

## Fifth Circuit Affirms Dismissal Of Title VII Claims Based Upon Former Employee's Failure To Disclose Them In Bankruptcy Case

Employers secured a key victory on June 13, 2005, in the on-going battle against employees who seek bankruptcy protection, yet fail to disclose their alleged Title VII claims, presumably in the hope of keeping any awards out of their creditor's pockets. In *Jethroe v. Omnova Solutions, Inc.*, No. 04-60557 (5th Cir. June 13, 2005), the Fifth Circuit held that, under the doctrine of *judicial estoppel*, a Title VII plaintiff who fails to disclose discrimination claims during the pendency of a bankruptcy proceeding does not have the right to simultaneously or subsequently maintain a Title VII lawsuit.

### Facts

Sharon Jethroe, an employee of Omnova Solutions, Inc., alleged that a male supervisor told her that the job to which she had recently been promoted was a "male job." According to Jethroe, the supervisor insisted that Jethroe return to her former post. When Jethroe refused, Omnova allegedly subjected Jethroe to numerous write-ups and then terminated her employment on March 15, 2000. The following week, Jethroe filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC").

In November 2000, Jethroe filed a petition for relief under Chapter 13 of the Bankruptcy Code. In a Chapter 13 case, the debtor is obligated to use disposable income to repay creditors a certain portion of the amounts owed. Debtors also are obligated to disclose all assets, including any causes of action or claims against third parties. Under penalty of perjury, Jethroe represented that she had no "other contingent and unliquidated claims of [any] nature" or any pending "suits and administrative proceedings." Two years later, in October 2002, she filed a discrimination lawsuit against Omnova. Soon thereafter, the district court hearing Jethroe's Title VII matter granted summary judgment in favor of Omnova, reasoning that because Jethroe failed to disclose her pending EEOC charge, potential lawsuit, and (later) her actual lawsuit during the bankruptcy proceedings, she was judicially estopped from maintaining the action.

### *Judicial Estoppel* Protects Our Court System By Requiring Candor With The Tribunal

Agreeing with the trial court, the Fifth Circuit noted that *judicial estoppel* is a doctrine designed to protect the integrity of the *judicial system*. Consequently,

[a] court should apply *judicial estoppel* if (1) the position of the party against which estoppel is sought is plainly inconsistent with its prior legal position; (2) the party against which estoppel is sought convinced a court to accept the prior position; and (3) the party did not act inadvertently. *Judicial estoppel* is particularly appropriate where, as here, a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset.

### Debtors Have An Ongoing Duty To Disclose Potential Title VII Claims

The appellate court had no problem finding the first element of *judicial estoppel* was satisfied in Jethroe's case:

Jethroe filed her EEOC charge approximately eight months before she filed her bankruptcy petition. She concealed this charge and the legalities associated with it, even though she had made various appearances before the bankruptcy court. She filed this lawsuit while her bankruptcy case remained open.

The second element also was satisfied easily because the bankruptcy court obviously relied on Jethroe's representations that she had no outstanding legal or administrative causes of action when it confirmed Jethroe's Chapter 13 plan.

With respect to the final *judicial estoppel* element, the Fifth Circuit determined that a showing of inadvertence is not made merely because a party claims to be unaware of her legal duties. Rather, the term means that a party must be unaware of the *facts giving rise to the duty to disclose*.

Given the eight month old EEOC charge and the obligation to disclose claims and potential claims, Jethroe was clearly aware of the facts giving rise to her duty to disclose. Moreover, an incentive existed for her to conceal her claims from creditors: “[a]lthough her bankruptcy confirmation plan required her to pay approximately \$9,000 of her \$9,300 in secured debt, it did not require her to pay any of her unsecured debt of \$8,373.” As a result, Jethroe would benefit by keeping her Title VII recovery, if any, out of the hands of the unsecured creditors.

