COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DANIEL H. PARKS, Complainant

v.

USF GLEN MOORE INC., Respondent

DOCKET NO. E-100541-A
EEOC NO. 17FA13676

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Complainant herein is Daniel H. Parks (hereinafter "Parks"), who, at all times relevant, resided at 11839 Raystown Road, James Creek, PA 16657. (N.T. 37).
2. The Respondent herein is USF Glen Moore, Inc., (hereinafter "Glen Moore"), a trucking company located at 1711 Shearer Drive, Carlisle, PA. (WCT.8).
3. On or about September 4, 2001, Parks filed a complaint docketed at E-100541-A with the Pennsylvania Human Relations Commission, alleging an age-based denial of promotion and that his employment was terminated because of his age.
4. On October 15, 2001, PHRC Harrisburg Regional Office staff served the Complaint on Glen Moore.
5. Glen Moore failed to file a verified Answer to the Complaint.
6. On January 3, 2002, PHRC Harrisburg Regional Office staff filed a "Petition for Rule to Show Cause" pursuant to 16Pa.Code §42.33(c.)

   *To the extent that the opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T.	Notes of Testimony
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit
S.F.	Stipulation of Fact agreed to at N.T. 12 + 13, 113.
W.C.T.	Parks' testimony at Worker's Compensation Hearing.
SSA	Parks' Social Security Application file.

7. On January 4, 2002, PHRC Motions Commissioner Russell Howell issued and caused to be mailed to Paul Dellasega, Esquire, Counsel for Glen Moore, a Rule to Show Cause extending another opportunity to Glen Moore to file a verified Answer on or before February 5, 2002.
8. Having received no answer, on February 25, 2002 the PHRC entered a judgment against Glen Moore, finding that Glen Moore had refused to promote Parks and terminated him because of his age.
9. On February 25, 2002, the PHRC's Order was served on Glen Moore.
10. Parks was born on June 7, 1940. (N.T. 38).
11. In or about June 1991, while a truck driver for Western Personnel, Parks strained his shoulders causing him to lose time from work. (W.C.T. 38, 39, 41).
12. When Parks returned to work in 1991, he returned as a driver. (W.C.T. 39).
13. In 1999, Glen Moore purchased Glen Moore Transport, Inc. (N.T. 44).
14. Prior to Glen Moore's purchase of Glen Moore Transport, Inc., Parks had been an employee of Glen Moore Transport, Inc. (N.T. 39, 41, 42).
15. On March 16, 1994, while a driver with Glen Moore Transport, Inc., Parks sustained a work-related injury to his left shoulder. (W.C.T. 36, 39; (CE 12).
16. Following his shoulder injury in March 1994, Parks filed a worker's compensation claim, and began to receive total disability benefits. (N.T. 83; (CE 12).

