Marquette Elder's Advisor

Volume 7
Issue 1 *Fall*

Article 3

Fall August 2012

Reconciling Definitions of "Disability:" Six Years Later, Has Cleveland V. Policy Management Systems Lived Up to Its Initial Reviews as a Boost for Workers' Rights?

Daniel Korhman

Kimberly Berg
George Washington University

RECONCILING DEFINITIONS OF "DISABILITY:" SIX YEARS LATER, HAS *CLEVELAND V. POLICY MANAGEMENT SYSTEMS* LIVED UP TO ITS INITIAL REVIEWS AS A BOOST FOR WORKERS' RIGHTS?

Daniel B. Kohrman* and Kimberly Berg**

In the world of employment law, 1999 marked a milestone for workers with disabilities. The United States Supreme Court passed judgment on concepts of "disability" underlying two key federal statutes, the Americans with Disabilities Act (ADA) and the disability insurance provisions of the Social Security Act (SSDI). A trio of decisions significantly narrowed the circumstances in which a worker may challenge employment discrimination on grounds of a "disability."[1] Yet in *Cleveland v. Policy Management Systems Corp.*,[2] the Court preserved an opening for other ADA claims. A unanimous Court said that a suit based on ADA's Title I, enacted to open workplaces to persons with "disabilities," actual or perceived, was compatible with a worker's receipt of SSDI benefits, which Congress authorized for people "[u]nable to engage in any substantial gainful activity" on account of "disability."[3] Thus, the Court

---

* Daniel Kohrman is a senior attorney with the AARP Foundation, where he handles trials and appellate employment discrimination cases brought on grounds of age and/or disability.

** Kimberly Berg is a third-year law student at George Washington University and contributed to this article while working as a law clerk for the AARP Foundation.

1. *See* Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (all ruling that a court reviewing whether a worker has an ADA "disability," an element required to assert a Title I claim, must take into account measures the worker takes to "mitigate" the impact of her underlying impairments on "major life activities." Such measures may include medication (*Murphy*), corrective devices such as eyeglasses (*Sutton*), or "coping" mechanisms the worker employs to ameliorate an impairment's impact, such as learning to use one eye to lessen the limitations otherwise imposed by "monocular vision."(*Albertson's*)).

2. 526 U.S. 795 (1999).

3. 42 U.S.C. § 423(d)(1)(A) (2005).

upheld Carolyn Cleveland's right to sue her former employer for denying her "reasonable accommodation" at work, and at the same time, to apply for and receive from the Social Security Administration awarded her SSDI benefits to replace her employment income. The Court rejected assertions by Cleveland's employer that these forms of relief were irreconcilable.

Since *Cleveland*, the legal landscape has become more forbidding for ADA employment plaintiffs, with restrictive United States Supreme Court decisions inspiring skepticism of ADA claims in many state and lower federal courts. Half a decade later, the question arises whether *Cleveland* still constitutes an exception to such trends. That is, have the possibilities seemingly afforded to ADA plaintiffs in *Cleveland* been realized?

The answer to this question is of great importance to people of all ages with disabilities, a significant share of whom have at least a plausible basis for seeking SSDI benefits as well as ADA protection from workplace bias. Yet the stakes are especially great for older workers, who include a disproportionate share of all workers with disabling impairments and who face far greater difficulties finding new employment,[4] particularly at comparable wages,[5] when they lose a job. Making it hard for terminated workers to seek relief for disability discrimination if they already have sought SSDI disability benefits undermines key public policies: it discourages civil rights enforcement and gainful employment in favor of reliance on government cash assistance. For displaced older workers, forcing a choice between SSDI and the ADA is particularly harsh, because it may amount to cutting off their last, best chance to thrive in the world of work.

INTRODUCTION

In May 1999, the Supreme Court issued its much anticipated decision in *Cleveland*. The Court granted *certiorari* in *Cleveland* to resolve a conflict among circuit courts of appeals regarding

4. L. Trupin & D.P. Rice, *Health Status, Medical Use, and Number of Disabling Conditions in the United States*, 9 DISABILITY STATISTICAL ABSTRACTS (1995).

5. Kenneth A. Couch, *Late Life Job Displacement*, 38 GERONTOLOGIST 7 (Feb-June 1998).

rights of SSDI beneficiaries to bring claims under the ADA.[6] Justice Breyer, writing for a unanimous Court, rejected the Fifth Circuit's application of a "rebuttable presumption" against ADA claims by SSDI recipients, stating that "pursuit, and receipt of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA."[7]

The dispute in *Cleveland* stemmed from an apparent conflict between basic terms of the two statutes. On one hand, the Federal Disability Insurance Program makes available monthly support to "every insured individual who 'is *under* a disability.'"[8] The Social Security Act employs a definition of "disability" focused on impairments of a kind "so severe" that a person is "unable to do [her] previous work" and "cannot . . . engage in any other kind of substantial gainful work which exists in the national economy."[9]

