Commission ("EEOC"), which seeks to recover victim-specific relief to vindicate the public interest, is not barred from pursuing a matter

where the victim of discrimination has signed an agreement to arbitrate. Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279 (2002) (EEOC is master of its own case, conferring on it the authority to evaluate the strength of the public interest at stake and to determine whether public resources should be committed to the recovery of victim-specific relief). Just as the charging party's agreement to arbitrate does not affect the Commission's ability to proceed to public hearing and award damages, Grzych's failure to disclose a claim to the bankruptcy court does not constrain the Commission from proceeding to public hearing, or from issuing a decision after public hearing and awarding victim-specific relief.

The Hearing Officer correctly concluded that the Commission's primary law enforcement role permits it to proceed in the public interest even where a private party might be otherwise affected by a bankruptcy. Given the MCAD's broad remedial enforcement powers and a legislative scheme which provides hearings that are the "means to protect the public interest in preventing employment discrimination," the automatic stay in bankruptcy does not prevent the MCAD from proceeding against respondents who have filed for bankruptcy because the Commission constitutes a "governmental unit enforcing police and regulatory powers" within the meaning of 11 U.S.C. § 362(b)(4) of the Bankruptcy Code. In re Mohawk Greenfield Motel Corp., 239 B.R. 1, 6 (Bankr. D. Mass. 1999).

Similarly, the Hearing Officer properly acknowledged that due to the public and remedial nature of EEOC proceedings, the EEOC is not judicially estopped from pursuing a prosecution where the charging party has declared bankruptcy and failed to notify the bankruptcy court of pending discrimination claims. In Equal Employment

Opportunity Comm'n v. Celadon Trucking Serv., Inc., 2015 WL 3961180 (S.D. Indiana 2015), the court considered claimants' failure to disclose their discrimination claims in their personal bankruptcy proceedings, and held that judicial estoppel does not apply to the EEOC. In fulfilling its enforcement role, the court held, the EEOC does not merely stand in the shoes of individual claimants but acts as a law enforcement agency. The court further held that given the EEOC's primary law enforcement role, "it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation . . ." Id., citing In re Bemis, 279 F.3d 419, 421-422 (7th Cir. 2002).

In Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012), the Eighth Circuit declined to judicially estop the EEOC from seeking victim-specific relief in a case where the claimants failed to disclose their discrimination claims in their personal bankruptcy proceedings. Id. While the court held that the individual claimants were judicially estopped because they took inconsistent positions in prior proceedings, the EEOC was not estopped. Judicial estoppel has no application to the EEOC, the court reasoned, because the agency never asserted an inconsistent position in a prior proceeding. The court recognized that it "cannot judicially estop the EEOC from suing to remedy employment discrimination simply because the defendant-employer happened to discriminate against an employee who, herself, was properly judicially estopped." Id. at 682. Moreover, relying on Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279 (2002), the Eighth Circuit held that the EEOC was authorized to seek victim-specific relief for the claimants even though they were individually estopped, because the claimants'

actions did not materially change the EEOC's statutory function or remedies available. In Waffle House, the Supreme Court considered whether an arbitration agreement between employer and employee bars the EEOC from pursuing victim-specific relief, such as backpay, reinstatement, and damages.[4] The Supreme Court concluded that an arbitration agreement between the employer and employee did not preclude the EEOC from obtaining victim-specific relief. Using the reasoning adopted in Waffle House, the Eighth Circuit held that the EEOC sued in its own name to correct any discriminatory employment practices that the employer perpetrated against the claimants and was authorized to seek victim-specific relief even where the claimants themselves were estopped. Id. at 681-682. Other courts have similarly concluded that the EEOC may pursue victim-specific remedies even where the claimants are judicially estopped based on inconsistent positions in bankruptcy court.[5]

These cases apply with equal force to the Massachusetts Commission Against Discrimination which, like the EEOC, proceeds in its own name, has broad remedial authority, and serves to vindicate the public interest in reducing discrimination in the workplace by deterring and punishing instances of

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[4] The lower court in Waffle House had held that the EEOC was limited to seeking general injunctive relief and could not also seek victim-specific relief on behalf of a victim who himself was subject to a binding arbitration agreement.