17. Parks' 1994 injury caused Parks to be out of work for several months and to undergo arthroscopic surgery. (N.T. 41, 50, 82, 83).
18. Upon his return, Parks' worker's compensation benefits were suspended and he was given the light duty position of driver recruiter. (N.T. 41, 50, 83).
19. In 1995 Parks was named Director of Human Resources for Glen Moore Transport, Inc. (N.T. 42).
20. In November 2000, Parks was made Glen Moore's Director of Safety. (N.T. 45; SF 2).
21. In December 2000, in the absence of Glen Moore's Senior Vice President, Dick McDonald, Parks assumed responsibility for Glen Moore's Safety Department, Recruiting, and Human Resources. (N.T. 47).
22. Vice President McDonald returned to work on a part-time basis in January 2001. (N.T. 47; SF 8).
23. In January 2001, Mark Martin was hired as President of Glen Moore. (N.T. 264, 265).
24. In May or June 2001, Glen Moore actively recruited Pamela Perrault (hereinafter "Perrault"), for the position of Vice President of Safety. (N.T. 193, 216).
25. On July 9, 2001, Glen Moore named Perrault to the position of Vice President of Safety. (N.T. 192; SF 9).
26. On July 12, 2001, Glen Moore discharged Parks from his position, effective July 13, 2001. (W.C.T. 10, 21).
27. At the time of Parks' termination, Parks was earning $860.00 per week. (SF 3).
28. Glen Moore paid Perrault a starting salary of $90,000.00 per year. (N.T. 219; SF 10).
29. Perrault received a bonus of $7,300.00 for the year 2001. (N.T. 229; SF 11).
30. After he was discharged, Parks informed Crum & Forster, the insurance carrier handling his 1994 worker's compensation claim, that he was no longer employed and sought re-instatement of worker's compensation benefits. (N.T. 50).
31. By Agreement dated November 9, 2001, Parks settled his worker's compensation claim with Crum & Forster for the sum of $80.000.00. N.T. 49; CE 12; W.C.T. 39).
32. On September 13, 2001, Parks filed a separate worker's compensation claim for a purported injury to his right shoulder Parks claimed to have suffered on May 24, 2001 and subsequently aggravated on July 5, 2001. (N.T. 282, 294; W.C.T. 8, 9).
33. Parks did not inform Glen Moore of the purported injury to his right shoulder until August 15, 2001. (W.C.T. 14, 20).
34. On January 16, 2002, while testifying before a Worker's Compensation Judge, Parks indicated that he was seeking payment for loss of use of his right arm "because, at this point, with the condition and disability that I suffer in the right arm I have not been able to successfully work at a job". (W.C.T. 28, 29).
35. Parks further testified that although the injury to his right arm was not to the same extent if his arm had been amputated, "[he has] loss of use, a limited loss of use." (W.C.T. 29).
36. After filing the September 13, 2001 worker's compensation claim, Parks consulted an attorney who, in effect, advised Parks to abandon the worker's compensation claim and, instead, pursue a disability claim with the Social Security Administration because Parks had "documented disabilities". (N.T. 282, 283, 292).
37. Parks did withdraw his September 2001 worker's compensation claim. (N.T. 294).
38. Subsequently, in February 2002, Parks filed a Social Security Administration Disability Claim. (N.T. 58, 283; SSA).

39. In Parks' Social Security application dated March 8, 2002, he stated: "I became unable to work because of my disabling condition on July 13, 2001", and "I am still disabled". (SSA).
40. On Parks' application he also agreed to notify the Social Security Administration if his medical condition improves so he would be able to work and to tell them if he applies for, or receives a decision on benefits under worker's compensation. (SSA).
41. Parks' application also contained the following statement:
    I KNOW THAT ANYONE WHO MAKES OR CAUSES TO BE MADE A FALSE STATEMENT OR REPRESENTATION OF MATERIAL FACT IN AN APPLICATION OR FOR USE IN DETERMINING A RIGHT TO PAYMENT UNDER THE SOCIAL SECURITY ACT COMMITS A CRIME PUNISHABLE UNDER FEDERAL LAW BY FINE, IMPRISONMENT OR BOTH. I AFFIRM THAT ALL INFORMATION I HAVE GIVEN IN CONNECTION WITH THIS CLAIM IS TRUE. (SSA).
42. On a Social Security Administration Disability Report Audit, Parks described how his injuries limit his ability to work by stating; "I can not lift my arms without pain in my shoulders, I have great difficulty extending my arms out from my body", and that he became unable to work because of injuries on July 13, 2001. (SSA).

