

No. 32165

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA HUMAN RIGHTS COMMISSION,  
on its own and on behalf of Scott and Mary  
Ellen Black, for their daughter, Rebecca A.  
Black, a minor child; SCOTT BLACK and MARY  
ELLEN BLACK, individually, and on behalf of  
Rebecca A. Black, their minor daughter,

Petitioners Below,

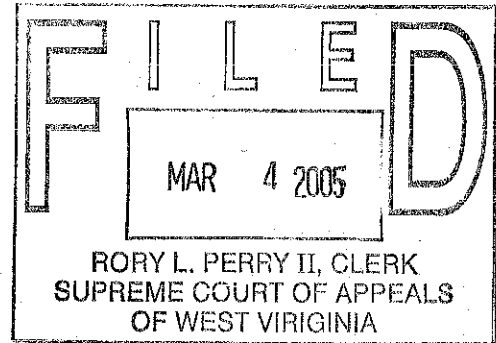
SCOTT BLACK, MARY ELLEN  
BLACK and REBECCA BLACK,

Appellants,

v.

THE ESQUIRE GROUP, INC.,

Respondent Below/Appellee.



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FROM THE CIRCUIT COURT OF  
CABELL COUNTY, WEST VIRGINIA  
CIVIL ACTION NO. 01-C-308

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REPLY OF THE  
WEST VIRGINIA HUMAN RIGHTS COMMISSION  
TO THE BRIEF ON BEHALF OF APPELLEE  
THE ESQUIRE GROUP, INC.

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March 4, 2005

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Petitioners Below,

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BLACK and REBECCA BLACK,

Appellants,

v.

THE ESQUIRE GROUP, INC.,

Respondent Below/Appellee.

**REPLY OF THE WEST VIRGINIA HUMAN RIGHTS COMMISSION  
TO THE BRIEF ON BEHALF OF APPELLEE THE ESQUIRE GROUP, INC.**

**THE COMPREHENSIVE SCHEME CREATED BY THE WEST  
VIRGINIA LEGISLATURE TO GUARANTEE FAIR HOUSING  
RIGHTS WOULD BE UNDERMINED BY THE APPLICATION  
OF RES JUDICATA TO THE WEST VIRGINIA HUMAN  
RIGHTS COMMISSION IN THE CASE AT BAR.**

The West Virginia Fair Housing Act creates a comprehensive scheme for the protection of fair housing rights. This scheme includes provisions for the filing of administrative complaints, investigations by the agency, adjudications under agency rules, civil penalties, etc. An essential part of this scheme is the right of citizens to bring their claims to the West Virginia Human Rights Commission [hereinafter HRC or Commission] so that the Commission can investigate and, if reasonable cause is found, adjudicate the claim. In defending the Summary Judgment Order of the Circuit Court of Cabell County, The Esquire Group has completely overlooked this comprehensive scheme and the right of the Blacks to make use of it. The lower court's application of the doctrine of res judicata

has the effect of cutting the HRC out of the process, and it completely undermines the statutory scheme set up by the Legislature for the protection of fair housing rights.

1. Esquire overlooks this comprehensive legislative scheme when it argues that the Commission was involved in the restrictive covenant case. Both the Circuit Court below and Esquire in its Brief erroneously treat the Commission's limited appearance before Judge Cummings in the restrictive covenant case as if it has significance to the application of the doctrine of res judicata here. In fact, the HRC's limited appearance in that matter was pursuant to the comprehensive statutory scheme, and based on that scheme, had only a limited purpose.

Esquire has argued that the Commission's prior assertion, that the HRC "attempted unsuccessfully to intervene in the restrictive covenant case. . .for the limited purpose of seeking a stay during an HRC investigation of the administrative housing complaint," is "patently false." See Brief On Behalf of Appellee The Esquire Group, Inc., p. 28. In arguing its claim of "patently false," Appellee notes that Judge Cummings' Order reflects that the intervention of the HRC was not technically *denied*, but rather, held in *abeyance*. Esquire attaches a copy of the Order to its Brief. However, this does not change the limited purpose of the Commission's appearance in that proceeding, or the fact that the HRC was never a party.

Pursuant to an explicit provision of the comprehensive legislative scheme for the protection of fair housing rights which speaks to temporary relief, W. Va. Code § 5-11A-11(e)(1), the Commission was merely seeking to prevent irreparable harm to the Blacks before an investigation could be conducted. The Commission had no other role in that "restrictive covenant" proceeding and sought no other role. The central objective of the Commission in its motion before Judge Cummings, that is, to prevent immediate harm to the Blacks pending investigation was accomplished, notwithstanding Judge Cummings' unwillingness to grant the Commission's motion to intervene. And the HRC intervention, although of no importance in and of itself, was in fact "unsuccessful."

