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COMPATIBILITY OF CLAIMS: THE U.S. SUPREME COURT DECLINES TO ADOPT A PRESUMPTION OF JUDICIAL ESTOPPEL AGAINST PLAINTIFFS IN AN AMERICANS WITH DISABILITIES ACT CLAIM WHO HAVE ALREADY APPLIED FOR SOCIAL SECURITY DISABILITY BENEFITS

Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999)

I. FACTS

In August 1993, Carolyn Cleveland began working for Policy Management Systems Corporation.[1] Her job entailed performing background checks on prospective employees of Policy Management Systems' clients.[2] On January 7, 1994, Cleveland "suffered a stroke, which damaged her concentration, memory, and language skills."[3] Cleveland filed an application for Social Security Disability Insurance (SSDI) benefits on January 28, 1994, "in which she stated that she was 'disabled' and 'unable to work.'"[4] By April 11, 1994, Cleveland's condition had improved, and she returned to work with Policy Management Systems.[5] Cleveland reported this fact to the Social Security Administration two weeks later.[6]

On July 11, 1994, the Social Security Administration denied Cleveland's SSDI application, noting that she had returned to work.[7] However, Policy Management Systems fired Cleveland on July 15, 1994.[8] On September 14, 1994, Cleveland asked the Social Security Administration to reconsider its earlier denial of benefits.[9] She claimed that she was fired due to her condition.[10] Cleveland stated that she had not been able to work since being fired, and "continue[d] to be disabled."[11] The Social Security Administration denied Cleveland's request for reconsideration.[12]

Subsequently, Cleveland requested a Social Security Administration hearing, reiterating that she was unable to work due to her disability and

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1. *See* Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 798 (1999).
2. *See id.*
3. *Id.*
4. *Id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.* at 798-99.
11. *Id.* at 799.
12. *See id.*

presenting new evidence concerning the extent of her injuries.[13] At the hearing, Cleveland's doctors classified her as 100% disabled.[14] On September 29, 1995, "[t]he S[ocial] S[ecurity] A[dministration] awarded Cleveland SSDI benefits retroactive to the day of her stroke."[15]

On September 22, 1995, the week before her SSDI award, Cleveland brought suit against Policy Management Systems under the Americans with Disabilities Act (ADA), in the United States District Court for the Northern District of Texas.[16] She claimed her employer fired her without trying to accommodate for her current condition.[17] Cleveland alleged that her requests for additional time and training were denied by Policy Management Systems.[18] The district court did not evaluate her claim on the merits, but rather granted summary judgment in favor of Policy Management Systems.[19] The district court held that Cleveland had "conceded" that her current condition was that of someone "totally disabled" due to the fact she had applied for and received SSDI benefits.[20] Cleveland had essentially negated any potential ADA claim by stating that she could not "perform the essential functions" of her job.[21]

The Fifth Circuit Court of Appeals affirmed the district court's grant of summary judgment, holding that "the application for or the receipt of social security disability benefits creat[ed] a *rebuttable* presumption that the claimant or recipient of such benefits [was] judicially estopped from asserting that he [or she was] a 'qualified individual with a disability.'"[22] The Fifth Circuit Court of Appeals recognized that it was "at least theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive."[23] However, the court of appeals concluded that

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13. *See id.*

14. *See* Respondents' Brief at 5-6, Cleveland v. Policy Management Sys. Corp., 526 U.S. 795 (1999) (No. 97-1008).

15. *Cleveland*, 526 U.S. at 799.

16. *See* Respondents' Brief at 1, *Cleveland* (No. 97-1008).

17. *See Cleveland*, 526 U.S. at 799.

18. *See id.*

19. *See id.*

20. *Id.*

21. *Id.* The ADA states that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8) (1994). "Reasonable accommodation" may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations . . . ." 42 U.S.C. § 12111(9)(B).

22. Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 518-19 (5th Cir. 1997), *vacated*, 526 U.S. 795 (1999).

23. *Id.* at 517.

Cleveland had consistently represented to the Social Security Administration that she was totally disabled.[24] Therefore, Cleveland had not raised a genuine issue of material fact concerning her status as totally disabled, thus estopping her from pursuing an ADA claim as a "qualified individual with a disability."[25]

Cleveland appealed to the United States Supreme Court, which granted certiorari to resolve the varying positions the circuits had taken regarding the interrelation of ADA and SSDI claims.[26] The Court *held* that "pursuit, and receipt, of SSDI benefits does not automatically estop a recipient from pursuing an ADA claim [or raise] a strong presumption against the recipient's [claim.]"[27]

II. LEGAL BACKGROUND

In order to fully appreciate the impact of the Supreme Court's opinion in *Cleveland v. Policy Management Systems Corp.*,[28] it is necessary to know some of the history concerning this area of law. The ADA and Social Security Act (SSA) are based on different sets of assumptions regarding disabled individuals and the nature of disabilities.[29] In recent years, courts have struggled to reconcile these two laws, leading to contradictory opinions as to how, or even whether, a prior SSA claim affects a plaintiff's ADA claim.[30]

A. THE PUBLIC POLICY BEHIND THE SSA AND THE ADA

The SSA and the ADA both assist individuals with disabilities, but they do so in different ways.[31] Congress established the disability provisions of the SSA in 1956, which are administered by the Social Security Administration.[32] The disability provisions of the SSA are designed to provide certain disabled individuals with benefits that, while not based

24. *See id.* at 518.

