



Smith was employed at Lindenmeyr since 1965, with the exception of thirty months of active duty in the United States Marine Corps during the Vietnam War. In September 1988, he sustained a work-related injury involving a severe cervical strain while lifting heavy pallets and rolls of carpeting. This injury caused Smith to undergo two surgeries, the first occurring in May 1990 and the second in September 1992. From the date of his first surgery until January 1991, Smith left work and began collecting workers' compensation benefits for total disability. Smith returned to work in January 1991, though he continued to suffer pain from his work-related injury, which resulted in intermittent absenteeism on his part. In March 1992, Smith again left work and began collecting workers' compensation benefits for total disability. Despite a brief return to work one month later, Smith has not returned to work since April 10, 1992.

On March 15, 1994, Dr. Saland, a medical examiner engaged by the employer's workers' compensation insurance carrier, evaluated Smith and determined that Smith could work full time with certain restrictions. In light of this evaluation, on May 16, 1994, Lindenmeyr offered Smith a position as second shift clerk, a less physically strenuous job. Smith's treating physician, Dr. Salkind, disagreed with Dr. Saland's diagnosis, and recommended that Smith could only return to a light-duty position on a part-time basis. In light of this recommendation, on October 24, 1994, Lindenmeyr offered Smith the second shift clerk position on a part-time basis, which it contends Smith rejected. Smith makes a *bona fide* contrary contention that he did not reject the job offers, but was terminated from employment.

On June 27, 1995, Smith filed a complaint in this Court seeking back pay and front pay damages. On February 3, 1997, a show cause hearing was held before the Honorable M. Faith Angell on Smith's request to stay ruling on the summary judgment of Lindenmeyr. At that hearing, Smith requested that the motion for summary judgment be decided without the granting of a stay. Smith stated at the hearing that his efforts to obtain

attorneys to represent him in his discrimination claims have been unsuccessful.

## II. LEGAL STANDARD

Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A disputed factual matter is a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248. The court must make its determination after considering the facts and all reasonable inferences drawn from them in the light most favorable to plaintiff Smith as the nonmoving party. Id. at 255-56. Here, plaintiff Smith, as the nonmoving party, must produce evidence to support his position, and may not rest upon bare assertions, conclusory allegations, or suspicions. Fireman's Ins. Co. of Newark, N.J. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

The Court recognizes its obligation to construe liberally *pro se* submissions to ensure that rules of pleadings and motions do not subvert a litigant's opportunity for a judicial remedy for wrongful conduct. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972). However, *pro se* status will not render immune from summary judgment a claim that lacks factual or legal viability. See Metsopoulos v. Runyon, 918 F. Supp. 851, 857 (D.N.J. 1996).

I note that although Smith has no attorney and lacks sophistication in legal matters, his efforts to proceed with his lawsuit have been diligent, and are therefore commendable. Unfortunately for Smith, even considering all reliable evidence in his favor, his claim is not supported by substantive law, and I therefore have no choice but to rule against him. The service of an attorney for Smith would not likely change the legal analysis or result. It is to this substantive analysis I will now proceed.

## III. DISCUSSION

To prevail under an ADA claim, a plaintiff must prove that he or she is a "qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of the job." 42 U.S.C. §§ 12111(8), 12112(a). A person who is not able to work is not covered under the ADA. McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996), cert. denied, 117 S. Ct. 958 (1997). Accordingly, to be covered by the ADA, Smith has to prove that at all relevant times he was able to perform the essential functions of his job, with or without accommodation. See id.

A. Judicial Estoppel

The doctrine of judicial estoppel is designed to protect the integrity of the courts by preventing parties from asserting inconsistent positions in different legal proceedings. See Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107, 121 (3d Cir. 1992), cert. denied, 507 U.S. 1005 (1993). In determining whether the doctrine applies, a court must engage in a two-step inquiry: "(1) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith--*i.e.* 'with intent to play fast and loose with the court?'" McNemar, 91 F.3d at 618 (quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996)).

The Court of Appeals for the Third Circuit recently applied this doctrine in a factually similar case, McNemar v. Disney Store Inc., cited above. The Court of Appeals held that the plaintiff was judicially estopped from asserting that he was a "qualified individual" as defined by the DA because he had previously asserted that he was unable to work and that he was totally and permanently disabled in his applications for state and Social Security disability benefits. Id. In reaching this holding, the Court of Appeals stated:

Clearly [plaintiff] has asserted inconsistent positions regarding his ability to work. Before the Social Security administration he and his physicians have certified under penalty of perjury that he was totally and permanently disabled. He made similar representations when he applied for New Jersey state disability benefits. . . . Thus, [plaintiff] has represented . . . that he was totally

disabled and unable to work--while now, in claiming relief under the American Disabilities Act, he states that he is "a qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of a job" . . . .

