

No. 1-10-1561

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

ANTHONY McKAY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 06 L 1520
	)	
CHICAGO TRANSIT AUTHORITY,	)	
a municipal corporation,	)	Honorable
	)	Allen S. Goldberg,
Defendant-Appellee.	)	Judge Presiding.

---

PRESIDING JUSTICE LAVIN delivered the judgment of the court.  
Justices Fitzgerald Smith and Sterba concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court properly denied plaintiff's section 2-1401 motion when it did not bring new factual matters to the trial court's attention which would have prevented the entry of summary judgment had they been known at the time that the judgment was entered.
- ¶ 2 Plaintiff Anthony McKay filed a *pro se* complaint for retaliatory discharge alleging that the Chicago Transit Authority (CTA) terminated him because he filed a claim for workers' compensation benefits following an injury at work. Approximately 10 months after the trial court granted the CTA's motion for summary judgment and dismissed the case with prejudice, McKay filed a *pro se* motion for rehearing. The trial court subsequently denied McKay's *pro se*

amended motion to vacate the summary judgment and for leave to file a third amended complaint. On appeal, McKay contends, *pro se*, that the trial court erred when it granted the CTA's motion for summary judgment because an issue of fact existed as to whether he was a "safety sensitive" employee. He further contends that he satisfied the requirements of section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (2008)) (the Code), because he provided the court with new information which would have prevented the entry of summary judgment. We affirm.

¶ 3 The record reveals that the CTA hired McKay as a rail janitor in 2002. On November 28, 2003, he slipped and fell at work. Later that day, he complied with a CTA request to submit a urine sample for a post-incident drug and alcohol test. McKay's urine tested positive for the presence of "cocaine metabolites." He was discharged on May 19, 2004.

¶ 4 In February 2006, McKay filed a *pro se* complaint alleging that he was terminated because he had filed a workers' compensation claim after he was injured. He then retained counsel and an amended complaint was filed. The amended complaint alleged that McKay was terminated at approximately the same time as the accident, reinstated after he filed a grievance with his union, and subsequently discharged under the pretext of discipline because of the workers' compensation claim.

¶ 5 During discovery, the CTA served McKay with certain requests to admit pursuant to Supreme Court Rule 216 (eff. Aug. 1, 1985). In McKay's response to the requests to admit, verified by McKay and submitted through counsel, the following appeared, "Anthony McKay worked in a safety sensitive position at [the] CTA. RESPONSE: ADMIT." McKay also admitted that he submitted a urine sample on the day of his injury that tested positive for the presence of cocaine, was subject to the collective bargaining agreement between his union and the CTA, and had been a CTA employee for less than three years at the time of his discharge.

¶ 6 The CTA then filed a motion for summary judgment alleging that pursuant to the collective bargaining agreement between the CTA and the union of which McKay was a member, an employee with less than three years of service who tested positive for illegal drugs while on duty was subject to discharge for the violation of the rules prohibiting drug use. The CTA argued that summary judgment was proper in this case because McKay had not established that any of the CTA employees involved in his termination knew that he had filed a workers' compensation claim and because as an employee with less than three years of service who had a positive drug test, McKay was subject to discharge pursuant to the collective bargaining agreement for the violation of the CTA's drug and alcohol policy alone.

¶ 7 McKay's response denied that he was "safety sensitive" employee and argued that there was a genuine issue of material fact as to whether the CTA knew about his workers' compensation suit.

¶ 8 After hearing argument on February 1, 2008, the trial court granted the CTA's motion for summary judgment finding that McKay could not establish retaliatory discharge because he had provided no evidence that the CTA employees involved in his termination were aware of his workers' compensation suit and as an employee with less than three years of service who tested positive for cocaine in violation of certain CTA regulations, he was subject to termination pursuant to the collective bargaining agreement.

¶ 9 In December 2008, defendant filed a *pro se* motion asking that the case be reheard because his attorney had mishandled the case. Ultimately, McKay filed a *pro se* amended motion to vacate the summary judgment and for leave to file a third amended complaint alleging that summary judgment was improper because he had not been a "safety sensitive" employee and the drug test was a pretext for his discharge. McKay also alleged that the CTA's requests to admit had been "tailored" to trick him into admitting that he was a safety sensitive employee and

that he had not filed a postjudgment motion sooner because his attorney did give him a copy of the court's February 2008 order.

¶ 10 In his affidavit in support of the motion, McKay averred that counsel ignored his phone calls until September 2008, when counsel informed him that he could obtain a copy of the order from the clerk's office at the Daley Center. Also attached to the motion were the job description for a CTA rail janitor and McKay's medical records. The job description indicates that rail janitors were not classified as "safety sensitive" employees.

¶ 11 After a hearing on McKay's motion, the court ordered the CTA to submit caselaw regarding requests to admit and copies of the CTA's drug and alcohol policies for both "safety" and "nonsafety" sensitive employees. At the next hearing, the court ordered the CTA to submit a copy of the collective bargaining agreement between the CTA and the union. Following a third hearing, the court denied McKay's motion finding that the classification of McKay's position was irrelevant when McKay would have been terminated, pursuant to the provisions of the collective bargaining agreement, as a result of the positive drug test because he had been a CTA employee for less than three years at the time of the positive test result.