25. *Id.* at 519. The Fifth Circuit ruled that "on the facts before [it]," Cleveland could not rebut her "unambiguous" and "uncontroverted" representations to the Social Security Administration and, therefore, was not a qualified individual with a disability. *Id.* The Fifth Circuit wrote "[t]o permit Cleveland to make such an argument in the face of her prior, consistent, and—until now—uncontested sworn representations to the S[ocial] S[ecurity] A[ct] would be tantamount to condoning her advancement of entirely inconsistent positions, a factual impossibility and a legal contradiction." *Id.*

26. *See* Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 800 (1999).

27. *Id.* at 797-98.

28. 526 U.S. 795 (1999).

29. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1006 (1998).

30. *See* Rascon v. U S West Communications, Inc., 143 F.3d 1324, 1330-32 (10th Cir. 1998) (explaining the split in the various United States Courts of Appeals which have dealt with the issue).

31. *See* Diller, *supra* note 29, at 1005-06 (stating that the SSA provides "income support" for disabled persons while the ADA provides assistance to integrate disabled persons into the workforce).

32. *See* Diller, *supra* note 29, at 1005.

on need, are intended to compensate them for lost income or to protect them from indigence.[33] The SSA provides that an insured individual has a "disability" and is entitled to benefits when the individual is unable to engage in "substantial gainful activity" because of a "physical or mental impairment" that is expected to result in death or that has lasted, or can be expected to last, for twelve months or more.[34] The impairment must be "of such severity that the insured is not only unable to do his [or her] previous work but cannot, considering his or her age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[35]

SSDI benefits are based upon the idea that a medical condition prohibits an individual from working, not that any social barriers are in place to impair the individual's ability to work.[36] Congress passed these programs on the premise that people with disabilities "should be exempt from the obligation to work [which] society imposes on its members."[37] In contrast to the SSA, the ADA looks at the concept of disability very differently and has a very different emphasis.[38]

The purpose of the ADA is to "eradicate widespread discrimination against individuals with disabilities and, among other things, to enable disabled people to move off the government benefit rolls and return to work."[39] The ADA was seen by many as an extension of the Rehabilitation Act of 1973,[40] which offered protections to disabled individuals who worked in federally funded programs or activities.[41] Congress created

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33. *See* H.R. REP. NO. 1189, at 4-5 (1955); *see also* Mathews v. Eldridge, 424 U.S. 319, 340-41 n.24 (1976).

34. 42 U.S.C. § 423(a)(1)(D), 423(d)(1)(A) (1994). The SSA states that in determining eligibility, "the Commissioner of Social Security shall consider the combined effect of all of the individual's impairments without regard to whether any [single] impairment, if considered separately, would be of [sufficient] severity." 42 U.S.C. § 423(d)(2)(B).

35. 42 U.S.C. § 423(d)(2)(A). "[W]ork which exists in the national economy means work which exists in significant numbers either in the region where such individual lives or in several regions of the country." *Id.*

36. *See* Diller, *supra* note 29, at 1005-06.

37. Diller, *supra* note 29, at 1006.

38. *See* Diller, *supra* note 29, at 1006 ("[S]ocial resources should be devoted to integrating people with disabilities into the work force . . . .").

39. Brief for the United States and the Equal Employment Opportunity Commission, Cleveland v. Policy Management Sys. Corp. at 7, 526 U.S. 795 (1999) (No. 97-1008). The ADA is extremely broad in scope, covering discrimination in the areas of employment, public services, and public accommodations. *See generally* 42 U.S.C. §§ 12111-12213 (1994). However, *Cleveland* only dealt with Title I of the ADA, which covers employment discrimination. *See* 526 U.S. at 798.

40. 29 U.S.C. § 794 (1994).

41. *See* Reed L. Russell, *Arguing For More Principled Decision Making in Deciding Whether an Individual is Substantially Limited in the Major Life Activity of Working Under the ADA*, 47 CATH. U. L. REV. 1057, 1057 (1998). The Rehabilitation Act of 1973 "prohibit[ed] discrimination based on disability by any program receiving federal financial assistance, any executive agency, and the United States Postal Service." *Id.* at 1057 n.2 (citing 29 U.S.C. § 794). The Rehabilitation Act "also extended protection to federal employees and employees of federal contractors." *Id.* (citing 29 U.S.C. §§ 791, 793 (1994)).

the ADA to compensate persons with disabilities for the barriers society places in their paths.[42] To this end, the ADA prohibits employers from discriminating against a qualified individual with a disability on the basis of the disability.[43] A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions" of his or her job.[44] The ADA defines "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[45]

The ADA allows individuals with disabilities the opportunity to partake in everyday life as much as possible through the removal of barriers.[46] "At the time of its enactment in 1990, the ADA was widely hailed as establishing a new foundation for disability policy."[47] The ADA assumed that simply because a person had a disability, this did not make the individual unable to work, and the investment of "social resources" to allow easier access to the workplace would be appropriate.[48]

The enactment of the ADA was not accompanied by amendments to the SSA.[49] The ADA contains nearly no mention of other disability benefit programs.[50] Consequently, two main disability policies exist, the ADA and the SSA, based upon differing views of what a disability is and how to compensate for disabilities.[51] The traditional approach equated a disability with the total inability to work,[52] while the modern view focused upon the removal of barriers which served to prevent people with disabilities from working.[53] Because of this, the federal courts of

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42. *See* McNeill v. Atchison, Topeka and Santa Fe Ry. Co., 878 F. Supp. 986, 991 (S.D. Tex. 1995).