## Other Courts

With its decision, the Fifth Circuit places itself in good company. Other courts have held that *judicial estoppel* principles may bar a Title VII lawsuit if the plaintiff failed to disclose his or her claims as required by the Bankruptcy Code. See, e.g., *De Leon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11th Cir. 2003)<sup>1</sup>; *Chandler v. Samford Univ.*, 35 F.Supp.2d 861 (N.D. Ala. 1999); *Walton v. Insurance Co. of North America*, No. 1:02-CV3489TWT, 2003 WL 22053106 (N.D. Ga. Aug. 22, 2003) *adopted by Walton v. Insurance Co. of North America*, No. 1:02-CV3489TWT, 2003 WL 23145903 (N.D.Ga. Dec 26, 2003); *Walker v. Delta Air Lines, Inc.*, No. 100CV0558-TWT, 2002 WL 32136202 (N.D.Ga. Aug 01, 2002) *aff’d* 66 Fed.Appx. 846, 2003 WL 1957308 (11th Cir. Apr. 14, 2003). Although not reaching the issue, a district court in Puerto Rico hinted that, given the proper set of facts, it might use *judicial estoppel*. *Vidal v. Doral Bank Corp.*, 363 F.Supp.2d 19, 22 (D.P.R. 2005) (given that plaintiff’s late-filed document demonstrated she amended bankruptcy schedule of assets, she was “no longer ‘asserting a position in one legal proceeding that was contrary to a position [she] has already asserted in another.’”) (emphasis in original).

On the other hand, not all courts have fully embraced the Fifth Circuit’s thinking. See, e.g., *Pealo v. AAF McQuay, Inc.*, 140 F.Supp.2d 233, 237 (N.D.N.Y. 2001) (“the court does not condone plaintiff’s failure to disclose his claims, but finds that [plaintiff’s] reopening of bankruptcy proceedings and the need to prevent a potential windfall [to defendant] are reasons enough to allow plaintiff to proceed with his [Title VII] claims.”); *Anderson v. ACME Markets, Inc.*, 287 B.R. 624 (E.D.Penn. 2002) (concluding, without discussing *judicial estoppel*, that plaintiff could not maintain suit, but his bankruptcy trustee might); *Cannon-Stokes v. Potter*, No. 03 C 1942, 2004 WL 407014 (N.D.Ill. March 4, 2004) (*judicial estoppel* did not apply because defendant did not come forward with evidence of “intentional wrongdoing” to support third prong of test); *Brack v. Shoney’s, Inc.*, No. 01-2997 DV, 2003 WL 23924999 (W.D. Tenn. Jan. 28, 2003) (even if plaintiff made misrepresentations to trial or bankruptcy court concerning his employment litigation, “because a Chapter 13 petition initiates a reorga-

nization and since the filing of the charge did not result in income, the failure to list the administrative filing had no impact on the bankruptcy confirmation . . . equity would warrant cause for Plaintiff to amend his bankruptcy petition if the petition had not previously been dismissed.”).

## Practice Tips

When facing a Title VII plaintiff who has filed for bankruptcy relief and has failed to make full disclosure of the pending claim, an employer should move promptly to dismiss the lawsuit or for summary judgment on *judicial estoppel* grounds. In some cases, this strategy will be met with a motion to re-open the bankruptcy proceeding or to otherwise correct the initial failure to disclose, in addition to the contention that the failure to disclose was inadvertent. The employer’s chances of prevailing increase, however, if it can demonstrate that the employee’s failure to disclose the Title VII claim was not inadvertent, but rather, part of an intentional effort to conceal his or her claims from creditors.<sup>2</sup>

## Endnotes

- <sup>1</sup> At least one Georgia court has held that, while *judicial estoppel* of a Title VII or age discrimination claim precludes a suit for money damages, the doctrine does not apply when a plaintiff seeks injunctive relief. *Davis v. Valley Hospitality Serv., LLC*, No. 4:04-CV-20 (CDL), \_\_\_ F.Supp.2d \_\_\_, 2005 WL 1006777 (M.D.Ga. Apr. 25, 2005) (citing *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003)).
- <sup>2</sup> *Judicial estoppel* is not the *only* ground on which employers should move to dismiss a Title VII claim after learning of the plaintiff's prior or pending bankruptcy. If, for instance, the employee had filed a Chapter 7 bankruptcy petition, the employer should move to dismiss the Title VII claim on the basis that the employee does not have standing to sue (that right belongs solely to the bankruptcy trustee who, in the typical case, will be more pragmatic about settlement).

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