Ironically, Esquire did not raise the res judicata defense in response to the Blacks' accommodation claim, or at any time during the HRC investigation, following the HRC Charge in February 2001 or even in response to the HRC's Complaint filed in the Circuit

Court of Cabell County on March 7, 2001. Esquire only raised the res judicata defense much later, after all possibility of the HRC incorporating the fair housing issues into issues in the first case was long exhausted. (See Order Granting Defendant's Motion to Amend Answer, dated February 5, 2002).

2. While some of the circumstances of this case may be unique to this case, the application of the doctrine of res judicata to bar the involvement of the HRC in every case where there was a prior adjudication by an individual complainant could have far reaching and profoundly unjust effects. Indeed, it could seriously undermine the clear intent of the Legislature in enacting the Fair Housing Act.

For instance, it is not uncommon for apartment tenants who are served with an eviction petition to permit a default to the legal action and then move from the apartment. While defenses of discrimination are permitted in those cases, they are rarely made. More commonly, tenants who believe themselves to be victims of discrimination later bring discrimination charges to the HRC based on race or other impermissible factors. See West Virginia Human Rights Commission v. Wilson Estates, Inc., 202 W. Va. 152, 503 S.E.2d 6 (1998). Typically, if the complainant has a meritorious claim for discrimination, it is only developed with the assistance of the Human Rights Commission. Residents of housing in West Virginia have a statutory right to seek the assistance of the Commission in affirmatively exploring and then pressing their claims of discrimination. The doctrine of res judicata has no place as a device to block the ability of the HRC to perform its statutory function.

3. Esquire would have this Court uphold an application of the doctrine of res judicata in a way that limits the enforcement ability of the HRC is clearly inconsistent with parallel federal law.

Esquire has argued in its Brief that the United States Supreme Court decision in EEOC v. Waffle House, Inc., 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755, 12 A.D. Cas. 1001 (2002), which clearly established that the EEOC does not merely act as a representative of individual claimants, applies only to arbitration agreements and is not applicable here. But Waffle House holds that the EEOC's claims against the defendant

therein are not derivative. There is no privity between the government and the individual complainant. And the impact of this applies beyond arbitration agreements.

Privity is a necessary element for *res judicata*. The Circuit Court below found privity between the HRC and the Blacks. It had to find it in order to grant the summary judgment ruling against the HRC. However, Waffle House contradicts this. The core analysis in Waffle House, when applied to the facts of this case, completely undermines the summary judgment against the Commission.

Esquire argues that Waffle House "notes that ordinary principles of *res judicata*, mootness, and mitigation still apply to claims brought by the EEOC." See Brief On Behalf of Appellee The Esquire Group, Inc., p. 29 (italics in original) (citation omitted). Actually, what the Supreme Court said was:

The fact that ordinary principles of *res judicata*, mootness, or mitigation may apply to EEOC claims does not contradict these decisions [holding that the governmental interest is not merely derivative], nor does it render the EEOC a proxy for the employee.

Waffle House, 122 S. Ct. at 766 (emphasis supplied).

In the context of that decision, it is clear what the Court meant by the reference that an individual claimant's "conduct may have the effect of limiting the relief that the EEOC may obtain in court." Id. 765-766. But there is nothing which even suggests that the doctrine of *res judicata* can be used to preclude the government from the prosecution of its case.

Not only has this Court clearly recognized that the Commission, in pursuing claims of discrimination, acts with police power, Allen v. West Virginia Human Rights Commission, 173 W. Va. 139, 324 S.E.2d 99 (1984), West Virginia Human Rights Commission v. Garretson, 196 W. Va. 118, 468 S.E.2d 733 (1996), but this has been recognized by the local federal courts as well. In particular, the federal bankruptcy courts in both West Virginia districts have recognized this governmental police power and held that it is a proper basis for the Human Rights Commission to avoid the effect of a bankruptcy court automatic stay. See Order, In Re: Summit Center for Human Development, Inc., BK No. 96-10874 (September 24, 1996) attached hereto as Exhibit A; and Order Granting Exception From

Stay, In Re: Parks Corporation, BK No. 02-22621 (October 22, 2003) attached hereto as Exhibit B.

Esquire cites several federal cases in support of its argument that the Circuit Court properly applied the doctrine of res judicata against the Commission. See, e.g., EEOC v. United States Steel Corp., 921 F.2d 489 (3d Cir. 1990); EEOC v. North Gibson School Corp., 266 F.3d 607 (7th Cir. 2001); EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998); and EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993). See Brief On Behalf of Appellee The Esquire Group, Inc., p. 30. Each of these cases preceded the U.S. Supreme Court's holding in Waffle House, and the effect of each case is either reversed or limited by Waffle House.

