DISTRICT OF COLUMBIA COMMISSION ON HUMAN RIGHTS

In the Matter of:

COMPLAINANT,

Complainant,

v.

BATH & BODY WORKS, INC.

Respondent.

_____/

Docket Number 01-057-PA
Final Decision and Order
Dianne S. Harris
Administrative Law Judge

BEFORE

Commissioner Thomas Fulton
Commissioner Nimesh M. Patel
Commissioner Michael E. Ward

Administrative Law Judge Dianne S. Harris

For the Complainant

Jewell T. Little, Esquire
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For the Respondent

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I. STATEMENT OF THE CASE

Respondent is a corporation that had a store located in the Union Station in the District of Columbia. On June 6, 2000, Complainant, an African-American entered the Bath and Body Works store ("Respondent") in Union Station accompanied by a co-worker and a student. During her visit to the store, Complainant made a purchase and requested that the sales associate place her purchased item into one of the Respondent's trademark shopping bags. The sales associate informed the Complainant that the trademark bags were out of stock. However, as the Complainant was leaving the store, she observed the same sales associate giving two Caucasian customers the trademark shopping bags. Complainant confronted the sales associate about the disparate treatment she had received, an angry exchange took place and Complainant was escorted from the store premises by a security guard.

Procedural History

Complainant filed a Complaint with the District of Columbia Office of Human Rights ("OHR" or the "Office") on March 30, 2001 alleging a violation of the District of Columbia Human Rights Act by the Respondent for discriminating against her due to her race in providing a public accommodation. *See* D.C. Code § 2-1402.31. This matter was investigated and OHR issued a Letter of Determination ("LOD") on May 19, 2003. The Office determined that there was probable cause to believe the Respondent had discriminated against the Complainant due to her race (Black) when Respondent's sales associate treated Complainant in a rude manner, refused to give Complainant one of Respondent's trademark shopping bags, and had a security guard remove Complainant from the premises.

The Office's Mediation Division made extensive efforts, to no avail, to facilitate a settlement between the parties. On September 30, 2003, OHR certified the Complaint to the District of Columbia Commission on Human Rights ("Commission") for adjudication. Once the Complaint was certified to the Commission, the proceedings were stayed until the Complainant

secured legal representation from the District of Columbia Office of the Attorney General ("OAG").

This matter was assigned to a hearing examiner who scheduled a telephonic status conference for September 13, 2004. However, neither the Complainant nor her counsel participated in that status conference. Further, no motion for a continuance was filed on Complainant's behalf. Accordingly, on October 8, 2004, Respondent filed a Motion to Dismiss. On October 15, 2004, the hearing examiner issued a Proposed Decision and Order granting the motion to dismiss on the grounds the Complainant had failed to participate in the hearing or file a motion for a continuance. Complainant filed an Opposition to the Motion to Dismiss on October 25, 2004. The tribunal of three Commissioners assigned to decide the case ("Tribunal") issued a Final Decision and Order on February 23, 2005 vacating the Proposed Decision and Order and remanding the case to the hearing examiner for further proceedings.

On March 15, 2005, Respondent filed an Application for Reconsideration and a Motion to Vacate the Final Decision and Order. Complainant filed an Opposition on March 25, 2005, and the Tribunal issued an Order directing the hearing examiner to schedule a limited evidentiary hearing to receive additional testimony from the parties concerning the failure of Complainant and her attorney to participate in the scheduled status conference. The limited evidentiary hearing was held on July 22, 2005 with the hearing examiner and two members of the Tribunal. Soon after that evidentiary hearing, the hearing examiner resigned from her position with the Commission and the case was subsequently reassigned to another judicial officer. On April 24, 2008, the Tribunal issued an order denying Respondent's request to reinstate the dismissal of this matter.

In the interim, Complainant's counsel sought and received permission from the Commission to withdraw as Complainant's attorney because he was reassigned to a new division within the OAG. Since Complainant was now without legal representation, at her request OHR assisted the Complainant in obtaining new *pro bono* counsel. On January 9, 2009, the new

counsel entered an appearance on Complainant's behalf. After some initial discussions, the parties sought a stay while they attempted to reach a settlement through mediation. After four months, the Commission issued a notice scheduling a status hearing for May 18, 2009. However, shortly after the notice was issued, the Complainant's counsel filed a Motion to Withdraw stating that counsel's firm had a conflict of interest that prevented counsel from continuing to represent Complainant. The Motion to Withdraw as counsel was granted and once again the Complainant requested OHR to provide her with legal representation.

