IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

J. B. LORING,	)	
	)	Davidson Chancery No. 94-1263-III
Plaintiff/Appellant	)	
v.	)	
	)	
NASHVILLE ELECTRIC SERVICE AND POWER BOARD OF METROPOLITAN GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TENNESSEE,	)	Appeal No. 01A01-9603-CH-00116
	)	
Defendant/Appellee	)	

FILED

August 16, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE
THE HONORABLE ROBERT S. BRANDT, CHANCELLOR

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AFFIRMED AND REMANDED

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

W. FRANK CRAWFORD, PRESIDING JUDGE

ALAN E. HIGHERS, JUDGE

O P I N I O N

The appellant questions the granting of summary judgment on various grounds. We think the case was proper for a Rule 56 disposition and therefore affirm the judgment.

The complaint alleges a violation of the Tennessee Human Rights Act, T.C.A. § 4-21-101, *et seq.*, which, *inter alia*, forbids discrimination against employees on the basis of age.

The plaintiff was initially employed by the Nashville Electric Service ("NES") in 1968, at age 38; through the years he rose in position and, on September 1, 1993, he was Director of Risk Management and Employment. On that day, plaintiff alleges that he was required to apply for the position he was currently holding, the title of which would be changed to Vice-President of Human Resources.

He was not appointed to the position, for which the defendant allegedly "was unable to articulate" specific reasons, according to the complaint; instead, he "was given a merit raise," but thereafter his job duties were undefined, which he believed was a part of a scheme to force his retirement. He alleged that he had to retire December 1, 1993 "or lose the retirement incentive."

In a separate count, the plaintiff alleges that the "Chairman of the Board" promised to pay him $10,000.00 per year as secretary of the Civil Services Board and that this contract was breached by the defendant.

The appellant filed an answer asserting that the agreement alleged in the second count is (1) *ultra vires*, (2) barred by the Statute of Frauds and (3) denied. It alleged that the decision of the plaintiff to retire was voluntary and that its decision not to select the plaintiff as Vice-President was based on factors other than age as permitted by T.C.A. § 4-21-407, one of which was the inability of the plaintiff to work as evidenced by his testimony in a workers' compensation proceeding.

Defendant moved for summary judgment, supported by various affidavits, the complaint for workers' compensation, and excerpts from the trial and deposition testimony of the plaintiff.

Donald Kohanski, Senior Vice-President and Chief Financial Officer of NES, testified by affidavit that in January 1993, Dr. Matthew Cordaro was named General Manager of NES. He implemented a reorganization of NES, which involved the elimination of several director positions, including that of Risk Management and Employment, and created numerous Vice-President positions, one of which was Human Resources. He testified that the selection process for this position was his, Cordaro's and James Dalrymple's responsibility. The position was widely advertised and 21 applications were received, one of which was the plaintiff's. Donald Wells, 51, was selected as the best candidate because he had 28 years of experience in the area of human resources. Kohanski testified that age was not discussed or considered in the decision-making process.

Of similar import are the affidavits of James Q. Dalrymple, Executive Vice-President and Chief Operating Officer of NES; Matthew C. Cordaro, President and Chief Executive Officer of NES; and Betty Nixon, Chairperson of the Board of Directors of NES.

Debbie Pemerton, Compensation Supervisor for the Human Resources Department of NES, testified that the plaintiff requested that she type a letter for him on November 22, 1993, which he signed. This letter is addressed to Donald Wells, Vice-President of Human Resources:

> Dear Mr. Wells:
>
> This letter is my request for early retirement effective December 1, 1993. I request that my military credit be applied to my years of credit in the retirement plan. Also, I request that all accumulated annual leave pay and the seven months severance pay be paid to me after January 1, 1994.
>
> s/J. B. Loring

On November 30, 1993, the plaintiff signed a document certifying that the retirement benefit was fully explained to him. The second paragraph of the document provides:

> I was given an opportunity to ask any and all questions I so desired. The benefits were explained to me to my satisfaction as well as the fact that this is an option and my choice is of my own free will and independent decision. I understand my rights and options under the benefit proposed, and

> my choice is made independently and without any threats, promises or coercion.
>
> s/J. B. Loring

In further support of the motion for summary judgment, the defendant attached a certified copy of a complaint filed by the plaintiff against NES seeking workers' compensation benefits. The complaint was filed January 21, 1994.[1]

The plaintiff claimed that he was "one hundred (100) percent disabled as a result of two work-related injuries" in 1983 and 1993. The workers' compensation trial was held on August 17, 1995; the plaintiff testified that the on-the-job accidents in 1983 and 1993 rendered him totally and permanently disabled.

The plaintiff filed his affidavit in opposition to the motion. He testified that "suggestions and references were repeatedly made with regard to my age" and that "my retirement was not voluntary" and " . . I was forced to sign certain letters requesting a `retirement'." He believed his lack of promotion was attributable to his age.

The Chancellor minced no words in ruling on the motion. He held:

> This is an age discrimination in employment case brought pursuant to the Tennessee Human Rights Act, T.C.A. § 4-21-407. The plaintiff asserts that when he did not receive a new position for which he was qualified, he was forced to retire against his will. The employer has moved for summary judgment. Because the plaintiff filed another suit against the same employer seeking workers' compensation benefits in which he claimed to be 100% disabled, he cannot maintain this suit in which he asserts he was qualified for the job. The motion for summary judgment is granted.

Summary judgment is appropriate if the moving party establishes that there are no disputed, material facts creating a genuine issue for trial and that he is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). The party opposing the motion must present evidence of a disputed material fact sufficient to create a genuine issue for trial. His own opinions, beliefs or conclusions will not suffice. *Id.*.

