

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

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| UNITED STATES EQUAL EMPLOYMENT |) |
| OPPORTUNITY COMMISSION, |) |
| Plaintiff |) |
| |) |
| v. |) |
| |) |
| AUTOZONE, INC., |) |
| Defendant |) |

Case No. 07-1154

ORDER

The parties have consented to have this case heard to judgment by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), and the District Judge has referred the case to me. Now before the Court is the Defendant’s motion for leave to file an amended answer and an additional affirmative defense (#56). The motion is fully briefed, and I have carefully considered the parties’ arguments. As explained below, the motion is DENIED.

BACKGROUND

This case was brought by the United States Equal Employment Opportunity Commission (“EEOC”). The EEOC has alleged that Autozone violated certain rights of an Autozone employee, John Shepherd, arising under the Americans with Disabilities Act. Shepherd himself is not a party to this suit.

The Defendant argues in its motion that it should be allowed to amend its affirmative defenses to raise the defense of judicial estoppel. According to Defendants, Shepherd applied for Social Security Disability benefits. In the process, Shepherd made sworn statements to the effect that:

1. He has been unable to work since 9/13/03 due to severe impairments;

2. those impairments include depression, myofascial pain, degenerative disc disease of the spine, obesity, and obstructive sleep apnea;

3. these impairments significantly impair his ability to perform basic work activities.

The Social Security Administration (“SSA”) ultimately awarded disability benefits to Shepherd, finding that his “sub-optimally controlled depression” had the greatest impact on his “overall functioning and which effectively renders him disabled.”

AMENDMENT GENERALLY

Rule 15 allows amendment of pleadings after an answer has been filed only with the written consent of the opposing party or with a court order. Fed.R.Civ.P. 15(a)(2). An answer has been filed in this case, and obviously, the EEOC has not consented to the proposed amendment, so the amendment is only possible if an order allows it. Leave to amend is to be freely given when justice requires. Fed.R.Civ.P. 15(a)(2). See, Foman v. Davis, 371 U.S. 178, 182 (1962); Ferguson v. Roberts, 11 F.3d 696, 706 (7th Cir. 1993).

A proposed amendment may, however, be denied if it would be futile. Winters v. Fru-Con Inc., 498 F.3d 734, 740 (7th Cir. 2007); Guise v. BWM Mortg. LLC, 377 F.3d 795, 801 (7th Cir. 2004); Indiana Funeral Directors Ins. Trust v. Trustmark Ins. Corp., 347 F.3d 652, 655 (7th Cir. 2003). Futility includes matters that are deficient as a matter of law. See, Indiana Funeral Directors, 347 F.3d at 655 (affirming denial of leave to amend complaint, where proposed additional claim was legally deficient under Indiana law).

JUDICIAL ESTOPPEL

Based on Shepherd’s statements and the SSA findings, Defendant asserts that the EEOC is judicially estopped from claiming that Shepherd is capable of performing essential functions of the job

with or without reasonable accommodation under the ADA, citing Johnson v. Exxon Mobil Corp., 426 F.3d 887 (7th Cir. 2005); and Opsteen v. Keller Structures, Inc., 408 F.3d 390 (7th Cir. 2005).

Judicial estoppel is “an equitable concept providing that a party who prevails on one ground in a lawsuit may not ... in another lawsuit repudiate that ground.” Johnson, 426 F.3d at 891. It’s purpose is to prevent manipulation of the courts by “litigants who seek to prevail, twice, on opposite theories.” Levinson v. U.S., 969 F.2d 260, 265-66 (7th Cir. 1992). In order for the doctrine to apply, several factors enter into the decision whether the doctrine should be applied in a particular case. These factors are not inflexible or exhaustive; additional considerations may inform the court in particular contexts. New Hampshire v. Maine, 532 U.S. 742, 750 (U.S. 2001)

First, the later position must be clearly inconsistent with the earlier position. Maine, 532 U.S. at 750. See also, U.S. v. Hook, 195 F.3d 299, 306 (7th Cir. 1999). Several cases have emphasized that it is a factual contradiction that triggers the analysis, not a contradiction in legal theory or legal conclusions. Cleveland v. Policy Management Systems, Corp., 526 U.S. 795 (1999); Opsteen, 408 F.3d at 392. “Litigants who take one view of the facts and prevail are equitably estopped to assert the opposite later.” Id. This is not a hard and fast rule: an employee’s self-assessment of permanent disability is not preclusive if professionals indicate that the condition is temporary, for example. See, Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495 (7th Cir. 2000).