CONCLUSIONS OF LAW

1. A combination of section 9(b)(3) of the Pennsylvania Human Relations Act and 16 Pa. Code §42.31(c) requires a Respondent to file a written, verified answer to a complaint within thirty days of service of the complaint.
2. 16 Pa. Code §42.31(d) declares that the failure of a Respondent to timely answer a complaint places a Respondent in default.
3. Under 16 Pa. Code §42.33, when a Respondent has not answered a complaint, a Rule to Show Cause may be issued.
4. Under Pa. Code §42.33(d)(4), when a Respondent does not respond to a Rule to Show Cause, the Pennsylvania Human Relations Commission ("PHRC") may make a finding of probable cause and enter a judgment for a Complainant on the issue of liability, to be followed by a public hearing on the issue of damages.
5. In this matter, the Respondent's failure to file a properly verified answer or to respond to a Rule to show Cause resulted in the entry of a judgment for the Complainant on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy.
7. Following a discriminatory termination, back pay is not allowed for any periods of disability.

OPINION

This case arises on a complaint filed by Daniel H. Parks, (hereinafter Parks) against USF Glen Moore, Inc., (hereinafter "Glen Moore"), or about September 4, 2001, at Docket Number E-100541-A. Generally, Parks' complaint alleged that from February 2001 through July 9, 2001, Glen Moore denied Parks a promotion to the position of Head of Safety and Recruiting because of his age, and that on July 12, 2001, Glen Moore discharged Parks because of his age. Parks claims that Glen Moore's actions violate Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA")

Under cover letter dated December 31, 2001, PHRC Harrisburg regional office staff petitioned for a Rule to Show Cause. The petition was filed because Glen Moore had not filed a timely answer to Parks' complaint. On January 4, 2002, a Rule to Show Cause was issued affording Glen Moore until February 1, 2002 to file an Answer. No Answer having been filed, Motions Commissioner Howell recommended to the full PHRC that Glen Moore be found liable for the alleged age-based failure to promote and termination. By Order dated February 25, 2002, Glen Moore was found liable for an age-based failure to promote Parks and for an age-based termination of Parks. The PHRC's February 25, 2002 Order further required the parties to attempt to eliminate the practices found unlawful through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for a public hearing on the limited issue of appropriate damages. The hearing began on November 24, 2002, and concluded on December 14, 2002 in Carlisle, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. Post-hearing briefs were submitted by the parties. Both Glen Moore's brief and the brief on behalf of the complaint were received on April 24, 2003. Additionally, on May 28, 2003, Glen Moore submitted a reply brief.

On November 24, 2002, before testimony was heard at the Public Hearing, Glen Moore made several oral motions. One of Glen Moore's oral motions sought a ruling that the equitable doctrine of "judicial estopped", should be applied to the present case because Parks had declared to the Social Security Administration that he was totally disabled and therefore eligible to receive benefits based on his disability. Glen Moore's motion seeks to estop Parks from seeking either monetary damages or reinstatement by submitting that Parks cannot now seek wages for a job he declared he cannot do because he is totally disabled.

The preclusion principle underlying the equitable doctrine of judicial estopped is the prevention of a party asserting a position in one forum that is contrary to a contention made under oath in another forum previously. The purpose of the doctrine is to promote broad public policy objectives. First, it is important to preserve the sanctity of one's oath by requiring consistency in sworn positions. Second, the integrity of the adjudicatory process is preserved by avoiding inconsistent results in two separate forums. Adjudicatory integrity is protected by preventing a litigant from playing "fast and loose with the courts" or "speaking out of both sides of their mouth." McNemar v. Disney Store, Inc., 91 F.3d 610 (3rd Cir. 1996); and Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990).

A ruling on Glen Moore's motion was reserved until the parties had the opportunity to argue the merits of Glen Moore's motion in their post-hearing briefs. As the purpose of the public hearing

of this matter was solely to determine what damages, if any, are appropriate given the entry of default judgment that Parks was denied a promotion and terminated because of his age, the issue posed by Glen Moore's motion has a nearly total effect on whether damages are appropriate.

The first argument raised in the post-hearing brief on behalf of the complaint suggests that Glen Moore waived the defense of judicial estoppel by failing to answer the complaint. However, this argument is misplaced. Glen Moore's motion does not seek to apply the doctrine of judicial estoppel to the default findings that Glen Moore is liable for either the promotion denial or the termination. Instead, Glen Moore's motion seeks application of the doctrine of judicial estoppel to the limited question of whether Parks can seek damages under the circumstances present.