43. *See* 42 U.S.C. § 12112(a). The Rehabilitation Act states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* "Covered entity" is defined as "an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2).

44. 42 U.S.C. § 12111(8).

45. 42 U.S.C. § 12102(2)(A)-(C) (1994).

46. *See* Diller, *supra* note 29, at 1004.

47. Diller, *supra* note 29, at 1004. Senator Harkin, the ADA's primary sponsor, called it "the 20th century Emancipation Proclamation for all persons with disabilities." Diller, *supra* note 29, at 1004 (citing 136 CONG. REC. S9689 (daily ed. July 13, 1990) (statement of Sen. Harkin)). "President Bush predicted that the ADA would 'open all aspects of American life to individuals with disabilities' and end the 'unjustified segregation of and exclusion of persons with disabilities from the mainstream of American life.'" Diller, *supra* note 29, at 1004.

48. *See* Diller, *supra* note 29, at 1005.

49. *See* Diller, *supra* note 29, at 1006.

50. *See* Diller, *supra* note 29, at 1006.

51. *See* Diller, *supra* note 29, at 1006.

52. *See* Diller, *supra* note 29, at 1006.

53. *See* Diller, *supra* note 29, at 1006.

appeals have had some difficulty reconciling the two statutes, resulting in a conflict in the various circuits,[54] which the Supreme Court finally addressed in *Cleveland*.[55]

B. THE SPLIT IN THE CIRCUITS

Prior to *Cleveland*, the federal courts of appeals were divided on whether some form of judicial estoppel should be adopted in the context of an ADA plaintiff's claim.[56] However, "the circuits [did] not align themselves on either side of a neatly drawn line."[57] Instead, "the varying approaches to the issue lie along a continuum."[58]

At one end of the continuum was the theory used in *McNemar v. Disney Store, Inc.*,[59] in which the Third Circuit Court of Appeals "held that a plaintiff . . . who claimed an inability to work for purposes of collecting disability benefits was estopped from arguing he [was] a 'qualified individual with a disability' under the ADA."[60] Further along this continuum was the position adopted by the Fifth Circuit in *Cleveland* which held that a rebuttable presumption was created barring a plaintiff from filing an ADA claim when the plaintiff was receiving SSDI benefits.[61] Finally, at the other end of this continuum was the approach adopted by the Tenth Circuit in *Rascon v. U S West Communications, Inc.*,[62] which rejected the doctrine of judicial estoppel and declined to apply any kind of presumption against the plaintiff.[63]

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54. *See* Diller, *supra* note 29, at 1007.

55. *See generally* Cleveland v. Policy Management Sys. Corp., 526 U.S. 795 (1999).

56. *See* Rascon v. U S West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998) (holding that application for, or receipt of, SSDI benefits is relevant to, but does not estop plaintiff from bringing, an ADA claim); McNemar v. Disney Store, Inc., 91 F.3d 610, 618-20 (3d Cir. 1996) (applying judicial estoppel to bar a plaintiff from bringing suit under the ADA); Kennedy v. Applause, Inc., 90 F.3d 1477, 1481-82 (9th Cir. 1996) (declining to apply judicial estoppel but holding that claimant who declared total disability in a benefits application failed to raise a genuine issue of material fact as to whether she was a qualified individual with a disability).

57. *Rascon*, 143 F.3d at 1330-32 (explaining the nature of the split in the circuits).

58. *Id.*

59. 91 F.3d 610, 618-20 (3d Cir. 1996).

60. *McNemar*, 91 F.3d at 618-20. In *McNemar*, the plaintiff suffered from AIDS. *See id.* at 613. He was terminated from his job for not returning two dollars he had taken from the cash register. *See id.* After losing his job, he applied for, and received, SSDI benefits. *See id.* at 615. He also filed an ADA suit against his employer, claiming the stated grounds for his termination were pretextual, and that he was really fired because of his medical condition. *See id.* at 616.

61. *See* Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 518-19 (5th Cir. 1997), *vacated*, 526 U.S. 795 (1999).

62. 143 F.3d 1324 (10th Cir. 1998).

