

No. 1-11-2725

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRENT L. MILLER,)	Appeal from
)	the Circuit Court
Plaintiff-Appellant,)	of Cook County
)	
v.)	No. 06 L 9431
)	
ILLINOIS BELL TELEPHONE COMPANY,)	Honorable
)	Joan Powell,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Former employee of defendant who never returned to his position following an on-the-job-injury, was judicially estopped by the representations he made in his workers' compensation settlement contract from thereafter pursuing a retaliatory discharge claim against his employer. His settlement representations that he could not return to his position and his acceptance of financial compensation for 29.8 years of remaining work life for his 43% disability prevents him from now stating in his retaliatory discharge claim that he was physically able to perform all the duties of his prior position. The two positions were taken by the plaintiff directly and he was financially successful in maintaining the first position and the two positions were totally inconsistent making application of the doctrine of judicial estoppel appropriate.

¶ 2 The plaintiff, Brent L. Miller, a former employee of defendant, Illinois Bell Telephone Co., appeals from the circuit court's grant of summary judgment dismissing his case of retaliatory discharge brought against the defendant pursuant to the retaliatory discharge provision of the Illinois Worker's Compensation Act (IWCA). 820 ILCS 305/4(h) (West 2008). The basis for the dismissal was the application of the doctrine of judicial estoppel. We affirm for the following reasons.

¶ 3 **Background**

¶ 4 Twenty years ago, on March 2, 1992, plaintiff was hired by the defendant when he was 24 years old to work as a cable splicing technician. About nine months into his job, on December 9, 1992, plaintiff injured himself while working for the defendant when he lifted a terminal box and developed a hernia. Plaintiff filed for benefits under the IWCA on March 25, 1993. Additionally, on March 18, 1993, plaintiff filed an application for social security disability benefits with the Social Security Administration (SSA) claiming he was unable to work at all because of his medical condition. He was on IWCA medical leave from his job until January 14, 1994, when he returned to work in a temporary, light-duty clerical assignment, not to his regular assignment as a cable splicer. On August 2, 1994, plaintiff again went on IWCA medical leave, this time from his temporary, light duty assignment, to undergo further medical treatment for his on-the-job injury. After that, plaintiff never returned to work at defendant's company in any capacity. On December 22, 1994, the SSA determined that the plaintiff was disabled and entitled to receive disability benefits.

¶ 5 After a number of years passed, the plaintiff settled his IWCA claim in full with his employer which was approved by the Industrial Commission's Board on January 9, 1998. In the settlement

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contract, the parties stipulated that the plaintiff was temporarily totally disabled from February 1, 1993 through January 13, 1994 and from August 3, 1994 through May 9, 1996. The parties also agreed that plaintiff suffered a 40% loss of each leg and an approximately 43% total loss of the plaintiff as a whole. The parties also agreed that plaintiff never returned to his regular work as a cable splice technician, notified his employer orally of this fact and that plaintiff was seeking employment through his own efforts. The defendant agreed to pay the plaintiff a lump sum of \$103,740 in full settlement of his IWCA claim. The sum represented \$10,000 for vocational training and an amount to compensate him for the remaining 29.8 years of his work life wherein he could not pursue his employment. Plaintiff's IWCA attorney requested the precise language appearing in the settlement agreement so as to minimize the impact the IWCA settlement would have on plaintiff's social security disability benefits. On the basis of the IWCA settlement contract, his employer sent the plaintiff a letter, dated April 1, 1998, which stated, in part, that "[d]ue to your acknowledged incapacity to pursue employment, your service ... has been terminated effective January 9, 1998."

¶ 6 Plaintiff had also initiated charges of disability discrimination and failure to accommodate his disability against the defendant with the Equal Employment Opportunity Commission (EEOC) beginning on July 16, 1997. After receiving the defendant's letter dated April 1, 1998, notifying him that his employment was terminated, plaintiff appended a claim of retaliatory discharge. On January 15, 2002, the EEOC issued a notice to the plaintiff of his right to sue after determining that its administrative efforts to resolve the case had been unsuccessful. Plaintiff filed a federal lawsuit in the Northern District of Illinois on March 29, 2002, alleging violations by his employer under the American With Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* (West 2008) and included a state