Normally, the issue raised by Glen Moore comes up when an employee has been terminated because of a disability and that terminated employee then declares he is totally disabled. The question then is whether such an employee can maintain an action for an alleged disability-based termination.

Should an employer be found liable under a default judgment under such circumstances, the employer would not be allowed to subsequently argue the termination was not disability-based. Entry of a default judgment means that the elements of the requisite *prima facie* showing cannot be subsequently challenged.

Here, the default judgment found age-based discrimination. Further, Glen Moore's motion does not attempt to contest any element of the age-based liability findings. Instead, Glen Moore's motion addresses the question of whether Parks' declaration to the Social Security Administration precludes him from now arguing he was not disabled and thus unable to work as of July 13, 2002.

Fundamentally, once a terminated employee becomes fully disabled or becomes otherwise unavailable for work following a termination, the employee is not entitled to back pay for any period after the employee becomes totally disabled. See Starceski v. Westinghouse Electric., 67 FEP 1184 (3rd Cir. 1995); and EEOC v. Riss International Corp., 35 FEP 423 (W.D. Mo. 1982).

Factually, what is known in this case is that first, on September 13, 2001, following his termination, Parks applied for worker's compensation for a purported injury to his right shoulder. Parks testified that he injured his right shoulder on May 24, 2001, and subsequently aggravated it on July 5, 2001.

Parks did not notify Glen Moore of the purported injury to his right shoulder until August 15, 2001, over a month after he was terminated. Added to this, Parks offered testimony at a worker's compensation hearing on January 16, 2002 that indicated, in effect, because of the condition of his right arm, he had not been able to successfully work at a job. Parks testified at that hearing that he had limited use of his right arm.

In addition to filing the worker's compensation claim for a purported injury to his right arm, on advice of counsel, Parks abandoned his worker's compensation claim and, instead, filed a Social Security Administration disability claim. What Parks declared to the Social Security

Administration serves to compound the impact of his testimony at the worker's compensation hearing. In effect, Parks' application for disability benefits declared under oath that due to a disability he became unable to work on July 13, 2001, and that as of March 8, 2002, the date of his application, he was still disabled. Parks told the Social Security Administration that he could not lift his arms without shoulder pain and that he had great difficulty extending his arms out from his body. Parks' disability is generally described as progressively deteriorating degenerative joint disease.

Based on Parks' representations to Social Security, the Social Security Administration declared that Parks had been disabled and unable to work since July 13, 2001, and awarded Parks $1,027.00 per month beginning in January 2002.

Under the Social Security Disability Insurance Benefits program, (42 U.S.C. 420-425 (1994)), in order to receive benefits a disabled worker must apply for benefits and have a disability. (42 U.S.C. 423 (1)(1)(A)-(D)).

Social Security defines a disability as the inability to "engage in any substantial gainful activity by reasons of any medically determinable physical . . . impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months". (42 U.S.C. 423 (d)(1)(A)). To meet this definition, an applicant must have a physical . . . impairment or impairments . . . of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. (42 U.S.C. 423 (d)(2)(A)).

Parks' circumstances are substantially similar to the circumstances surrounding the 3rd Circuit case of McNemar v. The Disney Store, Inc., 91 F. 3d 610, 5 ADC 1227 (3rd Cir. 1996). In McNemar the 3rd Circuit affirmed the district court's use of judicial estoppel in a disability-based termination case. McNemar was HIV positive and was accused of wrongdoing that was punishable with termination. McNemar's HIV status was not revealed to the employer until a termination interview. After his discharge, McNemar applied for both state and federal disabilities benefits. In doing so, McNemar asserted that he was disabled and unable to perform the regular duties of his job. Based on such statements, the district court estopped McNemar from claiming he was a "qualified individual with a disability" under the ADA. McNemar argued that HIV is a "presumptive disability" under Social Security Administration policies, and that he could still perform the essential functions of his job so as to qualify for ADA protections. The 3rd Circuit Court disagreed with McNemar's argument and stated "whatever the Social Security Administration's criteria for eligibility for disability benefits, the fact remains that McNemar told the U.S. Government and the states of New Jersey and Pennsylvania under penalty of perjury that he was physically unable to work". Id at 620.