The case was remanded to OHR on May 18, 2009 for the appointment of new counsel and for the parties to participate in mediation. The Office provided representation for the Complainant, and on January 4, 2010 the case was re-certified to the Commission for adjudication after mediation attempts once again failed to resolve this matter. A status conference was held, followed by discovery and on May 17, 2010, the Respondent filed a Motion for a Summary Judgment. Complainant filed a timely Opposition on May 26, 2010 and Respondent filed a Reply in Support of its Motion for Summary Judgment on June 1, 2010.

A Proposed Decision and Order was issued on August 23, 2010 and copies were provided to the parties by both regular and electronic mail accompanied with instructions for filing Exceptions within fifteen (15) days of receipt of the proposed decision and order. Neither of the parties filed exceptions within the timeframe provided.

STANDARD OF REVIEW

Summary Judgment is granted when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter law. *Celotex Corporation v. Catrell*, 477 U.S. 317, 318 (1986); *Bigwood v. U.S. Agency for Intern. Dev.*, 484 F. Supp. 2d 68, 72 (D.D.C. 2007); *Broderick v. Donaldson*, 338 F. Supp. 2d 30, 40 (D.D.C. 2004); *Grant v. May Department Stores*, 786 A.2d 580, 583 (D.C. 2001). In deciding summary judgment motions, courts view the evidence in the light most favorable to the nonmoving party. *See Anderson v. Liberty Lobby Inc*., 477 U.S. 242, 243 (1986). To prevail upon a motion for summary judgment, the moving

party must clearly demonstrate that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. *See Beard v. Goodyear Tire and Rubber Co.*, 587 A.2d 195, 198 (D.C. 1991). The Commission will grant summary judgment only if the moving party is entitled to a judgment as a matter of law based upon facts not in dispute. *See Ferguson v. Small*, 225 F. Supp. 2d 31, 36 (D.D.C. 2002). If a moving defendant has made an initial showing that the record presents no genuine issue of material fact, the burden of production of evidence shifts to the nonmoving party to show that a genuine material issue exists. *See Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005). In opposing summary judgment, a party may not rely on vague allegations, but instead must present specific facts showing that there is a genuine issue for trial and the record must be viewed in the most favorable light to the party opposing the motion. *Graff v. Malawar*, 592 A.2d 1038, 1040 (D.C. 1991).

II. ISSUE BEFORE THE COMMISSION

The issue before the Commission is whether the Respondent is entitled to Summary Judgment on the grounds of judicial estoppel due to the Complainant's failure to list her discrimination complaint as an asset on her Chapter 13 Bankruptcy Petition.

III. FINDINGS OF FACTS

1. On June 6, 2000, Complainant, an African-American school teacher employed by the District of Columbia Public School system entered Bath and Body Works located at Union Station in the District of Columbia accompanied by a co-worker and a student. Discrimination Complaint at ¶¶ 1 & 2 (a) [hereinafter cited as "Complt."]; Complainant's Answer to Respondent's Interrogatory No. 7.
2. While in the Respondent's store the Complainant made a purchase. Complainant requested that the item she purchased be placed in one of the store's trademark bags. The sales associate informed the Complainant that she did not have any trademark bags available in stock and put Complainant's purchase in a plain brown bag. Complt. at ¶ 2 (c).

3. As the Complainant was preparing to exit the store she observed the sales associate wait on two Caucasian customers and place their purchases in trademark bags. Complt. at ¶ 2 (e) & (g).

4. Complainant filed a Complaint with OHR on March 30, 2001. Complainant's Deposition at 45 [hereinafter cited as "Compl.'s Depo."].

5. On June 13, 2001, the Complainant filed a Chapter 13 bankruptcy petition with the United States Bankruptcy Court for the District of Maryland (Case No. 01-1-7774-DK). Compl.'s Depo. at 97-101. She was represented by counsel in her bankruptcy proceeding. Affidavit of Complainant at 1 [hereinafter cited as "Complainant Aff."].

