COMMONWEALTH OF MASSACHUSETS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
ERIC GRZYCH &
JOSEPH E. COLLINS, ESQ.,
TRUSTEE FOR IN RE: ERIC GRZYCH[1],
Complainants

V.

AMERICAN RECLAMATION CORP.
& VINCENT IULIANO,
Respondents

DOCKET NO. 08-SEM-00144

ORDER OF THE HEARING OFFICER ON
REMAND FROM THE SUPERIOR COURT

On January 24, 2008, Complainant Eric Grzych filed a complaint with this Commission charging American Reclamation Corporation and its president Vincent Iuliano with discrimination on the basis of race and color, disability and retaliatory termination. The Investigating Commissioner found probable cause to credit the claims of race/color discrimination and retaliatory termination and these claims were certified to public hearing.

On or about November 19, 2009, just prior to his MCAD claims being certified to public hearing, Complainant filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court, District of Massachusetts. (Docket No. 09-32060) Complainant did not notify the Commission of his bankruptcy filing and did not report to the bankruptcy court that he had a

[1] Josephine E. Collins, Esq. has been added as a party-Complainant in this matter as the Trustee in Bankruptcy for Complainant's bankruptcy estate, which has been re-opened.

contingent claim pending against Respondents at the MCAD.[2] Complainant's debts were discharged in bankruptcy on February 26, 2010 and the bankruptcy case was closed on March 2, 2010.

On June 23, 2010, a public hearing was held before me and on December 22, 2010, I rendered a decision finding Respondents liable for discrimination based on racial harassment in violation of M.G.L. c. 151B §4(1). Complainant's claim of retaliatory termination was dismissed. Respondent Vincent Iuliano was found to have interfered with Complainant's right to be free of discrimination in the workplace, in violation of M.G.L. c. 151B §4(4A), for having subjected Complainant to a barrage of racist epithets and offensive comments in the workplace because Complainant's girlfriend is black.[3] Two former co-workers of Complainant corroborated his testimony that Iuliano made these racist comments. Complainant was awarded $50,000 in damages for emotional distress he suffered as a result of being subjected to a racially hostile work environment. Respondents were also ordered to pay $10,000 in civil penalties to the Commonwealth because of the egregious nature of the offenses.

On January 30, 2015, the Full Commission affirmed the Hearing decision and awarded Complainant attorney's fees.[4] Respondents filed a timely appeal for judicial review pursuant to G.L. c. 30A in the Worcester Superior Court. (Docket No. WOCV 2015-0283-C)

In May 2015, counsel for Respondents discovered that Complainant had filed for bankruptcy while the Superior Court 30A appeal of the MCAD decision was pending. Respondents' counsel notified the trustee in Complainant's bankruptcy case about the MCAD

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[2] While there may be a suggestion that his failure to do so was to mislead or perpetrate a fraud on his creditors, that does not affect his MCAD claims as later discussed, and any award of portion thereof in this matter may ultimately enure to the benefit of his creditors.

[3] Iuliano called Complainant a "porch monkey," "nigger lover," "fat nigger," "pork chop," "piglet" and "fat black nigger." Iuliano also referred to African American workers as "niggers" "lazy niggers" and Hispanic workers as "lazy spics" and called an African American employee a "lazy mulignan," an unflattering euphemism for blacks, in Italian.

[4] This Order does not address the issue of Attorney's Fees.

proceedings and the award of damages to Complainant and the bankruptcy court re-opened Complainant's bankruptcy case on or about May 29, 2015.

On March 3, 2016, the Superior Court (Yessayan, J.) granted Respondents' Motion for Leave to Present Additional Evidence of the bankruptcy proceeding before the MCAD and the matter was remanded to me to assess whether my decision is impacted by knowledge of the bankruptcy proceeding or Complainant's failure to disclose it. Following a status conference with counsel for Respondents and the trustee in bankruptcy, the parties submitted briefs regarding the presentation of additional evidence.

Respondents assert that the doctrine of judicial estoppel compels the dismissal of Complainant's MCAD claims, because his prior bankruptcy filing precludes him from asserting a contrary claim before the MCAD, which he did not assert before the bankruptcy court. Alternatively, Respondents seek a modification of the Hearing Officer decision or a new hearing for the reasons set forth below. After careful consideration of the parties' submissions, I conclude that judicial estoppel is not applicable to this Commission's administrative proceedings and a new hearing is not required in this matter. In accordance with the Superior Court's order, I have duly considered Complainant's bankruptcy filing and assess its impact, if any upon my earlier findings as reflected below.