The pivotal factor in McNemar appears to be that McNemar claimed to be totally disabled and later tried to assert he could work and the court found this was tantamount to playing "fast and loose" with the court. To the 3rd Circuit Court, attempting to maintain that he was totally disabled in one forum while asserting he could work in another forum is equivalent to making "false representations with impunity."

Like McNemar, Parks consistently and vigilantly made representations that as of July 13, 2001, he was completely unable to work due to a disability. Park cannot now be permitted to suggest he was available to work after July 13, 2001.

At the December 14, 2002 continued Public Hearing, Parks was asked if he had contacted the Social Security Administration to discuss his benefits since the earlier Public Hearing date on November 14, 2002. Parks indicated he had not. It was clear that Parks did not make a confused blunder when he told both the Social Security Administration and worker's compensation that he was unable to work. Instead, his assertions were done with clarity and manipulative. Parks continues to receive substantial social security benefits which supports the conclusion that Parks considers himself as disabled.

Under the totality of the circumstances present, Parks is precluded from now validly representing that he was available for work anytime after July 13, 2001 because such a position is fundamentally at odds with the position he took for purposes of obtaining disability benefits.

This brings us to the one-week period between Monday, July 9, 2001 and Friday July 13, 2001. Besides the termination issue, Glen Moore was also found liable for an age-based promotion denial. On July 9, 2001, Glen Moore hired Perrault at a salary of $90,000.00 per year. At the time, Parks was earning $860.00 per week. Parks is entitled to the difference between Parks' earnings and Perrault's earnings for one week. Respondent Exhibit 6 reflects Perrault's weekly salary in 2001 as $1,730.77. Accordingly, Parks is entitled to lost wages of $870.77.

Parks is also entitled to be reimbursed for his out-of-pocket expenses in pursuit of his PHRC complaint. The post-hearing brief on behalf of the complaint calculates such costs as $387.60. Such calculations are considered reasonable.

Finally, the post-hearing brief on behalf of the complaint submits that Parks should be reimbursed for costs associated with maintaining medical insurance. When calculating damages, the term "back pay" is broadly interpreted to include many aspects of lost compensation besides simply wages. Consideration of back pay includes the notion of an employer's insurance contributions and benefits.

Because Parks is precluded from recovery of any back pay after his termination, Parks is thus also precluded from recovery of medical insurance expenses. To recover such an element, Parks had to be available to work after July 13, 2001.

An appropriate order follows.

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USF GLEN MOORE INC., Respondent

DOCKET NO. E-100541-A
EEOC NO. 17FA13676

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Parks suffered damages. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: Carl H. Summerson
Permanent Hearing Examiner

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FINAL ORDER

AND NOW, this 29th day of July, 2003, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERS

1. That Glen Moore shall pay to Parks within 30 days of the effective date of this Order the lump sum of $870.77 which amount represents back pay lost for the period between July 9, 2001, and July 13, 2001.
2. That Glen Moore shall pay additional interest of nine percent per annum on the back pay award, calculated from July 13, 2001 until payment is made.
3. That Glen Moore shall pay to Parks within 30 days of the effective date of this order the lump sum of $387.60 which amount represents certifiable travel expenses.
4. That within 30 days of the effective date of this Order, Glen Moore shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Joseph T. Bednarik, Esquire, in the Commission's Harrisburg, Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION
By: Stephen A. Glassman, Chairperson
Attest: Sylvia A. Waters, Secretary