¶ 12 On appeal, McKay contends that the circuit court improperly granted the CTA's motion for summary judgment because he was not a "safety sensitive" employee. He also contends that he satisfied the requirements of section 2-1401 because his job description and medical records were not before the court at the time summary judgment was entered.

¶ 13 Although McKay argues that summary judgment was improper in this case because a genuine issue of material fact existed as to the actual classification of his position, the record reveals that he did not file an appeal from the trial court's February 1, 2008 order entering summary judgment in favor of the CTA. See *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009) (the timely filing of a notice of appeal is both

jurisdictional and mandatory). Accordingly, as McKay never appealed from the trial court's order granting the CTA's motion for summary judgment, this court lacks jurisdiction to review that order. See *Secura Insurance Co.*, 232 Ill. 2d at 213. This court may review the trial court's May 25, 2010 order denying the *pro se* motion to vacate the summary judgment and for permission to file a third amended complaint, as McKay filed a timely notice of appeal from that order. The parties agree that this motion was essentially a motion seeking relief from a final judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2008)), as it sought relief from a final judgment more than 30 days from that judgment's entry. See *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104-05 (2002).

¶ 14 Section 2-1401 of the Code provides a statutory mechanism by which a final order or judgment may be vacated or modified more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2008). A petition brought under this provision is not a continuation of the original proceeding, but a commencement of a new cause of action with the purpose of bringing to the trial court's attention facts not of record which, if known by the court at the time judgment was entered, would have prevented the entry of that judgment. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 30. However, section 2-1401 is not a substitute for an appeal or a device through which a party can relitigate issues already decided or to put at issue matters which have previously been adjudicated. *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 110 (2009); see also *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 223 (1986) (a section 2-1401 petition does not afford a party a remedy through which he can be excused from the consequences of his own mistake or negligence) .

¶ 15 A party seeking relief from judgment must prove, by a preponderance of the evidence, a defense or claim that would have precluded the entry of judgment in the original action and diligence both in discovering the defense or claim and presenting the petition. *People v. Vincent*,

226 Ill. 2d 1, 7-8 (2007). When the trial court enters either a judgment on the pleadings or a dismissal, that order is subject to *de novo* review. *Vincent*, 226 Ill. 2d at 18.

¶ 16 Initially, this court notes that McKay has not shown that he acted with due diligence in filing the instant motion. Our supreme court has held that due diligence requires that the party filing a section 2-1401 motion has a reasonable excuse for failing to act within an appropriate time. *Smith*, 114 Ill. 2d at 222. Here, the trial court granted summary judgment in February 2008, and McKay filed his motion for rehearing in December. Although he attributes the delay to his attorney's refusal to return his phone calls, he admits that he learned in September 2008 that he could obtain a copy of the trial court's order from the clerk's office. However, he fails to explain why it took several more months for him to file the *pro se* motion for rehearing.

¶ 17 Even were this court to excuse McKay's lack of diligence in filing the motion for rehearing, his cause must still fail as the instant motion did not bring any new factual matters before the court. Although McKay argues that the job description constitutes "newly discovered" evidence establishing that he was nonsafety sensitive employee, the classification of his position was an issue raised before the trial court in the summary judgment proceedings. The record reveals that McKay admitted in his response to the CTA's requests to admit that he worked in a safety sensitive position at the CTA. Judicial admissions are formal admissions on the pleadings that have the effect of withdrawing a fact from issue and dispensing with the need for proof of that fact. *Serrano v. Rotman*, 406 Ill. App. 3d 900, 907 (2011). Although McKay later argued that there was an issue of fact as to the actual classification of his position with the CTA, he was unsuccessful in his opposition to the entry of summary judgment. See *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 569 (1995) (a factual dispute cannot be created by a party as a result of contradicting a previous unequivocal judicial admission).

¶ 18 Thus, the classification of McKay's position, and his later admission that it was a safety sensitive job were not only before the court in the original proceeding, this issue was one of the bases upon which McKay argued against the entry of summary judgment in favor of the CTA. Here, rather than raising a new factual matter, McKay's postjudgment motion simply expanded upon arguments made in opposition to summary judgment and argued that the CTA tricked him into admitting that his position was classified as safety sensitive. Whether McKay made this admission in error or whether he actually believed at the time that his position was classified as safety sensitive, a section 2-1401 petition does not provide a remedy through which he can be excused from the consequences of his mistake. *Smith*, 114 Ill. 2d at 223.

¶ 19 However, even were this court to accept that the actual classification of McKay's position constitutes a "new" factual matter, McKay has failed to show how the trial court's knowledge of that fact would have prevented the entry of summary judgment. Indeed, he ignores the fact that regardless of job classification, a CTA employee with less than three years of service who tested positive for illegal drugs in violation of certain drug and alcohol policies must be terminated pursuant to the terms of the collective bargaining agreement. Accordingly, as the motion did not bring any new factual matters to the trial court's attention that would have prevented the entry of summary judgment if known at the time that judgment was entered, the court properly denied the motion. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 30.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.