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claim of retaliatory discharge under the IWCA. On September 14, 2005, the district court entered summary judgment in favor of plaintiff's employer and dismissed all federal claims of disability discrimination, failure to accommodate and retaliation pursuant to the ADA. With the federal actions dismissed, the district court declined to continue to exercise its supplemental, ancillary jurisdiction over plaintiff's state IWCA claim of retaliatory discharge and dismissed it without prejudice. *Miller v. Ameritech Corp.*, 2005 WL 2266614 (N. D. Ill., Sept. 14, 2005) (unpublished order). Plaintiff appealed the district court's ruling to the Seventh Circuit Court of Appeals. On January 11, 2007, the federal appellate court affirmed the district court's entry of summary judgment in favor of plaintiff's employer on all counts. *Miller v. Ameritech Corp.*, 214 Fed. Appx. 605, 2007 WL 186237 (7th Cir., Jan. 11, 2007) (unpublished order).

¶ 7 Following the September 14, 2005 dismissal of his IWCA retaliatory discharge claim in federal court, plaintiff filed the instant case in the circuit court of Cook County on September 7, 2006, within one year of the termination of the federal action, as required by the Illinois Code of Civil Procedure. 735 ILCS 5/13-217 (West 2008). This complaint represents a single claim of retaliatory discharge pursuant to the IWCA. Plaintiff alleged that his employer terminated him in retaliation for pursuing his rights under the IWCA.

¶ 8 The defendant filed two motions for summary judgment on June 26, 2008 and January 21, 2009. Both motions were denied. In October 2010, the parties proceeded to a jury trial. However, the court declared a mistrial after the jury reported that they were unable to reach a unanimous verdict.

¶ 9 Retrial was scheduled for May 19, 2011. The defendant filed several motions *in limine*.

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Motion *in limine* number IV sought to bar the plaintiff from presenting evidence at retrial of any purported lost wages and ability to return to work after his termination. After full briefing, the court allowed this motion on the grounds that judicial estoppel precluded the plaintiff from presenting such evidence because of his positions in his IWCA settlement contract with his employer. The retrial was rescheduled for September 12, 2011. However, based on the judicial estoppel ruling, the defendant renewed its prior motions for summary judgment which the court granted on August 18, 2011. The circuit court found that plaintiff was judicially estopped from presenting evidence of lost wages and his purported ability to return to work which precluded him from establishing essential elements of his IWCA claim of retaliatory discharge as a matter of law. This timely appeal followed.

¶ 10 Analysis

¶ 11 In his retaliatory discharge claim under the IWCA, plaintiff must prove the following: (1) that he was an employee at the time he was injured on the job; (2) that he exercised his rights under the IWCA; and (3) that his discharge was causally related to his exercise of his IWCA rights. *Grabs v. Safeway, Inc.*, 395 Ill. App. 3d 286, 291 (2009). Causation cannot be met if the employer had a valid, nonpretextual reason for terminating the plaintiff. *Id.* (citing *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 160 (1992)).

¶ 12 In order to obtain IWCA benefits and secure an IWCA lump sum settlement from his employer, plaintiff represented that he was unable to perform his basic, required duties as a cable splicing technician for the defendant. In fact, from the date of his accident in 1993 until the IWCA settlement, plaintiff never returned to work in his capacity as a cable splicing technician. In order to obtain social security disability benefits, plaintiff claimed he was disabled and could not work in

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any capacity. Proceeding with his employment discrimination claims of disability discrimination, failure to accommodate and retaliation, he was required to prove that he was disabled and limited in a major life function. In the instant case, in order to claim damages for his IWCA retaliatory discharge allegations, plaintiff must prove he was and is able to work as a cable splicing technician. This is an about-face from the position he took before the Industrial Commission during his settlement of his IWCA claim with his employer. The precise issue on appeal is whether the position he took in his IWCA claim to obtain a settlement with his employer and the position he is now asserting in his IWCA retaliatory discharge claim against his now former employer are mutually exclusive, barring him from proceeding in this case under the doctrine of judicial estoppel.

¶ 13 a. Standard of Review

¶ 14 It is well settled that this court reviews a circuit court's application of the doctrine of judicial estoppel for an abuse of discretion regardless of the procedural manner in which the issue was raised. *Berge v. Mader*, 2011 IL App. (1st) 103778, ¶ 9.

¶ 15 b. Judicial Estoppel

¶ 16 The doctrine of judicial estoppel bars a party from making a representation in a case after he has successfully taken a contrary position in another case. *Id.* ¶ 12. The goal of the application of judicial estoppel is to protect the integrity of our system of justice and prevent a party from manipulating and making a mockery of our system of dispensing justice, in all its forms. *Id.* ¶ 12.