63. *See* Rascon v. U S West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998). In *Rascon*, the plaintiff suffered from post-traumatic stress disorder caused by his experiences in the Vietnam War. *See id.* at 1326. U S West fired him from his position as a network technician. *See id.* at 1329. The plaintiff applied for, and received, SSDI benefits. *See id.* He then brought suit against U S West under the ADA. *See id.*

Judicial estoppel is a doctrine based on fundamental fairness.[64] It applies when: (1) two different positions are taken by the same party, (2) the first position was taken in a judicial or quasi-judicial administrative proceeding, (3) the party to be estopped intended for the trier of fact in the first proceeding to accept the first position, and (4) the two positions are totally inconsistent.[65] The purpose of the judicial estoppel doctrine is to "preserve the integrity of the judicial system by preventing parties from 'asserting a position in this proceeding inconsistent with the one they previously asserted.'"[66]

In applying the doctrine, the Third Circuit, in *McNemar*, used a two-part inquiry.[67] First, the court asked if the party's present position was inconsistent with a position formerly asserted.[68] If so, the court then asked if the party "assert[ed] either or both of the inconsistent positions in bad faith, [that is,] 'with intent to play fast and loose' with the court."[69] The court in *McNemar* found that the plaintiff clearly asserted inconsistent positions.[70] The plaintiff represented to one federal agency and two state agencies that he was unable to work, while also stating he was "a qualified person with a disability who, with or without reasonable accommodation, could perform the essential functions of a job."[71] Therefore, the Third Circuit decided the plaintiff should be judicially estopped from "speak[ing] out of both sides of [his] mouth with equal vigor and credibility before [the] court."[72] The Second and Ninth Circuits seemed to favor the approach used by the Third Circuit in *McNemar*.[73]

Accordingly, those circuits applying judicial estoppel assumed a plaintiff could apply for SSDI benefits or ADA benefits, but not for

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64. *See* Rissetto v. Plumbers and Steam Fitters Local 343, 94 F.3d 597, 601 (9th Cir. 1996) (citing Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (explaining the doctrine of judicial estoppel as an "equitable doctrine")).

65. *See id.*

66. McNemar v. Disney Store, Inc., 91 F.3d 610, 617 (3d Cir. 1996) (quoting Delgrosso v. Spang & Co., 903 F.2d 234, 241 (3d Cir. 1990)).

67. *See id.* at 618.

68. *See id.*

69. *Id.* (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996) (applying the doctrine of judicial estoppel in the context of bankruptcy proceedings)).

70. *See id.*

71. *Id.* (quoting 42 U.S.C. §§ 12111(8), 12112(a) (1994)).

72. *Id.* (quoting Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970 (E.D.N.C. 1994)).

73. *See* Simon v. Safelite Glass Corp., 128 F.3d 68, 74 (2d Cir. 1997) (applying judicial estoppel in an age discrimination case but stating that the applicability of judicial estoppel to ADA cases would be left for another day); Kennedy v. Applause, Inc., 90 F.3d 1477, 1481-82 (9th Cir. 1996) (holding that the plaintiff, who made sworn statements of total disability in a social security disability application and then testified at her deposition that she was not totally disabled, failed to raise a genuine issue of material fact as to whether she was a qualified individual with a disability within the meaning of the ADA).

both.[74] "[I]n many of these cases, judges appear[ed] angered by the attempts of disability . . . claimants to seek work."[75] The courts treated the plaintiff as dishonest and "view[ed] attempts to rely on both statutory schemes as . . . 'double-dipping.'"[76]

Further along the continuum was the approach adopted by the Fifth Circuit in *Cleveland*.[77] Under this view, the application for, or receipt of, disability benefits does not automatically estop the plaintiff from bringing an ADA claim.[78] However, the SSA claim creates a rebuttable presumption that the plaintiff is judicially estopped from bringing an ADA claim.[79]

At the other end of the continuum was the approach adopted by the Tenth Circuit in *Rascon*, which rejected the theory of judicial estoppel and rejected creating any kind of presumptions against the plaintiff.[80] In *Rascon*, the Tenth Circuit held that "statements made in connection with an application for social security disability benefits [would] not be an automatic bar to a disability discrimination claim under the ADA."[81] However, such statements may be used as evidence to determine whether a plaintiff was a "qualified individual with a disability."[82] The Tenth Circuit disagreed with the Third Circuit's analyis because the ADA also considered the individual's ability to work "*given reasonable accommodation*" while the SSA makes no consideration of accommodations.[83]

Therefore, statements made to support an application for SSDI benefits are not automatically inconsistent with statements made to further an ADA claim because the issue of accommodations is not considered in determining eligibility for SSDI benefits.[84] Joining the Tenth Circuit in

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74. *See* Diller, *supra* note 29, at 1033-34.

75. Diller, *supra* note 29, at 1034-35. The author quoted from one lower court case, "[I]t is logically impossible for an individual to be sufficiently 'disabled' to qualify for long-term disability benefits yet nonetheless be capable of 'perform[ing] the essential functions of the employment position that such individual holds' . . . simply stated, these two statutes are incompatible." Diller, *supra* note 29, at 1033-35 (quoting Cline v. Western Horseman Inc., 922 F. Supp. 442, 446 (D. Colo. 1996) (holding that the plaintiff, who had been employed by the defendant as a clerk, was estopped from raising an ADA claim because of her prior receipt of numerous disability benefits (quoting 42 U.S.C. § 12111(8) (1994)))).

76. Diller, *supra* note 29, at 1035.

77. *See* Rascon v. U S West Communications, Inc., 143 F.3d 1324, 1331 (10th Cir. 1998) (citing Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 518 (5th Cir. 1997), *vacated*, 526 U.S. 795 (1999)).