A careful reading of the U.S. Steel decision reveals that its effect on the issues in the case at bar is limited by Waffle House. The court in U.S. Steel concluded that the EEOC claim is "representative" and this conclusion was the basis of the ruling. But this conclusion is overruled in Waffle House. What is left of the U.S. Steel approach after Waffle House is that individual relief to the claimant might yet be limited by the doctrine of res judicata, where the individual had fully litigated his discrimination claim as he had in U.S. Steel.

EEOC v. Kidder, cited by Esquire as further authority of the applicability of res judicata to the HRC in this case (Brief On Behalf of Appellee The Esquire Group, Inc., p. 30) not only preceded Waffle House, but it was explicitly noted and overruled in that Supreme Court opinion 122 S. Ct. at 759.

EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993), is not authority for upholding the Circuit Court's summary judgment against the HRC for two reasons. First, the Harris Chernin decision, by its own terms, allowed the government to proceed with its case even where res judicata barred individual relief for a complainant who had already litigated his discrimination claim. Second, the effect of Harris Chernin is limited by the U.S. Supreme Court's subsequent decision in Waffle House, leaving the governmental agency with even more rights than the Harris Chernin decision recognized.

In Harris Chernin, the Seventh Circuit attempted to sort out the relationship between the EEOC and an individual claimant on whose behalf the case was brought. The claimant

in Harris Chernin had previously litigated his discrimination claim to judgment, but the EEOC maintained that this did not bar its claim. The Harris Chernin court took essentially the same approach to res judicata as the Fourth Circuit in its Waffle House opinion took to an arbitration agreement. The Fourth Circuit in EEOC Waffle House, Inc., 193 F.3d 805, 9 A.D. Cas. 1313 (4th Cir. 1999), held that the arbitration agreement signed by the complainant applied to bar individual relief, but not to preclude the agency's right to bring the case. Like the Fourth Circuit, the Seventh Circuit in Harris Chernin held that the EEOC could not seek individual relief for the complainant who had already obtained a judgment on his claim. But the Harris Chernin court only limited the relief which the EEOC could seek in that case. It also *explicitly* recognized the right of the governmental agency to go forward, notwithstanding that the individual complainant had actually litigated his discrimination claim to a judgment. The court said, "the EEOC has a right to sue independent of any private plaintiff's rights." 10 F.3d at 1291. Harris Chernin, by its own terms, is authority for reversing the Cabell County Circuit Court's summary judgment against the Commission.

However, the effect of the Harris Chernin decision has been modified by the U.S. Supreme Court's decision in Waffle House. Just as the Supreme Court's analysis in Waffle House extended the scope of the government's authority to seek relief beyond where the Fourth Circuit had set it, the effect of U.S. Supreme Court decision in Waffle House has the same effect on the precedential impact of Harris Chernin. Except perhaps in a case where an individual complainant had actually litigated her discrimination claim to a judgment, or was otherwise obtaining double recovery, the HRC's authority to sue, and to seek individual relief for that complainant, is not abridged by the doctrine of res judicata.

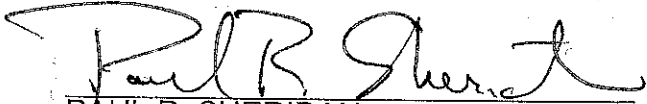
### **Conclusion**

For all the forgoing reasons, and those set out in the West Virginia Human Rights Commission's Brief, the Commission respectfully requests that the Summary Judgment Order of the Circuit Court of Cabell County be reversed.

Respectfully submitted,

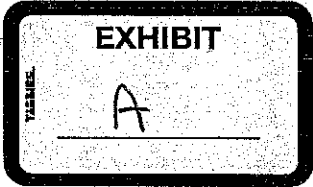
WEST VIRGINIA HUMAN  
RIGHTS COMMISSION,  
Appellee,  
By Counsel.

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

A handwritten signature in black ink that reads "Paul R. Sheridan". The signature is written in a cursive style with a horizontal line underneath the name.

PAUL R. SHERIDAN  
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G:\CIVIL\PRS\Black v. Esquire (appeal)\HRC'S REPLY BRIEF



UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE

SUMMIT CENTER FOR HUMAN  
DEVELOPMENT, INC.,

BK NO. 96-10874

Debtor(s).