¶ 17 Illinois has developed a test composed of five elements to determine if judicial estoppel is applicable. Those five elements are as follows:

"(1) the two positions must be taken by the same party; (2) the

positions must be taken in judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position, and received some benefit thereby; and (5) the two positions must be 'totally inconsistent.'" *Id.* ¶ 13 (quoting *Ceres Terminals, Inc. v. Chicago City Bank & Trust Co.*, 259 Ill. App. 3d 836, 851 (1994)).

¶ 18 The circuit court found all five elements were present in this case. We now review these same elements. First, plaintiff is the identical party who took the two positions in question.

¶ 19 Secondly, plaintiff took these two conflicting positions in separate legal proceedings. He pursued his legal remedies for his on-the-job-injury before the Industrial Commission. He also pursued disability payments with the Social Security Administration. Then, after plaintiff settled his Industrial Commission case with his employer, he turned around and sued his now-former employer for retaliatory discharge arising out of the same set of facts and circumstances.

¶ 20 Thirdly, plaintiff attested to his Industrial Commission settlement agreement via his signature and the signature of his attorney and submitted the settlement agreement as a pleading to the Board for its approval. Plaintiff's complaint in this case satisfies this third element, as well. *Department of Transportation v. Coe*, 112 Ill. App. 3d 506, 510 (1983).

¶ 21 Fourth, plaintiff successfully derived a financial benefit from the representations made in his settlement agreement with his employer that was approved by the board members of the Industrial Commission. Additionally, plaintiff was successful in including language in the settlement agreement to calculate the lump sum payment weekly over his 29.8 years of remaining work life so

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as to minimize the financial impact the lump sum settlement would have on any monthly social security disability payments.

¶ 22 Plaintiff challenges the circuit court's ruling regarding the fifth element: that plaintiff presented two conflicting positions. His position before the Industrial Commission which has exclusive jurisdiction over worker's compensation claims was that he be compensated throughout the remainder of his 29.8 years of work life because he could not return to his former position due to a 40% disability in both legs and a total body disability of 43%. Additionally, plaintiff's position was that he needed an amount to compensate him for vocational training to secure a different job, that he was seeking employment through his own efforts and that he had orally notified his employer of this. Then, plaintiff took the position in this lawsuit that he was discharged not because he could not work as a cable splicing technician anymore but because his employer retaliated against him for exercising his rights before the Industrial Commission.

¶ 23 Plaintiff argues that there is a section of his settlement contract wherein the parties stipulated that he was temporarily totally (100%) disabled for two periods of time. He submits that the use of the word "temporarily" in conjunction with his two periods where he was totally disabled should permeate the entire document and govern a completely different section of his settlement document where his final recovery for 43% total body disability over the 29.8 years of his work life should be read as temporary, as well. This makes no sense.

¶ 24 We agree with the circuit court that these two positions taken by the plaintiff are indeed totally inconsistent. Plaintiff represented that he was looking for other work on his own. In fact, plaintiff never returned to his position as a cable splice operator after he was injured on December

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9, 1992. In the instant case, plaintiff maintains that his employer retaliated against him in 1998 when they terminated his employment as a cable splice operator following the IWCA settlement even though he now claims he was physically able to return to that position. His pursuit of this retaliatory discharge case is in direct contravention of the positions he took before the Industrial Commission in his approved settlement agreement.

¶ 25 Judicial estoppel focuses on the relationship between the judicial process and the litigant. The circuit court considered the actions of the plaintiff in changing his position and felt the need to protect the integrity of the judicial process from his intentional assertion of an inconsistent position that perverted the judicial process.¹ No crucial nexus between the parties in the two cases need exist under judicial estoppel. The primary focus of judicial estoppel is to prohibit a party from stating at different times, two conflicting factual positions as their private interests change. *Finley v. Kesling*, 105 Ill. App. 3d 1, 9 (1982). In other words, a party cannot be permitted to affirm a contrary position. “[T]ruth is not a weather vane. It does not veer when winds of self-interest change. It remains constant.” *Department of Transportation v. Coe*, 112 Ill. App. 3d 506, 507-08 (1983).