78. *See Cleveland*, 120 F.3d at 518.

79. *See id.*

80. *See Rascon*, 143 F.3d at 1332 (refusing to apply the doctrine of judicial estoppel against a plaintiff who suffered post-traumatic stress disorder and was fired from his position as a network technician).

81. *Id.*

82. *Id.*

83. *Id.* at 1330-31.

84. *See id.* at 1331.

this view were the Sixth, Seventh, and Eleventh Circuits, as well as, the District of Columbia Circuit.[85] The only other circuit to address the issue was the Eighth Circuit, which declared it had not yet "firmly entrenched itself within any of the camps of divergent opinions on this issue."[86]

Based on the divergence of views among the federal courts of appeals, there was obviously much confusion over what effect, if any, a prior SSA claim should have on an ADA claim.[87] In order to settle the question, the Supreme Court granted certiorari in *Cleveland* and addressed the issue directly.[88]

III. ANALYSIS

In a unanimous opinion written by Justice Breyer, the Supreme Court held that despite the appearance of conflict that arises from the language of the ADA and SSDI statutes, "the two claims do not inherently conflict [so much that] courts should apply a special negative presumption like the one" which the Fifth Circuit applied.[89] There are too many situations where an SSDI claim can legitimately co-exist with an ADA claim.[90]

Policy Management Systems argued that Cleveland could not establish a prima facie case under the ADA because she could not show that she was a qualified individual with a disability.[91] Because Cleveland and her doctors had consistently and repeatedly described her as completely disabled, Policy Management Systems argued that the district court was correct in ruling that Cleveland could not simultaneously and

85. *See id.* (citing Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376, 381 (6th Cir. 1998) (agreeing with the opinion of the D.C. Circuit that receipt of disability benefits does not preclude subsequent ADA relief, and therefore judicial estoppel is not appropriate, but that a plaintiff's prior sworn statements may be considered as a material factor); Talavera v. School Bd., 129 F.3d 1214, 1220 (11th Cir. 1997) (holding that a plaintiff, whose position as a secretary for a school board was not renewed, was not barred from bringing ADA action merely because she had claimed a total disability in her application for disability benefits); Weigel v. Target Stores, 122 F.3d 461, 466 (7th Cir. 1997) (stating that the granting of disability benefits is not determinative as to whether or not one is a qualified individual under the ADA); Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 586 (D.C. Cir. 1997) (holding that receipt of disability benefits does not preclude subsequent ADA relief for a plaintiff who suffered from a spinal abnormality and was fired from his position as a special police officer)).

86. Dush v. Appleton Elec. Co., 124 F.3d 957, 962 n.8 (8th Cir. 1997) (stating that it was not necessary for the Eighth Circuit Court of Appeals to take a position on judicial estoppel).

87. *See* Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 800 (1999).

88. *See id.*

89. *Id.* at 802.

90. *See id.* at 802-03.

91. *See* Respondents' Brief at 34-35, *Cleveland* (No. 97-1008).

inconsistently seek the protection of the ADA.[92] However, the Supreme Court disagreed with this argument.[93]

The Court noted "the ADA defines a 'qualified individual' to include a disabled person 'who . . . can perform the essential functions' of her job 'with reasonable accommodation.'"[94] In contrast, the Social Security Administration does not look to the possibility of "reasonable accommodations" when determining eligibility for SSDI benefits.[95] In fact, the Court stated that an applicant need not even "refer to the possibility of reasonable accommodation when [he or she] applies for SSDI."[96] This omission reflects the fact that the Social Security Administration receives over two and a half million claims for disability benefits every year and has limited administrative resources.[97] The Court wrote that the issue of "'reasonable accommodation' may turn on highly disputed workplace-specific matters, and a Social Security Administration misjudgment about that . . . matter would deprive a seriously disabled person of the critical financial support the statute seeks to provide."[98] Thus, an ADA claim alleging a plaintiff could perform her job with reasonable accommodations could be consistent with an SSDI claim that without reasonable accommodations the plaintiff could not perform her job or another job.[99]

The Court explained that a five-step process is used to determine eligibility for SSDI benefits.[100] The process is based upon assumptions concerning disabilities which are not consistent with ADA views but are essential to ensure some sense of efficiency within the Social Security

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92. *See id.*

93. *See Cleveland*, 526 U.S. at 802 (explaining an SSA representation of total disability often implies a context-related legal conclusion).

94. *Id.* at 803.

95. *Id.*

96. *Id.*

97. *See* Diller, *supra* note 29, at 1005. SSDI and Supplemental Security Income together cost approximately $60 billion a year and provide support to approximately 7.5 million people. *See* Diller, *supra* note 29, at 1005. The disability determination process costs approximately $2.5 billion a year. *See* Diller, *supra* note 29, at 1016.

98. *Cleveland*, 526 U.S. at 803.

