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SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

April 26, 2010

Honorable Ronald M. George, Chief Justice
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Kevin Murray v. Alaska Airline, Inc.*, Case No. S162570
Brief in Reponse to Order Dated April 14, 2010

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

Kevin Murray respectfully submits this brief in response to the Court's Order dated April 14, 2010, providing the parties the opportunity to provide briefing regarding the effect of *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, on the question posed by the Ninth Circuit in this case.

The question posed by the Ninth Circuit is:

> "Should issue-preclusive effect be given to a federal agency's investigative findings, when the subsequent administrative process provides the complainant the option of a formal adjudicatory hearing to determine the contested issues *de novo* as well as subsequent judicial review of that determination, but the complainant elects not to invoke his right to that additional process?"

In our view, the decision in *McDonald* has little bearing on the answer to the question. Important distinctions should be considered in connection with any application of *McDonald* to the *Murray* case. First, the primary issue in *McDonald* is whether the FEHA statute of limitations was equitably tolled by virtue of the plaintiff's pursuit of an internal administrative grievance.

Equitable tolling is not an issue in *Murray*, as there was no issue regarding whether he filed his wrongful termination lawsuit within any applicable statute of limitations. Secondly, the public policies underlying these two cases differ significantly. The most important public policy driving FEHA cases is the statute's stated objective of resolving discrimination cases through conciliation. In the context of *Murray*, our state's primary interest in allowing - even encouraging - claims for wrongful termination in violation of public policy in the aviation safety context is far different. However, the Court's principal holdings, that equitable tolling of the FEHA statute of limitations was not precluded, provides support for the general proposition that the doctrine of equitable tolling itself results in no penalty from voluntary abandonment of an alternate proceeding, such as the AIR 21 administrative proceeding at issue here. In fact, the *McDonald* opinion cites a series of cases in which tolling was applied to save the cases from dismissal because the defendant had timely notice, was not prejudiced, and the plaintiff acted in reasonable good faith.

However, this Court's analysis of the doctrine of *judicial* estoppel in *McDonald* (which we do not understand to constitute a holding of the case) does provide relevant guidance to the question to be decided in *Murray*. The Court notes that judicial exhaustion may arise "when a party initiates and takes to decision an administrative process - whether or not the party was required, as a matter of *administrative* exhaustion, to even begin the administrative process in the first place. Once a decision has been issued, provided that decision is of a sufficiently judicial character to support collateral estoppel, respect for the administrative decisionmaking process requires that the prospective plaintiff continue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69-72). Failure to do so will result in any quasi-judicial administrative findings achieving binding, preclusive effect and may bar further relief on the same claims."

This Court found in *McDonald* that no judicial exhaustion applied because "[t]he administrative proceedings in this case lacked the judicial characteristics we have held essential to according administrative findings collateral estoppel effect, including but not limited to testimony under oath, the opportunity to call witnesses and introduce evidence, and a formal record of the

hearing. [citations omitted] There was no evidentiary hearing. In the absence of quasi-judicial proceedings, Brown was not required to seek judicial relief to set aside any findings or bear the consequences of their binding effect." *McDonald, supra,* at 114.

Similarly, the administrative proceedings in *Murray* do not possess sufficient judicial characteristics to bring our case within the penumbra of judicial estoppel any more than those in *McDonald.* The administrative decision here (that there was no causal link between Murray's protected activity and his termination) was made on the basis of an investigation including interviews of unsworn witnesses, which was ultimately converted into an administrative decision. There was no "litigation" of any of the issues. No record was made or kept of the evidentiary proceedings, such as they were. In short, none of the attributes of judicial, or even quasi-judicial, proceedings, attended the fact-finding process in this case.

Very truly yours,

JAMES P. STONEMAN II

JPS/keb
Enclosure

cc: David J. Reis (Proof of Service attached)

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of Los Angeles County. I am over the age of eighteen years and not a party to the within entitled action; my business address is: 100 West Foothill Boulevard, Claremont, California, 91711.

On April 26, 2010, I served the within BRIEF IN RESPONSE TO ORDER DATED APRIL 14, 2010 on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

David J. Reis, Esq.
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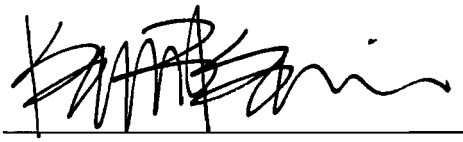
(X) **(BY MAIL)** I deposited such envelope with postage thereon fully prepaid, in the United States mail at Claremont, California.

I declare that I am employed in the office of a member of the bar of this court, at whose direction this service was made.

Executed on April 26, 2010 at Claremont, California.



KATHERINE E. KARAISCOS