¶ 26 We agree with the circuit court that the intentional self-contradiction by the plaintiff in this

¹ Although the parties do not argue equitable estoppel, there appears to be a clear case of equitable estoppel in the instant case, as well. A party may invoke equitable estoppel to prevent his opponent from changing positions when 1) he was an adverse party to someone in a prior proceeding, 2) he detrimentally relied on his opponent’s prior position; and 3) he would be prejudiced if the court permitted his opponent to change positions. All elements of equitable estoppel are present in this case. The parties, employee and employer, are the same in both the worker’s compensation case and in the instant retaliatory discharge case. The employer detrimentally relied on the employee’s positions in the workers’ compensation case for which it would suffer severe prejudice if the employee would be allowed to change his position in this case. Equitable estoppel focuses on the parties’ relationship, then and now.

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case is an affront to judicial dignity. Plaintiff is advocating a contrary factual position as a means of obtaining an unfair advantage in a forum designed for seeking justice and for which a court provides fairness. There is nothing more fair than forcing a party to suffer the consequences of judicial estoppel based on an earlier factual position he took and benefitted from in a prior case. We agree with the circuit court's finding the plaintiff's two positions are diametrically opposed. The truth of plaintiff's 43% total body disability for which he was compensated over his expected work life of 29.8 years and his professed inability to do his job in the worker's compensation case precludes the truth of his position in this case that he could do his job but his employer retaliated against him by terminating him for exercising his worker's compensation rights. Judicial integrity has as its core purpose the promotion of truth. The truth is no less important to the Industrial Commission acting exclusively on worker's compensation cases than it is to the circuit court. *Department of Transportation v. Coe*, 112 Ill. App. 3d 506, 510 (1983). The doctrine of judicial estoppel applies with equal force to both proceedings. *Id.*

¶ 27 Other jurisdictions have also applied judicial estoppel to circumstances not unlike the plaintiff's case. See *Simon v. Safelite Glass Corp.*, 128 F. 3d 68, 72 (2nd Cir. 1997) and cases cited therein. In *King v. Herbert J. Thomas Memorial Hospital*, 159 F. 3d 192, 197-98 (4th Cir. 1998), a plaintiff represented to the Social Security Administration, a quasi-judicial forum not unlike the Industrial Commission, that she was disabled and could not perform her prior work. Based on these representations, she received disability benefits. The district court judicially estopped her from asserting in her subsequent age discrimination claim against her former employer that she was able to perform her previous work. The appellate court affirmed, refusing to allow the plaintiff to seek

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to obtain financial benefits from two sources based on two incompatible positions. In the instant case, plaintiff is seeking to obtain financial remuneration from the same source, his former employer, based on two incompatible positions. We agree with the circuit court that the plaintiff should not be allowed to undermine the integrity of our judicial process in this manner any more than King was allowed to do so. *Id.* at 198.

¶ 28 In the instant case, the Industrial Commission judicially endorsed the factual assertions in the worker's compensation settlement contract the parties entered into when the Board approved and signed the agreement. Allowing the plaintiff to move forward with a contrary position in this case would be to sanction a perversion.

¶ 29 The IWCA does not prevent an employer from terminating an employee who suffered an on-the-job injury that is compensable under the IWCA. *Hartlein v. Illinois Power*, 151 Ill. 2d 142, 159-60 (1992). An employer is also not required to reassign an employee to another position rather than terminate the employment. *Id.* In Illinois, an injured employee's lengthy inability to work is considered a valid reason for discharge. *Slover v. Brown*, 140 Ill. App. 3d 618 (1986). The IWCA only prohibits the firing of an employee because the employee exercised his IWCA right to file a claim. *Grabs v. Safeway, Inc.*, 395 Ill. App. 3d 286, 291 (2009). The defendant, in this case, was well within his right to terminate the plaintiff who represented in his Industrial Commission settlement contract that he was too physically disabled to return to work and for which the employer financially compensated him. *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 160 (1992) (citing *McEwen v. Delta Air Lines, Inc.*, 919 F. 2d 58, 60 (7th Cir. 1990)). Plaintiff was terminated in 1998, more than five years after his injury and only after he admitted in his settlement that he could not

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perform the duties of the position he was hired to perform and was looking for work on his own. The many years that lapsed between plaintiff's assertion of his worker's compensation rights in 1993 and his termination in 1998 belies any nexus that his employer fired him for filing a IWCA claim for benefits.

¶ 30 Plaintiff agreed in his worker's compensation claim that he could not meet those duties in order to both receive worker's compensation benefits and his worker's compensation settlement through the IWCA Board. He also received social security disability under the heightened premise of being unable to work in any capacity. He cannot turn around and say he really could perform the duties of a cable splicing technician for purposes of this retaliatory discharge lawsuit so he can then collect damages for time spent out of work and seek reinstatement.