99. *See id.*

100. *See id.* at 804. The five-step procedure consists of five questions:

1. Are you presently working? (If so, you are ineligible.)
2. Do you have a "severe impairment," i.e., one that "significantly limits" your ability to do basic work activities? (If not, you are ineligible.)
3. Does your impairment "mee[t]or equa[l]" an impairment on a specific . . . SSA list? (If so, you are eligible without more.)
4. If your impairment does not meet or equal a listed impairment, can you perform your "past relevant work?" (If so, you are ineligible.)
5. If your impairment does not meet or equal a listed impairment and you cannot perform your "past relevant work," then can you perform other jobs that exist in significant numbers in the national economy? (If not, you are eligible).

Id. (quoting 20 C.F.R. § 404.1520(b)-(f), .1525, .1526, .1560(c) (1999)).

Administration.[101] However, "they inevitably simplify [the situation,] eliminating consideration of many differences potentially relevant to an individual's ability to perform a particular job."[102] Thus, due to special individual circumstances, an individual could qualify for SSDI under the SSA's administrative rules and still remain capable of performing the essential functions of his or her job under the ADA.[103]

The Court also pointed out that the Social Security Administration may allow SSDI benefits to be given to employed individuals.[104] For example, to aid a disabled individual in returning to work, the SSA allows a nine-month trial-work period during which SSDI recipients can still receive full benefits.[105] The SSDI benefits may not be terminated even when an individual's situation improves to the point which allows the individual's full-time return to work.[106] The Court stated that because of the varying degree of impact a disability may have on an individual at any given time, the application for, or receipt of, SSDI benefits may not accurately reflect an individual's capacity at a subsequent point in time, namely when an ADA claim is filed.[107]

Finally, the Court noted that "if an individual has merely applied for, but has not been awarded, SSDI benefits, any inconsistency in the theory of the claims is of the sort normally tolerated by our legal system."[108] Ordinary rules of procedure allow parties to bring forth alternative theories; thus, parties are allowed to "set forth two or more statements of a claim or defense alternately or hypothetically" and to "state as many separate claims or defenses as the party has regardless of consistency."[109] The Court did not think that the law should be any different with respect to the assertion of SSDI and ADA claims.[110] In light of these facts, the Court held that it would not apply "any special legal presumption permitting someone who has applied for, or received, SSDI benefits to bring an ADA suit only in 'some limited and highly unusual set of circumstances.'"[111]

Nevertheless, the Court acknowledged that there may be some situations when an SSDI claim and an ADA claim would not be able to

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101. *See id.*
102. *Id.*
103. *See id.*
104. *See id.* at 805.
105. *See id.* (citing 42 U.S.C. §§ 422(c), 423(e)(1) (1994); 20 C.F.R § 404.1592 (1999)).
106. *See id.*
107. *See id.*
108. *Id.*
109. *Id.* (quoting FED. R. CIV. P. 8(e)(2)).
110. *See id.*
111. *Id.* (quoting Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 517 (5th Cir. 1997), *vacated*, 526 U.S. 795 (1999)).

co-exist.[112] Thus, if a plaintiff were unable to prove an essential element of an ADA claim because of a genuine conflict with a previous claim, summary judgment would be proper.[113] ADA plaintiffs bear the burden of proving they are "qualified individuals with a disability," in other words, individuals "who, with or without reasonable accommodation, can perform the essential functions" of their jobs.[114] Sworn assertions by plaintiffs, in an application for disability benefits, that they are "unable to work", would seem to negate an essential element of their ADA case, at least if they do not offer a sufficient explanation.[115] For this reason, the Court held that ADA plaintiffs cannot simply ignore any apparent contradiction that arises, but rather must give a sufficient explanation.[116]

The Court indicated that lower courts had found a similar need for explanation.[117] The lower courts have almost unanimously held that if previous statements made by a plaintiff seemingly contradict the current claim, the plaintiff must attempt to explain or resolve the dispute in order to survive summary judgment.[118] Although those lower court decisions involved contradictions of fact, the Court believed a similar insistence upon explanation was warranted when the conflict involves a legal conclusion, as in this case.[119] The Court stated that "[w]hen faced with a plaintiff's previous sworn statement asserting 'total disability,' . . . [a] court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim."[120] In order to survive sum-

112. *See id.*

113. *See id.* at 805-06 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

114. *Id.* at 806 (quoting 42 U.S.C. § 12111(8) (1994)).

115. *Id.*

116. *See id.*

117. *See id.*

118. *See id.* (citing Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996) (denying a motion for summary judgment in a breach of contract claim when the plaintiff's subsequent sworn testimony amplified, and did not merely contradict, his prior testimony); Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 5 (1st Cir. 1994) (granting summary judgment in favor of the defendant in negligence action when the plaintiff's prior sworn testimony conflicted with an affidavit he submitted); Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1297 (7th Cir. 1993) (holding that a plaintiff's contradictory affidavits did not create a genuine issue of material fact); Sinskey v. Pharmacia Ophthalmics, Inc., 982 F.2d 494, 498 (Fed. Cir. 1992); Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991); Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) (granting summary judgment in favor of the defendant when the plaintiff's affidavit contradicted his earlier deposition testimony); Pyramid Sec. Ltd. v. IB Resolution, Inc., 924 F.2d 1114, 1123 (D.C. Cir. 1991) (granting summary judgment in the context of a RICO claim); Davidson & Jones Dev. Co. v. Elmore Dev. Co., 921 F.2d 1343, 1352 (6th Cir. 1991); Tippens v. Celotex Corp., 805 F.2d 949, 953-54 (11th Cir. 1986) (finding summary judgment inappropriate when the affidavit was not inherently inconsistent with affiant's deposition testimony); Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986); Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 228 (5th Cir. 1984); Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984); Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1365-66 (8th Cir. 1983) (stating that a party should not be allowed to create contradictions of fact by contradicting his own earlier testimony)).