6. Complainant stated that her main concern at the time she filed her petition for bankruptcy was the loss of her home. Complainant Aff. at 1.

7. As a part of the Bankruptcy Petition, the Complainant was required to submit a "Statement of Financial Affairs" which contained a Section 4 captioned "Suits and administrative proceedings, executions, garnishments and attachments." In this section, the Complainant was asked to "List all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case." Respondent's Exhibit C [hereinafter cited as "Res. Ex."].

8. In Section 4 of her "Statement of Financial Affairs," the Complainant listed two lawsuits where she was the named defendant: [redacted] and [redacted]. The first case, filed in the Superior Court of the District of Columbia, was an action for a default on a loan and resulted in a judgment being entered against the Complainant on February 14, 2000. The other case involving an auto loan was pending in the Prince George's County District Court at the time the bankruptcy petition was filed. Res. Ex. C.

9. Complainant signed the "Statement of Financial Affairs" indicating, under the penalty of perjury, that the information contained therein was true. Res. Ex. C.

10. Despite the requirement to list all suits and administrative proceedings that had been filed within the preceding year, Complainant failed to list the discrimination complaint filed with OHR in the "Statement of Financial Affairs" portion of her bankruptcy petition. Compl. Depo. at 97-101.

11. Complainant never amended her "Statement of Financial Affairs" or any of the other documents filed in her bankruptcy petition to reflect that she had a discrimination complaint pending with OHR. Compl. Depo. at 97-101.

12. Complainant never informed the attorney representing her in the bankruptcy petition that she had a discrimination complaint pending at OHR. Compl. Depo. at 97-101.

13. Complainant, by her own admission, never informed any of the attorneys representing her in the OHR discrimination matter about the bankruptcy petition she had filed in the United States Bankruptcy Court. Compl. Depo. at 97-101.

14. The Bankruptcy Court approved the Complainant's Chapter 13 plan and discharged her unsecured debts in the amount of $19,497.00 on December 18, 2006. Compl. Depo. at 103, 107; Michael Griffaton's Affidavit at ¶ 3.

PROPOSED CONCLUSIONS OF LAW

The doctrine of judicial estoppel is an equitable remedy applied by the Courts when a party assumes a position in a legal proceeding, succeeds in that position and then, because his or her interests have changed, assumes a contrary position. *See Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010). In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the Supreme Court ruled judicial estoppel to be an appropriate remedy to "prevent a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by a party in a previous claim." 532 U.S. at 749 (quoting 18 MOORE'S FEDERAL PRACTICE § 134.30 (3d ed. 2000).

Respondent contends that the OHR Complaint should be barred due to Complainant's failure to disclose in her Chapter 13 Bankruptcy Petition, as required by law, that she had filed a discrimination claim with OHR. Complainant has responded that she did not list her

discrimination claim in her bankruptcy petition because of mistake, inadvertence and ineffective counsel.

The Bankruptcy Code requires debtors to "file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." 11 U.S.C. § 521(a) (1). "The disclosure obligations of consumer debtors are at the very core of the bankruptcy process and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge." *See Lewis v. Weyerhaeuser Co.*, 141 Fed. App'x. 420, 2005 WL 1579713 at **4 (6th Cir. 2005) (quoting *In re Colvin* 268 B.R. 477, 481 (Bankr E.D. Mich. 2003)). The debtor's obligation to disclose pending legal causes of action in a bankruptcy proceeding is an ongoing and continuous one. *See In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999).

In *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) the Supreme Court set forth three factors that typically inform the decision whether to invoke judicial estoppel: whether a party's later position is clearly inconsistent with its earlier position; whether the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and whether the party seeking to assert an inconsistent position derives an unfair advantage or imposes an unfair detriment on the opposing party if not estopped. *See also Moses v. Howard University Hospital*, 606 F.3d 789, 798-99 (D.C. Cir. 2010).