[5] Equal Employment Opportunity Comm'n v. New Breed Logistics, 962 F. Supp. 2d 1001 (W.D. Tenn. 2013) (declining to apply judicial estoppel because the EEOC, even when it pursues entirely victim-specific relief for a victim who him or herself is estopped, does so to vindicate the public interest in enforcement of anti-workplace discrimination statutes); Equal Employment Opportunity Comm'n v. JP Morgan Chase Bank, 928 F. Supp. 2d 950 (S.D. Ohio 2013) (no estoppel even if end result is that victim obtains a monetary benefit she might not have otherwise been able to pursue, much less obtain, as a result of her conduct in bankruptcy proceedings).

discrimination against employees. Stonehill, supra, at 562-563; 804 Code Mass. Regs. § 1.20(3). Respondents urge us to find that these EEOC cases are inapplicable because the EEOC does not provide a forum for hearing, while the MCAD does. The SJC explicitly rejected this argument in Joulé v. Simmons, supra at 96, n. 10 ("[i]t is beside the point that the prosecution takes place not before a judge in a court but in the administrative forum in the first instance.") Just as the EEOC is not judicially estopped by an employee's inconsistent statements in bankruptcy, the Commission is not judicially estopped by a victim's acts and retains the authority, consistent with its mission, to award victim-specific relief.

III. The Hearing Officer did not err when she confirmed that the victim-specific remedies would stand despite Grzych's bankruptcy.

We reject Respondents' argument that the victim-specific remedy awarded offers Grzych a "windfall" because the remedy awarded in the 2010 Hearing Officer Decision is greater than the $25,960.99 total pending claims in the bankruptcy case. The Hearing Officer declined to reopen the hearing to alter the victim-specific remedies awarded based on her conclusion that Grzych's failure to be forthcoming about the bankruptcy proceeding did not undermine his credible testimony that he suffered emotional distress as a direct result of the egregious racially hostile work environment. We defer to the Hearing Officer's supplemental credibility finding and conclusion, as she had the opportunity to observe the witnesses and draw reasonable inferences from the facts found in the public hearing leading to the 2010 Hearing Officer Decision. Smith College v. Massachusetts Comm'n Against Discrimination, 376 Mass. 221 (1978) (it is appropriate to defer to the fact-finder's role, including his/her right to draw reasonable inferences

from the facts found). This conclusion is supported by substantial evidence in the record and is not based on an error of law. Ramsdell v. Wester Mass. Bus Lines, Inc., 415 Mass. 673 (1993). In addition, Respondents' argument that the equities require a set-off to prevent a "windfall" recovery is not supported by the case law. Respondents have cited no case supporting the contention that judicial estoppel must be applied to prevent a windfall recovery for the charging party, in this case a victim of egregious discrimination and harassment. On the contrary, the courts have declined to apply judicial estoppel because it would create a potential windfall for the defendant. See Christie v. Harbor Towers Condo Trust I and II, 85 Mass. App. Ct. 1101 (2014) (unpublished opinion) (declining to hold judicially estop the plaintiff because it would create a potential windfall for defendants); see also Graupner v. Town of Brookfield, 450 F. Supp. 2d 119, 129 (D. Mass. 2006) (dismissal of pre-bankruptcy petition claims "would create a potential windfall for defendants, who (if they have engaged in wrongful conduct) may thereby avoid liability altogether.") The victim-specific relief awarded by the MCAD was designed to deter discriminatory practices, consistent with the Commission's mandate, and to reduce the remedies awarded based on Grzych's bankruptcy, would undermine the public-minded nature of these awards and the detailed enforcement scheme inherent in M.G.L. c. 151B.[6]

[6] Similarly, the trustee in bankruptcy is not judicially estopped based on Grzych's failure to disclose this claim in his personal bankruptcy. Murphy v. Wachovia Bank of Delaware, 88 Mass. App. Ct. 9, 16 (2015). The trustee has been added as a party, and is not restricted by Grzych's actions. Graupner v. Town of Brookfield, 450 F. Supp. 2d 119 (D. Mass. 2006) (permitting the victim of a civil rights violation to move for the appointment of a trustee rather than dismiss the claim on the grounds that the victim was judicially estopped based on his bankruptcy). Moreover, judicial estoppel does not apply to an innocent bankruptcy trustee where doing so allows tortfeasors to escape responsibility and