Second, the party to be estopped must have 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. Maine, 532 U.S. at 750. “Absent success in a prior proceeding, a party’s later inconsistent position introduces no risk of inconsistent court determinations” and thus poses little threat to judicial integrity. Id. at 750-51.

Finally, the court must consider 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. Id. at 751.

The EEOC responds that it is not judicially estopped by statements made by Shepherd, because it, the EEOC, is the Plaintiff in this litigation, not Shepherd, and Shepherd's statements are not the EEOC's statements. Defendant disagrees about the applicability of the theory under the circumstances of this case. Both parties cite cases.

In one line of cases¹, Defendant argues that the courts have applied judicial estoppel when the victim of discrimination has made prior inconsistent representations to the SSA. A careful reading of those cases belies that interpretation.

Two of the cases involved individual plaintiffs who filed charges with the EEOC and then filed for bankruptcy. The employees did not disclose the EEOC charge as an asset in the bankruptcy petition. When those individual plaintiffs later intervened in the EEOC's enforcement suit, the courts applied judicial estoppel, finding that their failure to list the claim as an asset was essentially an admission that the claim did not exist. See, EEOC v. Outback Steak House, -- F.Supp. 2d --, Case No. 06-cv-1935, 2007 WL 2947326, 2007 U.S. Dist. LEXIS 62996, Aug. 27, 2007 (D.Colo.); and EEOC. v. J.D. Streett & Co., -- F.Supp. 2d --, Case No. 06-cv-4186, 2006 WL 3076667, 2006 U.S. Dist. LEXIS 78906 (S.D.Ill.2006).

¹In addition to the cases discussed, Defendant included two other district court cases that have no official citation. Only a LEXIS citation was provided, and no copy of the case was included with the filing. Westlaw did not report these cases. The Court is unable to access those cases, so they are not discussed herein, other than to mention that they exist.

In a third case, an employee filed a charge of discrimination with the EEOC. The EEOC filed an action against the employer, and then identified 34 additional individuals who sought to join the case as a class. Several of the individuals filed bankruptcy and did not disclose the litigation as an asset. Defendant sought judicial estoppel against the EEOC, once again based on that failure to disclose. Relying on binding Eighth Circuit law, this court found insufficient evidence of an intent to misrepresent or to defraud the court and declined to apply judicial estoppel against those class members. EEOC v. Tobacco Superstores, -- F.Supp. 2d --, Case. No. 05CV00218, 2008 WL 2328330 at *6-8, 2005 U.S. Dist. LEXIS 54824 (E.D.Ark. 2008). Part of the court's rationale in reaching that conclusion was based on the fact that the EEOC was the party in charge of the case, as opposed to the employees, who had no control over the decision to file the case or the conduct of the case itself. That distinction, along with the underlying differences in policies underlying the causes of action brought by the EEOC and those brought by individual employees, led the court to decline to apply judicial estoppel to one based on the conduct of the other. Id. at *8.

Not one of these cases raised or discussed the question whether judicial estoppel applied to the EEOC based on conduct of an individual employee. The same is true of Johnson, 426 F.3d 887 and Opsteen, 408 F.3d 390. In both of those cases, the individual employee was estopped based on factual representations made in his application for SSDI benefits. There was no consideration of the applicability of the doctrine to the EEOC.

There are two cases from outside the Seventh Circuit in which judicial estoppel was held to bar the EEOC's claim based on conduct of the discrimination victim. In neither case, however, did the EEOC raise the question whether judicial estoppel should be applied, and in neither case did the court actually discuss that question. In EEOC v. Winslow Memorial Hospital, -- F.Supp. 2d --, Case

No. 04-2060, 2006 WL 1663488, June 12, 2006 (D. Ariz.), the court first determined that the individual employee was judicially estopped from asserting a Title VII claim. The entirety of the court's discussion of the estoppel issue as it applied to the EEOC is as follows: "The EEOC does not contend that it can assert claims on [victim]'s behalf when she is judicially estopped from asserting them. Judicial estoppel therefore bars its claim as well." In EEOC v. Stowe-Pharr Mills, Inc., 216 F.3d 373 (4th Cir. 2000), the EEOC not raise the question at all. Even if it had been raised, the Court of Appeals would likely not have considered the question, because it reversed the district court's grant of summary judgment on judicial estoppel, finding factual disputes. Neither of these cases is binding, and neither is persuasive in the context of the case now before this Court.