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[1]The complaint seeking damages for alleged civil rights violations was filed April 27, 1994.

If the plaintiff is to establish a *prima facie* case of age discrimination, he must demonstrate, *inter alia*, that he was qualified for the position. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 668 (1973). Having established a *prima facie* case, the burden shifts to the employer to come forward with a legitimate, non-discriminatory reason for its action and, if this is accomplished, the burden reverts to the plaintiff to prove by a preponderance that the employer's stated purpose was pretextual only and a cover for the real discriminatory reason. *Bruce v. Western Auto Supply Co.*, 669 S.W.2d 95, 97 (Tenn. App. 1984).

The Chancellor ruled that the plaintiff by his twice-sworn testimony was not qualified for the position. As we have noted, the plaintiff filed a complaint in the Chancery Court three months before he filed the complaint in the case at bar that he was totally and permanently disabled as a result of two job-related injuries. He was cross-examined about this allegation and testified that he believed himself to be "totally and permanently disabled." In his affidavit filed in opposition to the motion for summary judgment, he takes a contrary position, which cannot be tolerated.

A litigant is estopped to contradict a statement made under oath in the course of a prior judicial proceeding or to maintain an inconsistent position in a subsequent judicial proceeding. A "statement under oath" includes statements made in a pleading, a deposition or during oral testimony. *Allen v. Neal*, 396 S.W.2d 344, 346 (Tenn. 1965); *Melton v. Anderson,* 222 S.W.2d 666, 669 (Tenn. App.1949). A contrary policy would permit a litigant "to obtain an advantage for himself or attempt to do so by pleading inconsistent facts within his personal knowledge in two lawsuits with the possibility of prevailing in both suits." *Leatherwood v. United Parcel service*, 708 S.W.2d 396, 402 (Tenn. App. 1985).

In *Leatherwood*, the employee first brought suit against his employer claiming total disability as the result of a work-related injury. The employee received a lesser award. He then filed suit against his employer alleging he was discharged in retaliation for making a claim for workers' compensation benefits.

This Court noted that, "In an employment contract, an implied condition, absent an agreement otherwise, is that both parties must be alive and capable of

performing." *Id.* .This Court then dismissed the retaliatory discharge claim and held that the employee was estopped to maintain the suit given his earlier, inconsistent position that he was "100% disabled."

Loring's actions are indistinguishable from those examined in *Leatherwood*. In his workers' compensation action, Loring claimed to be "100% disabled" as a result of two work-related injuries. At trial and under oath, Loring affirmed his position that he was "permanently and totally disabled" and verified that the allegations in the original complaint were his own.

In his separate suit against NES alleging discrimination on the basis of age, Loring inconsistently claimed that he "had no desire to retire (on disability or otherwise) until age seventy," and further affirmed under oath that at the time the Vice-President of Human resources was selected, he "met all of the minimum qualifications" for the position but was "forced to retire" due solely to his age.

Similar to the employee in *Leatherwood*, Loring is now estopped to maintain an employment discrimination suit given his earlier position that he was 100% disabled. As prohibited by the doctrine of judicial estoppel, Loring has advanced inconsistent factual positions in separate lawsuits with the possibility of prevailing in both and cannot now excuse the inconsistency on the basis he did not draft the original workers' compensation complaint. He had the opportunity to rectify any inaccuracy at the time he confirmed the allegations in the pleadings at trial. In assessing vocational disability under the Tennessee Workers''s Compensation Law, the employee's testimony is probative and competent in assessing the ability or inability to work. *Clark v. National Union Fire Insurance Company,* 774 S.W.2d 586, 589 (Tenn. 1989). The test is whether the employee's earning capacity in relation to the open labor market has been diminished by the residual impairment caused by a work-related injury and not whether he is able to return and perform the job he held at the time of injury. *Id.* Testimony of the injured employee is admissible on the issue of the employee's inability to work and may be sufficient to establish that fact without expert medical testimony. *Thompson v. Leon Russell Enterprises*, 834 S.W.2d 927, 930 (Tenn. 1992).

In addition to being unqualified for the position he sought, the plaintiff was not subjected to adverse employment action. The affidavits reveal no contested issue of material fact on this point and no rational conclusion can be drawn other than his retirement was voluntary. He made the conclusory statement that he was "forced" to retire but offered no support whatever for his opinion. The letter to Wells and the signed document are nowhere refuted. Moreover, he was not replaced by a younger person within the provisions of the Act, the purpose of which is to prohibit discrimination in employment and not to restrict the employer's right to make *bona fide* business judgments. *Brenner v. Textron Aerostructures*, 874 S.W.2d 579, 588 (Tenn. App. 1993).

Finally, Loring did not as a matter of law establish *prima facie* his claim that an enforceable contract was agreed to by NES. He alleges merely that the Chairman of the Board of NES promised him the sum of $10,000.00 per year for services as Secretary to the Board. He offered no countervailing proof to defendant's proof that only the Civil Services and Pension Board is authorized to elect a Secretary and fix a salary; that all NES contracts are required to be prepared by the General Counsel, who testified that he was never requested to do so. The plaintiff not only could not recall when the alleged agreement was made, he offered no specific argument about it. The issue was not stressed at argument, and we will not further belabor it.

The judgment is affirmed at the costs of the appellant.

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William H. Inman, Senior Judge

CONCUR:

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W. Frank Crawford, Presiding Judge

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Alan E. Highers, Judge