Id.

Lindenmeyr, relying on McNemar, argues that Smith is judicially estopped from proving that he is a "qualified individual" under the ADA because he previously represented to the Pennsylvania Workers' Compensation Board that he was unable to work and totally disabled. In support of this argument, Lindenmeyr submits a copy of Smith's Petition for Commutation of Compensation dated June 4, 1996 (Def. Exh. K), which plaintiff submitted to that Board. Upon a careful review of the Petition, plus the accompanying Stipulation of Facts dated June 13, 1996, which was submitted by Smith, I find no sworn statements made by Smith in those documents that he is totally disabled or unable to work. It must be observed, however, that the legal and factual foundation for a Commutation of Benefits is that the claimant/worker is disabled. See Glinka v. Workemen's Compensation Appeal Board (Sears, Roebuck and Company), 521 A.2d 503, 505 (Pa. Commw. 1987) (holding that commutation of benefits was not warranted given testimony from medical expert that claimant was physically able to return to work in his former employment).

It is not surprising then that the evidentiary record herein is replete with numerous documents, letters, and other papers, submitted by Smith to this Court, that contain statements made or accepted by Smith and his treating physicians that Smith was totally disabled and unable to work.

First, I note that Smith states in several of his submissions to the Court that his physicians found him totally and permanently disabled. See Chronological List at 3 (Plaintiff Exh. - unnumbered) ("Dr. Salkind states in his report that I am totally and perminately [sic] disabled."); Plaintiff Exh. A ("May 8, 1995, "Dr. Rosen confirmed that I am permanently and totally disabled."); Plaintiff Exh. G ("All specialist in their fields, all

agreed that I am totally and permanently [sic] disabled, except Dr. Saland. . . . On July 13, 1995, Dr. Salkind again confirmed that I was totally and permanently [sic] disabled.");<sup>4</sup> Plaintiff Exh. G (Application for Disability Retirement Benefits) (treating physician, Dr. Salkind, responded "yes" to question on application that Smith is totally and permanently disabled and unable to engage in any business or occupation whatsoever). Furthermore, Lindenmeyr submits two reports of Dr. Rosen, which state that Smith "is totally disabled" and that there is "no realistic hope at all of returning to productive employment." Def. Exh. M.

Second, I note that Smith states in several submissions that he was recognized as having a total disability under the Social Security programs. See Chronological List at 4 ("11/22/93 Received approval for total disable [sic] from Social [S]ecurity"); Plaintiff Exh. A ("March 2, 1992 Social Security determined that I was disabled and could not engage in any substantial gainful activity . . . .").

Third, I note that Smith states himself that he has a total disability. See Exh. D ("As a direct result of my employers action I had to have a second surgery which left me totally and permanently disabled."); Plaintiff Exh. E ("As of 3/2/92 I had to leave the job because of physical pain in my neck and shoulders and mental stress because of the already overload of work my employer has been giving me.").

Moreover, the evidentiary record shows that Smith received disability compensation through federal and state programs. Smith's claim for Social Security disability benefits was approved. See Plaintiff Exh. A (Report of Confidential Social Security Benefit Information). Smith also submits a document entitled Supplemental

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<sup>4</sup> Dr. Saland, in his report, states that "Smith is not totally disabled, but is capable of working on a full time basis within certain restrictions . . . ." Def. Exh. F at 12. Smith criticizes the report of Dr. Saland as having "nothing to do with my work related injury." Plaintiff Exh. G at unnumbered page 5. Smith continues that "Dr. Saland has undermined [sic] the professional integrity of Dr. Gene Salkind, Dr. Rosen, Dr. Ronald Abraham, Dr. Barry Fass, VA Doctor's Social Security disability. All specialist in there [sic] field. And all are in agreement that I am totally and permanently disabled." Id. In essence, Smith is attacking Dr. Saland for concluding that Smith is able to work. This lends further support that Smith claims to be totally disabled and unable to work.