Nearly 40 years ago, the Supreme Court held that when the EEOC files a suit over violation of an employment discrimination statute, "the EEOC is not merely a proxy for the victims of discrimination." General Telephone Co. of the Northwest f. EEC, 446 U.S. 318, 326 (1970). See also EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) ("The EEOC does not stand in the employees' shoes."); In re Bemis Company, 279 F.3d 419, 422 (7th Cir. 2002)("the EEOC does not sue as the representative of the discriminated-against employee"). Accord, EEOC v. Digital Connections, Inc., - F.Supp. 2d --, Case No. 05-0710, 2006 WL 2792219, Sept. 26, 2006 (M.D. Tenn) (class member's failure to disclose claim in bankruptcy did not judicially estop EEOC); EEOC v. Apria Healthcare Group, Inc., 222 F.R.D. 608 (E.D.Mo. 2004)(same); EEOC v. Frank's Nursery & Crafts, 177 F.3d 448, 464 (6th Cir. 1999)(EEOC not judicially estopped where victim had agreed to resolve dispute by arbitration rather than litigation).

In EEOC v. Sidley Austin LLP, 437 F.3d 695 (7th Cir. 2006), the Court of Appeals held that the EEOC can obtain relief for victims of age discrimination even though the victims themselves

would be barred from bringing their own suits. “The reason there was no bar was not that the arbitration clause was unenforceable but that the Commission was not bound by it because its enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole.” Id. at 696.

The Seventh Circuit has apparently not ruled directly on the question whether sworn factual statements made to the SSA by the victim of discrimination bar the EEOC from pursuing a claim on his behalf. In light of the holdings of the cases cited above, however, I conclude that such would be the holding. First, as those cases make clear, the EEOC is not merely an alter-ego of the individual employee, and it is not barred by prior actions or statements of those individuals in any other context. Defendant has not explained why this context should be any different.

Equally as important, however, is the statutory grant of authority to the EEOC to enforce the underlying policy of and public interest in the anti-discrimination statutes. As stated by the Bemis Court,

The EEOC’s primary role is that of a law enforcement agency ... The EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choice where conflicts of interest exist ...

279 F.3d at 421-22. See also, Waffle House, 534 U.S. at 291 (Statute “makes EEOC master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake”); Digital Connections, 2006 WL 2792219 at *3 (EEOC brings lawsuits to adjudicate public interest in enforcement of anti-discrimination statutes).

In other words, the EEOC’s interest in pursuing perpetrators of discrimination is much broader than simply obtaining relief for the victim of that discrimination. Narrowing that interest by placing on it the same boundaries that limit individual litigants would be ill advised.

Also crucial is the underlying policy of the doctrine of judicial estoppel: namely, the prevention of manipulation of the courts by litigants who seek to prevail twice on opposite theories. The EEOC was not (and could not have been) a litigant in administrative proceedings before the SSA. It had no control over or input into the application process. The EEOC's pursuit of justice for the victim and its statutory enforcement authority are not somehow diminished by the fact that monetary relief is sought. As the Seventh Circuit has made clear, "it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation rather than pocketing the money itself and putting them to the bother of suing separately." Bemis, 279 F.3d at 421.

The EEOC is not a proxy for Alan Shepherd. It's interest in pursuing relief on Shepherd's behalf is a public interest in eliminating discrimination, and that interest is not as narrow as is Shepherd's interest. The EEOC is therefore not estopped by Shepherd's statements and conduct, and I conclude that the affirmative defense of judicial estoppel is futile as a matter of law.

CONCLUSION

As explained in this Order, the affirmative defense of judicial estoppel is futile, and the motion for leave to add it as an affirmative defense is denied for that reason. Nothing in this opinion is to be construed as denying Autozone the opportunity to challenge the EEOC's contention that Shepherd was a qualified individual or that he could perform the functions of the job, with or without accommodation or any other element of the claim being pursued. But these are not affirmative defenses.

ENTERED ON February 23, 2009

s/ John A. Gorman

JOHN A. GORMAN
UNITED STATES MAGISTRATE JUDGE