Judicial Estoppel

Respondents argue that the doctrine of judicial estoppel compels the dismissal of Complainant's MCAD claims. They assert that Complainant is precluded from pursuing his claims before the Commission because he failed to report to the bankruptcy court that he was a

party to pending litigation of claims before the Commission. For the reasons stated below, I conclude that the doctrine of judicial estoppel is not applicable to c. 151B §5 proceedings before the MCAD.

The doctrine of judicial estoppel precludes a party from asserting a position in one legal proceeding which is contrary to a position it has already successfully asserted in another. Fay v. Federal Nat. Mortg. Ass'n., 419 Mass 782, 788 (1995). A party in bankruptcy may be subject to judicial estoppel. Guay v. Burack, 677 F. 3d. 10, (1st. Cir. 2012) (it is well-established that a failure to identify a claim as an asset in a bankruptcy proceeding is a prior inconsistent position that may serve as the basis for application of judicial estoppel, barring the debtor from pursuing the claim in a later proceeding) However, for the reasons stated below, there is a strong argument in favor of declining to apply the doctrine to §5 proceedings before this Commission.

The MCAD was established to enforce the Commonwealth's antidiscrimination laws. Its primary purpose is "to vindicate the public's 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. 541(2004) [citations omitted] While the Complainant may be a party to a §5 proceeding and may present testimony at the public hearing, §5 proceedings before the Commission are not a private right of action. The Investigating Commissioner is a party to the proceedings and Commission acts in a quasi-prosecutorial role, to vindicate rights in the public interest. Id; See G.L. c. 151B, §5. "Although the complaint is filed by the individual, the agency proceeds in its own name." See also Joule, Inc. v. Simmons, 450 Mass. 88 (2011)

The MCAD is not prohibited from proceeding with its public prosecution of a discrimination claim when a party is in bankruptcy. In the matter of In Re Mohawk Greenfield

Motel Corp., 239 B. R. 1(1999) the bankruptcy court ruled that the Commission's §5 proceeding was exempt from the automatic stay and that the Commission was authorized to proceed against the Respondent employer in bankruptcy and that its award of back pay damages to the Complainant fell within its police and regulatory powers.

In a different context, the Supreme Judicial Court has held that if an employee signs a binding arbitration agreement and then files a claim at the Commission, the MCAD is not precluded from proceeding against the employer to vindicate important public rights. Joule, Inc. v. Simmons, supra.

Likewise, in upholding the MCAD's right to prosecute a claim under the Younger Abstention Doctrine, the First Circuit recognized that though the MCAD is empowered to seek relief on behalf of victims of discrimination, the primary purpose of any such relief is to effectuate the goals of Massachusetts anti-discrimination law.[5] Sirva Relocation, LLC v. Richie, 794 F.3d 185(1st Cir. 2015) [citations omitted]. The court noted that an MCAD proceeding exhibits "all the essential hallmarks of a civil enforcement action" and is "more akin to a criminal prosecution than are most civil cases." Id. at 195. The court in Mohawk Greenfield noted that while an order of back pay benefited the Complainant, it also had a deterrent purpose in serving to ensure that the company and others would be dissuaded from practicing "similar odious behavior."[6] Id. at.9.

Federal Courts have likewise held that EEOC's proceedings to enforce Federal employment discrimination laws are not subject to judicial estoppel in circumstances similar to this case. EEOC v. Celadon Trucking Services, Inc., WL 3961180 (S.D.Ind. 2015); EEOC v.

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[5] See, EEOC v. Waffle House, Inc., 534 U.S. 279, 294–96, 122 S. Ct. 754, 151 L.Ed.2d 755 (2002) (discussing parallel federal scheme)

[6] In the underlying MCAD claim that gave rise to Mohawk Greenfield, the Complainant was subjected to egregious sexual harassment, e.g. touching, sexually suggestive comments and retaliatory termination. Mayhew vs. Stetson Management Corp., Franchise Associates, Inc. and Mohawk Greenfield Motel Corp. 20 MDLR 11(1999)

CRST Van Expedited, 679 F.3d. 657, 682(8th Cir. 2012) (court cannot judicially estop the EEOC from bringing suit in its own name to remedy employment discrimination); EEOC v. Tobacco Superstores, -- F.Supp. 2d --, Case. No. 05CV00218, 2008 WL2328330 at *6-8, 2005 U.S. Dist. LEXIS 54824 (E.D.Ark. 2008) (Court declines to expand judicial estoppel to individuals in bankruptcy who did not bring the law suit and have no control over suit) [7]

Following the principals elucidated in the above-cited decisions, it stands to reason that the doctrine of judicial estoppel is not applicable to the Commission proceedings in this matter because there is a significant public interest in holding Respondents liable for egregious and unlawful acts of racial harassment. Given its mandate to serve the public interest and to eradicate discrimination, the MCAD is not prohibited from proceeding with its public prosecution of Complainant's discrimination claim; nor is it prohibited from awarding damages for emotional distress[8] or assessing a civil penalty.[9]

Re-opening of the Public Hearing is not Required

Respondents argue that even if Complainant's MCAD claim is not prohibited by judicial estoppel, the Commission should hold a new hearing to take additional evidence of Complainant's bankruptcy.