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§  
§  
§  
§

ORDER GRANTING RELIEF FROM STAY

On May 20, 1996, the West Virginia Human Rights Commission (hereinafter "Commission") commenced an investigation of Summit Center For Human Development, Inc. (hereinafter "Summit") pursuant to an employment discrimination complaint based on race filed by Charlton D. Lawson, Sr. Shortly thereafter the Commission filed a complaint on behalf of Mr. Lawson against Summit.

On June 10, 1996, Summit filed for bankruptcy protection in the United States Bankruptcy Court for the Northern District of West Virginia.

The Court finds that the Commission is a governmental agency and that its purpose is to eliminate discrimination in order to promote principles of freedom and stop harm to the public. Therefore, under Bankruptcy Code §362(b)(4), the agency is granted an exception to the automatic stay for purposes of pursuing and investigating its complaint.

It is therefore ORDERED that the West Virginia Human Rights Commission may continue without the threat of sanctions, to investigate the allegations set out in a complaint filed against Summit which has been assigned Docket No. ER-429-96 and should such investigation result in finding of probable cause, the Commission may litigate the claim to judgment. Collection on such judgment, however, shall be made through the proof of claim processes of bankruptcy administration.

The Clerk is directed to transmit copies of this Order to the parties in interest.

DATED 9/23/96

*[Handwritten Signature]*  
L. Edward Frazier II  
U. S. Bankruptcy Judge

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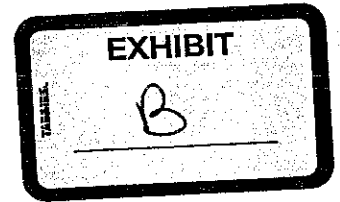
CLERK  
US BANKRUPTCY COURT  
NORTHERN DISTRICT OF WV

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SEP 26 1996

ATTORNEY GENERAL  
CIVIL RIGHTS DIV.

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA



IN RE:  
PARKS CORPORATION,  
Debtor.

BK No. 02-22621  
Chapter 11

RECEIVED

OCT 27 2003

ORDER GRANTING EXCEPTION FROM STAY ATTORNEY GENERAL  
CIVIL RIGHTS DIVISION

On or about October 30, 2001, the West Virginia Human Rights Commission (hereinafter "Commission") commenced an investigation of Parks Corporation (hereinafter "Parks"), the Debtor herein, pursuant to an employment discrimination complaint based on race filed by Warren E. Tyler, Jr. On or about June 27, 2002, the Commission commenced a second investigation of Parks associated with a complaint of sex discrimination filed by Ashley Napier. Each case involves claims of a hostile work environment and constructive discharge related to such discrimination.

On November 25, 2002, Parks filed for bankruptcy protection in the United States Bankruptcy Court for the Southern District of West Virginia.

The Court finds that the Commission is a governmental agency and that its purpose is to eliminate discrimination in order to promote principles of freedom and stop harm to the public. Therefore, under Bankruptcy Code § 362(b)(4), the agency is granted an exception to the automatic stay for purposes of administrative litigation of the human rights claims of Ms. Napier and Mr. Tyler.

It is therefore ORDERED that the West Virginia Human Rights Commission may continue without the threat of sanctions to litigate through its administrative process the allegations set out in the complaint filed against Parks by Warren E. Tyler, Jr., which has been assigned Docket No. ER-180-02, and the allegations set out in the complaint filed against Parks by Ashley J. Napier, which has been assigned Docket No. ES-08-03, and should such litigation result in a finding of discrimination against Parks, the Commission may continue to litigate the claim to judgment. Collection on such

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judgment, however, shall be made through the proof of claim processes of bankruptcy administration.

The Clerk is directed to transmit copies of this Order to the parties in interest.

DATED: **OCT 22 2003**



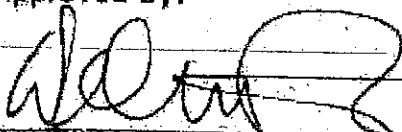
UNITED STATES BANKRUPTCY JUDGE

Prepared by:



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No. 32165

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Appellants,

v.

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Respondent Below/Appellee.

CERTIFICATE OF SERVICE

I, Paul Sheridan, Deputy Attorney General of the State of West Virginia, do hereby certify that a true copy of the foregoing Reply of the West Virginia Human Rights Commission to the Brief on Behalf of Appellee The Esquire Group, Inc. was served upon the following, by depositing a true copy thereof in the United States mail, first class postage prepaid, on the 4<sup>th</sup> day of March, 2005, addressed as follows:

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Counsel for Appellants Scott and  
Mary Ellen Black

The original and nine copies were hand delivered this date to:

The Honorable Rory L. Perry II, Clerk  
West Virginia Supreme Court of Appeals  
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State Capitol Complex  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305

  
PAUL R. SHERIDAN