¶ 31 Despite plaintiff's attempt to try to distinguish his case from *Department of Transportation v. Coe*, 112 Ill. App. 3d 506, 509 (1983), the case is actually quite analogous. In *Coe*, a Department of Transportation employee who was on leave of absence due to an on-the-job injury, submitted with his workers' compensation claim, a doctor's letter stating he "was entitled to 20% permanent partial disability to the body as a whole" and that Coe could no longer perform the duties of the job for which he was hired. Thereafter, the parties entered into a lump sum settlement in his worker's compensation claim which was approved by the Industrial Commission board. The settlement with his employer represented a 20% permanent disability. As a result of that settlement, his employer informed Coe that because he was no longer able to perform his job, he would either have to resign or be discharged. Coe refused to resign and sought to set aside the workers' compensation settlement. The employer initiated discharge proceedings which Coe challenged at a hearing before

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the Civil Service Commission. Coe prevailed before the Commission by alleging he was now 100% capable of performing the duties of his former position, despite his earlier representations to the contrary when he secured his lump sum settlement. The circuit court reversed and held that plaintiff was judicially estopped from asserting that he was able to perform his former duties in a subsequent case. This court affirmed, and also modified the elements of judicial estoppel by expanding them to include positions taken in quasi-judicial proceedings and in circumstances where the party intended everyone to rely on the veracity of the statements he made. *Coe*, 112 Ill. App. 3d at 509.

¶ 32 Plaintiff encourages this court to follow *Department of Transportation v. Graue*, 113 Ill. App. 3d 336 (1983), decided the same day as *Coe*. Graue's doctor, in contrast to Coe's doctor, stated that Graue was fit to return to work. The Civil Service Commission twice ordered the public employer to reinstate Graue. On appeal, this court held that the judicial estoppel doctrine did not apply where Graue's workers' compensation settlement agreement did not refer to the extent of plaintiff's physical disability and contained no statement indicating he was permanently disabled at all or unable to perform his former duties going forward.

¶ 33 Plaintiff also relies on *Parisi v. Jenkins*, 236 Ill. App. 3d 42 (1992), which involved a police officer who settled his "temporary disability" case. A hospital employee and three doctors reported that Parisi was fit to return to work. Neither *Graue* nor *Parisi* were retaliatory discharges cases. *Graue* involved an order of the Civil Service Commission and Parisi was a police officer who could only be discharged for cause upon written charges and after an opportunity to be heard at a fair and impartial hearing conducted by the Board of Fire and Police Commissioners. *Parisi v. Jenkins*, 236 Ill. App. 3d at 50.

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¶ 34 Considering specifically *Coe*, *Grawe* and *Parisi* as applied to the instant case, we find that the judicial estoppel doctrine bars any evidence that plaintiff could ever perform his prior duties or is entitled to back pay or reinstatement to his prior job. Similar to the settlement agreement in *Coe*, the agreement in this case referred to a 40% disability to each of plaintiff's legs with a total body disability of 43% and compensated plaintiff for the remaining 29.8 years of plaintiff's work life for this loss. Plaintiff further represented that he was seeking other employment on his own efforts. Plaintiff's current case is inconsistent with and completely contrary to the terms of his worker's compensation settlement. In *Grawe*, the plaintiff never represented either in his worker's compensation claim or the resulting settlement that he was permanently disabled or incapacitated in any degree from performing his employment duties for which he was hired. *Department of Transportation v. Grawe*, 113 Ill. App. 3d at 343.

¶ 35 In the instant case, plaintiff never returned to work as a cable splice operator during the many years his IWCA claim was pending and stated in his settlement contract that he could not return to that work.

¶ 36 Therefore, the circuit court's ruling that judicial estoppel barred plaintiff's claims in this case is completely consistent with case precedent.

¶ 37 Conclusion

For the foregoing reasons, we affirm the circuit court's decision to apply the doctrine of judicial estoppel and its entry of summary judgment in favor of defendant. We find that the circuit court exercised its discretion appropriately when it ruled that plaintiff is judicially estopped from pursuing his damages in his retaliatory discharge case against the defendant. Plaintiff is judicially

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estopped from contradicting his previous positions taken in his workers' compensation settlement before the Industrial Commission. Therefore, there was no genuine triable issue of material fact for a fact-finder to resolve. The circuit court properly granted defendant's renewed motions for summary judgment and we affirm.

¶ 38 Affirmed.