Considering the three factors that the Supreme Court set forth and the facts of this case, the Commission finds that judicial estoppel should be applied in this case. With respect to the first factor – whether a party's later position is clearly inconsistent with its earlier position – it is undisputed that the Complainant has adopted inconsistent positions. The Complaint in this matter was filed with OHR on March 30, 2001. Proposed Finding of Fact at ¶ 4 [hereinafter cited as "Facts"]. Approximately two months later, the Complainant filed her Bankruptcy Petition in the United States Bankruptcy Court for the District of Maryland but failed to mention

in the Statement of Financial Affairs section of the Bankruptcy filing that an administrative proceeding was pending before OHR. *Id.* at ¶¶ 5, 10. Specifically, 1) her filing in the Bankruptcy Court was made under oath; and 2) the bankruptcy form plainly asks her to "list all lawsuits and administrative proceedings" in which she was a party in the year immediately preceding the filing. She was represented by counsel in her bankruptcy matter and failed to inform her bankruptcy attorney about the administrative complaint pending before OHR. *Id.* at ¶¶ 9, 7 & 5 (emphasis added).

In her defense, the Complainant contends that the failure to list the discrimination claim in her Bankruptcy Petition was due solely to inadvertence and mistake. Compl. Ex. 1. The Commission finds this argument unpersuasive in two regards. First, Complainant offers no competent evidence of inadvertence or mistake. *Cf. Moses v. Howard University Hospital*, 567 F. Supp. 2d 62, 69 (D.D.C. 2008), *aff'd* 606 F.3d 789 (D.C. Cir. 2010). The only "evidence" is her statement that she did not "relate" her complaint to her bankruptcy filing. This does not suffice. A debtor's failure to satisfy their statutory disclosure duty is "inadvertent" only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment. *In re Coastal Plains, Inc*., 179 F.3d at 210. Complainant does not assert that she was unaware of the complaint and she most certainly had motive to conceal it. In the two lawsuits listed by Complainant in the bankruptcy proceeding, the Complainant was the party defending against a claim for damages, and the effect of those two suits, had they not been stayed, would have been to reduce the amount of assets potentially available for creditors in Complainant's bankruptcy estate. Whereas in the OHR administrative proceeding, the Complainant was the party asserting the claim for damages, and the effect of that proceeding would have been to increase the amount of assets potentially available for creditors in her bankruptcy estate. *See Moses*, 606 F.3d at 799 (holding that a plaintiff who maintained a lawsuit without disclosing that fact in bankruptcy proceedings sets up a situation where he could gain an advantage over his creditors). Indeed, various courts have consistently recognized that a failure

to list a discrimination claim in a bankruptcy petition is regarded as a motive of concealment. *See*, e.g., *DeLeon v. Comcar, Industries, Inc.*, 321 F. 3d 1289,1291 (11th Cir. 2003); *Chandler v. Samford Univ.*, 35 F. Supp. 2d 861, 865 (N.D. 1999). At most, Complainant's assertion is that she was unaware of the legal requirements. While that might be relevant to a claim of ineffective counsel, it provides no excuse for a failure to disclose.

With respect to Complainant's contention that her failure to list her discrimination claim on her bankruptcy petition was due to ineffective counsel, this line of argument is not considered a valid defense in bankruptcy proceedings. The Supreme Court has determined inadequate legal counsel does not relieve the client of the consequences of his or her own actions in bankruptcy cases. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-634, 634 n. 10 (1962); *Cannon-Stokes*, 453 F.3d at 449. Further, as the Fifth Circuit ruled in *In re Coastal Plains*, 179 F.3d at 212, a claim of inadvertence resulting from ignorance of the bankruptcy disclosure requirements and reliance on one's attorney for guidance does not preclude judicial estoppel from being issued against a plaintiff who would otherwise receive an unjust financial gain and deprive their creditors from obtaining payment. Moreover, while the bankruptcy was pending, Complainant discharged her attorney and chose to represent herself. Complainant Aff. at ¶ 6. At that point, she accepted the responsibilities of self-representation and cannot complain of ineffective assistance of counsel. Yet, despite the continuing nature of disclosure requirement; *In re Coastal Plains, Inc.*, 179 F.3d at 208; she did not subsequently amend her bankruptcy filing. Compl. Depo. at 97-101.