119. *See id.* at 807.

120. *Id.*

mary judgment, a plaintiff must show that the previous statements were made with the belief that the plaintiff's situation warranted disability benefits and that the plaintiff was not so disabled as to preclude employment with the proper reasonable accommodation.[121]

By rejecting a theory of judicial estoppel or any kind of heightened burden of proof in an ADA case, the Supreme Court, in effect, stated that it would treat ADA claims just as it would treat any other claim.[122] The Court did not find anything extraordinary about ADA claims; thus, the ordinary rules of procedure should still apply.[123] Therefore, plaintiffs who have applied for SSDI benefits will still have the protections of the ADA.[124]

IV. IMPACT

Between the time the Fifth Circuit Court of Appeals decided *Cleveland* and the time of the Supreme Court's opinion, not a single plaintiff was successful in the Fifth Circuit in an ADA claim.[125] However, the *Cleveland* opinion already seems to have had an impact on ADA law, and cases since *Cleveland* indicate that plaintiffs are faring somewhat better.[126] Now, it looks as if more plaintiffs will be able to get beyond the summary judgment stage and have the merits of their case heard in court.[127] To be sure, plaintiffs still must explain inconsistencies, and they will lose if they fail to offer sufficient explanation.[128] However, ADA plaintiffs will not have to satisfy a higher burden of proof than plaintiffs in ordinary lawsuits.[129]

Cleveland left unanswered the issue of whether the doctrine of judicial estoppel might be appropriate in some other context.[130] For

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121. *See id.*

122. *See id.* at 805.

123. *See id.*

124. *See id.*

125. *See, e.g.*, Pena v. Houston Lighting & Power Co., 154 F.3d 267, 269 (5th Cir. 1998) (finding against an ADA plaintiff); McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 564 (5th Cir. 1998) (affirming district court's grant of summary judgment against an ADA plaintiff).

126. *See* Gibson v. Wal-Mart Stores, Inc., 182 F.3d 917 (unpublished table decision), 1999 U.S. App. LEXIS 15180, at *12 (6th Cir. 1999); Giles v. General Elec., No. CIVA 3-97-CV-2774-14, 1999 U.S. Dist. LEXIS 9369, at *3 (N.D. Tex. June 9, 1999) (reversing summary judgment against ADA plaintiffs in light of *Cleveland*). *But see* Lamb v. Bell County Coal Corp., 188 F.3d 508 (unpublished table decision), 1999 U.S. App. LEXIS 22201, at *1 (6th Cir. 1999); Moore v. Payless Shoe Source, Inc., 187 F.3d 845, 853 (8th Cir. 1999) (upholding summary judgment against ADA plaintiffs under the *Cleveland* rule).

127. *See Gibson*, 1999 U.S. App. LEXIS 15180, at *9-*10 (vacating district court's grant of summary judgment against an ADA plaintiff).

128. *See id.*

129. *See id.*

130. *See* Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 802 (1999) (explaining the Court was only considering one specific way in which the SSA and ADA might interact, and was not addressing the interaction of other statutes).

example, railroads and their employees are not covered by the SSA; but rather, they are covered by the Railroad Retirement System (RRS), which is similar to Social Security but differs in some important ways.[131] Railroad employees who are unable to work at any regular employment may qualify for total and permanent disability benefits, and in evaluating eligibility for such benefits it is accepted practice to rely on the regulations of the Social Security Administration.[132] Thus, a railroad worker who is injured on the job may qualify for benefits under both RRS[133] and the Federal Employer's Liability Act (FELA).[134] A plaintiff in a FELA claim may not work during the time it takes his or her claim to go through the trial process but may later attempt to be reinstated.[135] The attempt to return to work sometimes occurs after the plaintiff has applied for and received disability benefits.[136]

This situation creates a conflict similar to that which existed in *Cleveland*.[137] The logic of the Supreme Court's opinion would seem to apply in this case just as it would in an SSDI setting, but the Court never addressed this example.[138] It could be that because the RRS and FELA serve very different purposes than SSDI, the doctrine of judicial estoppel might be appropriate in FELA cases and inappropriate in ADA cases.[139] Prior to the decision in *Cleveland*, the courts had sustained the railroad's position that the plaintiff was judicially estopped from reclaiming his or her prior job.[140] Now, at the very least, it appears that this area of the law has become unsettled.[141]

Another question left unanswered by the Court is what impact a tort lawsuit by the employee against the employer might have.[142] For example, instead of pursuing benefits under the SSA, a plaintiff could pursue tort compensation and claim in a tort lawsuit that he or she was permanently disabled and prevented from returning to work.[143] The

131. *See* Brief for the Association of American Railroads at 2, *Cleveland* (No. 97-1008).

132. *See id.* at 2-3.

133. *See id.* at 3.