Agreement for Compensation for Disability or Permanent Injury dated March 20, 1992, which states that "Employee [Smith] was unable to work because of his 9/6/88 work injury." (Plaintiff Exh. - unnumbered). Because Smith received total disability benefits under these statutory programs, I may reasonably infer that he had claimed he was disabled and unable to work at the time he applied for these benefits.

Although neither party submitted a complete application of Smith for disability benefits where he expressly states, under oath, that he is disabled and unable to work, as did the plaintiff in McNemar, I find that there is overwhelming evidence that Smith, along with his treating physicians, had previously claimed that he was disabled and unable to work. In addition, the evidentiary record does not reflect that Smith ever renounced the conclusions made by his physicians that he is totally disabled. The position Smith is attempting to assert in his current ADA claim that he is able to work is inconsistent with his previous claims that he was totally disabled and unable to work. Therefore, I conclude, as a matter of law, under the direction of the McNemar decision, that Smith is judicially estopped from arguing whether he is qualified to perform the position involved. Because Smith is estopped from proceeding under the ADA, I will grant summary judgment in favor of Lindenmeyr.<sup>5</sup>

B. Prima Facie Case under ADA

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<sup>5</sup> The McNemar decision has been attacked by both academia and the Equal Employment Opportunity Commission. See, e.g., EEOC Notice No. 915.002 - EEOC Enforcement Guidance: Effect of Representations Made in Applications for Disability Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" under the Americans with Disabilities Act of 1990 (ADA), [Feb. 12, 1997] EEOC Compliance Manual (BNA) at 18 & n.66 ("The Third Circuit . . . ignored this fundamental difference between the ADA and [the Social Security Act] and failed to conduct the individualized inquiry mandated by the ADA definition . . . . McNemar was wrongly decided."); Anne E. Beaumont, This Estoppel Has Got to Stop: Judicial Estoppel and the American With Disabilities Act, 71 N.Y.U. L. Rev. 1529, 1567 (1996) (criticizing legal and policy reasoning behind application of judicial estoppel to ADA cases). Indeed, one court in the Third Circuit declined to follow McNemar in a factually similar case on the grounds that bad faith is a threshold requirement for application of judicial estoppel and there was no evidence in the record that the plaintiff asserted inconsistent positions in bad faith. Harrison v. Delaware, Civ. No. 95-406-SLR, 1996 WL 790101, at \*5 (D. Del. Dec. 30, 1996). Some of this criticism may, in the future, be found to be deserved, and it is likely that the Court of Appeals for Third Circuit will, at some later point, refine its application of judicial estoppel doctrine in the context of the ADA. However, because the decision in McNemar is the law of this Circuit, Smith is precluded from asserting an ADA claim.

Even assuming that Smith is not judicially estopped from asserting that at all material times he was able to perform the essential functions of his job, with or without reasonable accommodation, I find that Smith has failed to show that he can establish a prima facie case under the ADA. To make out a prima facie case under the ADA, the plaintiff must prove that (1) he is disabled within the meaning of the ADA; (2) he is qualified, with or without reasonable accommodation, to perform the job he held or sought; and (3) he was terminated or discriminated against because of his disability. McCoy v. Pennsylvania Power and Light Co., 933 F. Supp. 438, 440 (M.D. Pa. 1996) (citing White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995)). As discussed above, Smith admitted several times in his response to the summary judgment motion that he is totally disabled and unable to work. Moreover, Smith himself submitted to this Court the reports of his treating physicians, who conclude that he is totally disabled and unable to work. In fact, Smith disputes the accuracy of the only medical report that concludes to the contrary, which was prepared by a medical examiner hired by Lindenmeyr to defend the workers' compensation claim. I find that the *nunc pro tunc* response of Smith to the motion for summary judgment contains statements and representations by Smith that he is totally disabled and unable to work. I have no choice but to construe these statements and representations made by Smith to the Court as constituting factual admissions. See M. Graham, Federal Practice and Procedure: Evidence § 6795 (Interim Ed. 1992) (noting that the assumption that people do not make false statements damaging to themselves underlies the "declaration against interest" exception to hearsay rule). Therefore, I conclude that Smith has not submitted any evidence that creates a genuine issue of material fact that he is qualified individual who can perform the job he held or sought with or without reasonable accommodation and thus cannot recover under the ADA. Accordingly, I will enter summary judgment in favor of Lindenmeyr.

### **III. CONCLUSION**

For the foregoing reasons, I will grant the motion of Lindenmeyr for summary

judgment.

An appropriate Order follows.