IV. Grzych's waiver of his right to bring this action in Superior Court does not invalidate the MCAD proceeding.

Respondents argue that Grzych did not have the authority to sign the written waiver of state action, waiving the right to bring suit pursuant to M.G.L. c. 151B, § 9 in superior court, because he signed the waiver at a time when the trustee in bankruptcy possessed the claim. Even if Grzych did not possess the claim at the time he signed the written waiver, M.G.L. c. 151B and Massachusetts mandate that once a party proceeds through a full adjudicatory hearing at the MCAD, the party may not file suit pursuant to M.G.L. c. 151B, § 9. Brunson v. Wall, 405 Mass. 446, 453 (1989) (since the plaintiff chose to pursue the administrative remedy before the Commission, she cannot invoke the alternative remedy afforded by § 9). Under M.G.L. c. 151B, a discrimination victim has "the threshold opportunity to choose" whether to seek redress through the MCAD, pursuant to M.G.L. c. 151B, § 5, or through a private right of action in court pursuant to M.G.L. c. 151B, § 9. Stonehill v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 565 (2004). Once a Section 5 action is selected, as it was here, the alternative avenue of redress pursuant to Section 9, is no longer available. Brunson v. Wall, supra. Therefore, regardless of the validity of Grzych's waiver, any Section 9 proceeding has been waived and the only avenue of redress is pursuant to M.G.L. c. 151B, sec. 6 and M.G.L. c. 30A.

In addition, the trustee in bankruptcy, who is a party in this matter, has never argued that the bankrupt estate was prejudiced by the decision to pursue this

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thwart one of the core goals of the bankruptcy system – obtaining a maximum and equitable distribution for creditors – by unnecessarily vaporizing the assets belonging to the creditors. Alward v. Johnston, 199 A.3d 1190 (N.H. 2018).

case pursuant to M.G.L. c. 151B, § 5. The trustee has not objected, or taken any action reflecting an objection, to pursuing this action pursuant to Section 5. The Respondents have no right to determine whether to proceed pursuant to Section 5 or Section 9. Stonehill, supra, at 565-661. Thus, even if Grzych lacked the authority to waive the right to bring this action pursuant to Section 9, it in no way prejudiced the substantial rights of the Respondents, who never possessed the right to determine whether to proceed pursuant to Section 5 or Section 9. Their dissatisfaction with the choice to proceed at the MCAD, and the trustee's subsequent acceptance of this choice, has no effect on this action.

V. The Commission properly notified Respondents of their obligation to submit testimony and introduce evidence and Iuliano is solely responsible for the decision to proceed without counsel

Respondents opted to proceed *pro se* throughout the investigation and at the public hearing. They now argue that had they known that Grzych had filed bankruptcy, or had the Hearing Officer more comprehensively described the administrative process on the record, they would have hired counsel and obtained a better result. The Hearing Officer properly rejected these claims in her 2017 Order, concluding that the argument that Respondents would have hired counsel and settled the matter is speculative and unpersuasive given that Iuliano failed to participate in the MCAD's mandatory conciliation, attend the conciliation conference, testify at the public hearing or even give testimony disputing the allegation that he racially harassed Grzych. Based on his lack of participation in the process, there is no reason to believe that Iuliano would have hired counsel had he known of Grzych's bankruptcy.

As for the argument that the Hearing Officer should have explained to Iuliano that he should testify in his own defense, *pro se* status does not relieve a party of the obligation to meet the procedural requirements established by law. Lattimore v. Polaroid Corp., 99 F.3d 456, 464 (1st Cir. 1996). Respondents received a Notice of Hearing dated May 17, 2010 which stated that a hearing would be held and that "[t]he parties, and their witnesses, shall appear at said hearing and submit testimony, introduce evidence and cross examine witnesses." Respondents were on notice of their obligation to submit testimony and introduce evidence, did not do so, and may not now evade the consequences of their decision to proceed without legal representation.

ORDER

For the reasons set forth above, we hereby affirm the Order of the Hearing Officer on Remand from the Superior Court dated March 13, 2017.

SO ORDERED this 2nd day of May, 2019

Sunila Thomas George
Commissioner

Sheila A. Hubbard
Commissioner

Monserrate Quiñones
Commissioner