Thus, with respect to Complainant's contention that the failure to list her administrative claim was an inadvertent mistake, the Commission therefore finds that her behavior was willful and not inadvertent or a mere mistake. Accordingly, the first query posed by the *Moses* case is resolved in favor of applying judicial estoppel in this case.

With respect to the second query – whether the party succeeded in persuading a court to accept an earlier position so that judicial acceptance of an inconsistent position in a later

proceeding would create the perception that either the first or the second court was misled – it is clear the Complainant succeeded in having the Bankruptcy Court accept her earlier position. Specifically, in reliance on her bankruptcy filing, the Bankruptcy Court discharged Complainant's debts in the amount of $19,497.00. Facts at ¶ 14. Were this Commission, in its judicial capacity, to now award Complainant damages due to her having been discriminated against by Respondent's employee, the Complainant would have clearly achieved a judicial acceptance of an inconsistent position in a later proceeding that would create the perception that the Bankruptcy Court had been misled in the first proceeding. Accordingly, the second query posed by the *Moses* case is resolved in favor of applying judicial estoppel in this case.

With respect to the third query – whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped – it is a somewhat closer question as to whether the Complainant gained an unfair advantage or imposed an unfair detriment on the opposing party. Clearly the Complainant gained an unfair advantage with respect to the creditors in the bankruptcy proceeding by being able to present an inconsistent position to reduce the amount of money potentially available to them to satisfy the Complainant's debts. However, that bankruptcy case has been closed for more than three and a half years and it is far beyond the authority of this Commission to attempt to somehow correct the injustice perpetrated in that case against the bankruptcy creditors.[1]

Next, with respect to the Respondent, it is not clear that Respondent has suffered an unfair detriment, or that the Complainant has gained an unfair advantage as to Respondent. In the Motion for Summary Judgment, Respondent argues that if the Complainant had disclosed the existence of her administrative complaint in her bankruptcy filing it might have made her more receptive to settling this case at an earlier stage in the proceedings. This is pure speculation.

Nonetheless, judicial estoppel is an equitable doctrine the application of which is

[1] This does not mean, however, that this Commission is completely without authority to address the unfairness of the situation gained by Complainant's failure to disclose the existence of the discrimination claim in her bankruptcy filing.

discretionary with the court based upon the facts and circumstances of a case. *See, e.g., Park v. City of Valley Park, Missouri*, 567 F.3d 976, 981 (8th Cir. 2009). The Supreme Court was clear that the factors set forth in *New Hampshire v. Maine* are not "inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." 532 U.S. at 751. In this case, the facts and circumstances present several considerations that lead the Commission to conclude that the doctrine of judicial estoppel should be applied in this case. Specifically, it should be noted that the Respondent's liability for the discrimination in this case is vicarious, based upon the willful wrongdoing of one of its employees, and is not the result of a company policy or the action of an officer or high-level employee. Also, it should be noted that when Respondent learned of the incident, it promptly investigated the situation and when it discovered that the employee had previously engaged in rude behavior to another minority patron, the employee was terminated. In addition, the purpose of the doctrine of judicial estoppel is to protect the integrity of the courts, rather than the litigants. *In re Coastal Plains*, 179 F3d at 210. In view of these factors, notwithstanding the fact that Respondent's showing of unfair detriment in this case is not particularly strong, considering all the facts and circumstances present, the Commission concludes that the doctrine of judicial estoppel should be applied in this case.[2]

CONCLUSION AND FINAL DECISION

For the reasons set forth above, the undersigned Tribunal hereby grants the Respondent's Motion for Summary Judgment and dismisses this case with prejudice. However, any legal costs that were paid on behalf of Complainant are hereby assessed against Respondent based upon the fact that it was ultimately liable for an act of discrimination committed by its employee.

So Ordered on November 10, 2010.

Thomas Fulton

[2] The Commission cautions that the fact specific nature of this holding should be noted. That is to say, in a case where complainant in good faith was unaware of the obligation to list an administrative complaint as an asset, and the respondent was not a litigant who had acted promptly and in good faith to correct or ameliorate the discriminatory injury caused by one of its employees, this Commission might well determine that the equities of the situation did not justify applying the equitable doctrine of judicial estoppel.

Commissioner Thomas Fulton

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