134. *See* 45 U.S.C. §§ 51-60 (1994).

135. *See* Brief for the Association of American Railroads at 4-5, *Cleveland* (No. 97-1008) (explaining the public policy behind FELA).

136. *See id.* at 5.

137. *See Cleveland*, 526 U.S. at 797-802.

138. *See id.* at 802 (stating that the Court was not addressing how the ADA interacts with FELA).

139. *See* Brief for the Association of American Railroads at 6-8, *Cleveland* (No. 97-1008) (arguing in favor of the doctrine of judicial estoppel).

140. *See id.* at 8 (citing Lewandowski v. National R.R. Passengers Corp., 882 F.2d 815 (3d Cir. 1989); Morawa v. Consolidated Rail Corp., 819 F.2d 289 (6th Cir. 1987)).

141. *See id.*

142. *See generally Cleveland*, 526 U.S. 795.

143. *See* Brief for the Association of American Railroads at 14-15, *Cleveland* (No. 97-1008) (stating that when judicial estoppel is not imposed, a plaintiff could possibly receive future lost wages in a lump-sum payment and also be reinstated at the job for which he or she had received the payment

Court's decision leaves unanswered the question of whether a plaintiff should be judicially estopped from bringing an ADA claim when a tort action had been initiated.[144] The logic in *Cleveland* would again seem to apply, in which case estoppel would be inappropriate.[145] However, if the context of the statement is the key factor to the Court, then estoppel might be appropriate, because claiming that one is disabled in a tort lawsuit could mean something very different than the same claim would mean in an SSA context.[146] The Court's reliance on the context of a plaintiff's statement creates a host of new questions.[147] For example, disability could mean one thing in a tort lawsuit, and something else in an SSA application, and still something else in a FELA claim.[148] It remains to be seen whether the Court will make distinctions in these separate areas of the law. It is also unclear how the Court could justify any distinctions based on the context of the claim.[149] The Court in *Cleveland* did indicate that it was reluctant to subject plaintiffs to a heightened burden of proof standard except in unusual circumstances.[150] Given this fact, it seems unlikely that the Court will apply the doctrine of judicial estoppel in ADA cases, regardless of the context.

The Court also did not express any views on how, or whether, Congress should modify the SSA or the ADA to prevent these types of contradictions from occurring.[151] Critics have called for Congress to enter the field and reconcile any inconsistencies that exist between the two Acts.[152] By recognizing that the two programs overlap, the Court seemed to believe that any inconsistencies could effectively be dealt with at trial, without the need for Congress to step in and change the law.[153]

In one sense, the Supreme Court's decision in *Cleveland* was fairly unremarkable. *Cleveland* established that statements made in connection with a benefits application could be considered as evidence in a subsequent ADA action, and the fact-finder could determine the appropriate weight to be given the statements.[154] In essence, the Court said that ADA

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for future lost wages).

144. *See Cleveland*, 526 U.S. at 802 (stressing that the Court was only deciding the question of how the ADA and SSA interact in one specific context).

145. *See id.* (explaining why the doctrine of judicial estoppel is not usually appropriate).

146. *See id.* (stating that disability under the SSA implies a context-related legal conclusion).

147. *See generally* Brief for the Association of American Railroads, *Cleveland* (No. 97-1008) (listing some of the ways in which the ADA may conflict with other areas of the law).

148. *See id.* at 16 (stating that there is no specific definition of disability under FELA, but that disability is precisely defined by SSA regulations).

149. *See Cleveland*, 526 U.S. at 802 (refusing to address how the ADA might conflict with statutes other than SSA).

150. *See id.* at 805 (indicating that judicial estoppel should only apply in extraordinary circumstances).

151. *See generally id.* (declining to call upon Congress to reconcile the ADA and SSA).

152. *See* Diller, *supra* note 29, at 1067 (recommending Congressional action in this area).

153. *See Cleveland*, 526 U.S. at 805.

154. *See id.* at 806.

cases will proceed under the same standards as most ordinary lawsuits do, and there is nothing special about ADA suits which warrants either a per se bar or a heightened evidentiary standard on the plaintiff.[155] Under this decision, the ADA is now available to protect and assist people with disabilities even if they have been granted SSDI benefits.[156] Plaintiffs will not have to choose between benefits they may need immediately and a more complete remedy under the ADA.[157]

V. CONCLUSION

In rejecting the theory of judicial estoppel, the Court in *Cleveland* recognized that there is no inherent contradiction between the idea that some individuals should receive income support because of their disabilities and the notion that society should remove obstacles faced by disabled people in the workplace.[158] Supplemental income goals and equal treatment goals can co-exist in a "comprehensive disability policy."[159] However, the differing assumptions these two goals are based upon create the current "tension in disability law."[160] While *Cleveland* is a major step toward a comprehensive disability policy, the manner in which these tensions are resolved will be the determining factor in whether the ADA becomes the society changing legislation its creators intended.[161]

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155. *See id.* at 805-06.
156. *See id.*
157. *See id.*
158. *See* Diller, *supra* note 29, at 1006.
159. Diller, *supra* note 29, at 1006-07.
160. Diller, *supra* note 29, at 1007.
161. *See* Diller, *supra* note 29, at 1007.

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