Respondents first contend that the public hearing was "invalid," although the legal import of that assertion is unclear. In support of the argument to re-open the hearing,

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[7] While the EEOC is the sole plaintiff in judicial proceedings to enforce Title VII, the courts are not precluded from awarding damages to the individual who suffered the discrimination. EEOC v. Celadon, supra.

[8] Where the Trustee in Bankruptcy has been added as a party-Complainant and the Bankruptcy Estate re-opened, any award of damages to Complainant will likely enure to the benefit of his creditors.

[9] Civil penalties enure to the benefit of the Commonwealth of Massachusetts and do not benefit Complainant.

Respondents posit that had Iuliano been aware of Complainant's bankruptcy, instead of appearing before the Commission pro se, he might have obtained counsel and settled the matter prior to public hearing. This argument is speculative and not persuasive. [10] Iuliano's actions in connection with Complainant's claim suggest otherwise. He declined to participate in mandatory conciliation and did not attend the scheduled conciliation conference; he chose not to testify at the Hearing despite the suggestion of the Hearing Officer and *never disputed* the credible testimony about his racial harassment of Complainant. It is not entirely clear how knowledge of Complainant's bankruptcy would have altered his stance or his strategy in defending this matter.

Respondents further assert that the hearing is "invalid" because once Complainant filed for bankruptcy, he no longer owned the MCAD claim; rather, it was controlled by the trustee in bankruptcy who had "exclusive standing" to pursue the claim. The claim should properly have been adjudicated by the bankruptcy court with any proceeds therefrom enuring to the benefit of Complainant's creditors. I am not persuaded by this argument because the Commission could have proceeded with the hearing notwithstanding the bankruptcy, with the trustee in bankruptcy as a party to the Commission proceedings. The substitution of the trustee would not have affected the decision of the Hearing Officer and currently the trustee is in position to pursue collection of any MCAD award. [11]

As I read the Superior Court's remand order, it mandates that the Hearing Officer consider Complainant's bankruptcy filing and whether his failure to notify the Commission of

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[10] The fact the Iuliano is now represented and seeks a new hearing with benefit of counsel makes his argument somewhat disingenuous. The Commission encourages parties to take charges against them seriously and to engage counsel for adjudicatory proceedings. Iuliano chose to appear before the Commission without benefit of counsel.

[11] Respondents also argue that Complainant's written waiver of his right to trial in Superior Court is invalidated by his filing of a bankruptcy petition. This argument has no bearing on my decision.

the filing has any bearing on the MCAD's authority to proceed with a §5 hearing, any assessments of credibility made at the hearing or the ultimate outcome of the hearing decision. I have duly considered the matter and hereby take note of the following: On November 18, 2009, Complainant filed a Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court, District of Massachusetts (Springfield), Docket No 09-32060. Complainant, however, did not inform the Commission of the filing of the bankruptcy petition and he did not inform the Bankruptcy Court of his MCAD complaint.

Having considered these events, I have determined that judicial estoppel does not apply to the Commission's §5 proceedings in this matter. I have also determined that Complainant's failure to inform the Commission of his bankruptcy filing does not affect the credibility findings I made with respect to the acts of discrimination and does not change my ruling that Complainant was subjected to a racially hostile work environment by Iuliano. These acts were corroborated by other witnesses who I found to be credible and I remain persuaded that they occurred. Likewise, I conclude that Complainant's testimony regarding the emotional distress he suffered as a direct result of the egregious racially hostile work environment is not suspect because of his failure to be forthcoming about the bankruptcy proceeding. I therefore decline to reopen the hearing in this matter or to alter the findings of fact with respect to liability and damages.

In accordance with the Superior Court remand order, I have reviewed and assessed my earlier findings and decision and find that there is adequate credible evidence in the record as it stands to support that conclusions that Respondents engaged in egregious racial harassment, that Complainant suffered significant emotional distress resulting therefrom, that the award of $50,000 for emotional distress is reasonable and that the civil penalty of $10,000 is supported by the egregious nature of the actions.

SO ORDERED, this 13th day of March, 2017.

JUDITH E. KAPLAN
Hearing Officer