Carolyn Cleveland also sought to show, in another forum-federal district court, that she was a "qualified individual with a disability" under the ADA.[10] To this end, she argued that she had limitations *only* so severe that she still "could 'perform the essential functions' of her job, 'at least with reasonable accommodations.'"[11]

The crux of the *Cleveland* case was the employer's assertion that eligibility for SSDI benefits and ADA remedies should be presumed to be mutually exclusive.[12] Indeed, although both laws address needs of individuals with disabilities, they serve populations that, on the surface, appear quite distinct. Title I of the ADA benefits persons with disabilities who are "qualified" to perform gainful employment; by contrast, SSDI primarily supports persons unable to take full advantage of, or even to find a niche in, the world of work. Thus, SSDI eligibility often is

6. 526 U.S. at 800.

7. *Id.* at 797.

8. *Id.* at 801(quoting 42 U.S.C. § 423 (a)(1) (1999) (emphasis added).

9. *Id.* at 797. (quoting 42 U.S.C. § 423(d)(2)(A) (1999)).

10. 42 U.S.C. §§ 12111(8); 12112(a) (2005).

11. 526 U.S. at 799-800.

12. The flip-side of this contention is the equally unfounded assertion that findings of SSDI and ADA "disability" are mutually reinforcing. *See, e.g.*, Hayes v. Philadelphia Water Dep't, No. Civ. A. 03-6013, 2005 WL 745857, *8 n.20 (E.D. Pa. Mar. 31, 2005) ("Hayes cannot rely on past findings of the Social Security Administration to prove that she is 'disabled within the meaning of the ADA.'").

viewed as defining a population of persons outside the economic mainstream,[13] while Title I of the ADA is seen as a vehicle to integrate disabled persons into the market-based system of opportunity inhabited by most adult Americans. While SSDI is thought of as a safety net for persons no longer economically productive, the ADA "seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the nation with the benefit of their consequently increased productivity."[14] It is a small wonder then that persons claiming protections of both laws have generated legal controversy.

Based on these apparently dueling conceptions of "disability," the Fifth Circuit deemed it no more than "theoretically conceivable that under some limited and highly unusual set of circumstances the two claims [to SSDI eligibility and coverage by the ADA] would not necessarily be mutually exclusive."[15] Yet, Ms. Cleveland persuaded the United States Supreme Court that "there are . . . many situations in which a SSDI claim and an ADA claim can comfortably exist side by side."[16]

AN OVERVIEW OF *CLEVELAND'S* IMPLICATIONS

The *Cleveland* Court avoided a systematic division of persons with disabilities into two mutually exclusive camps, consisting of those eligible for SSDI and those permitted to assert ADA claims.[17] Thus, the Court appears to have recognized that

---

13. *See, e.g.*, Mathew Diller, *Dissonant Disability Policies: The Tensions Between the Americans With Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1006-07; 1015 (1998) (Social Security Disability Insurance appears to "erect a regime in which people with disabilities are certified as unable to work and are segregated from the work force." Social Security's disability definition tends to "create a boundary that separates 'the disabled' from the rest of society so that income support can be provided without undermining the obligation to work borne by the nondisabled." Social Security Disability Insurance is "based on an implicit view that people with disabilities should be exempt from the obligation to work that our society imposes on its members.").

14. *Cleveland*, 526 U.S. at 801. In other words, "[t]he ADA is premised on the recognition that barriers to full participation in society are socially created, rather than the inevitable consequence of medical impairments." Diller, *supra* note 13, at 1005.

15. *Id.* at 800 (quoting Cleveland v. Policy Mgmt. Sys. Corp., 120 F.3d 513, 517 (5th Cir. 1997), *vacated*, 526 U.S. 795).

16. *Id.* at 802-03.

17. Diller, *supra* note 13, at 1007-08. Thus, the Court understood that SSDI is not

> [a]lthough it may not be possible to reconcile fully the premises of the disability programs with those of the ADA, the tensions are not as sharp as they first appear. The Social Security Act presents the disability benefit programs as dealing exclusively with inability to work due to medical impairments. However, the reality of these programs is more complex.[18]

Thus, for many, the *Cleveland* decision signified "a major victory for disability claimants,"[19] of which there have been precious few in the United States Supreme Court, at least in the employment context.[20] At first glance, *Cleveland* appeared to encourage a more favorable, and more nuanced, view of ADA employment plaintiffs: those receiving SSDI benefits no longer could be automatically barred from filing a disability discrimination claim against a former employer. *Cleveland* gave ADA plaintiffs an opportunity to explain alleged inconsistencies between their claims of disability supporting a SSDI application and their assertions that they were qualified workers protected by the ADA. Hence, it seemed "more [such ADA] plaintiffs [would] be able to get beyond the summary judgment stage and have the merits of their case heard in court."[21] Others predicted

---

simply "for people who 'cannot work; while the ADA is intended to protect disabled people who 'can' work." *Id.*

18. *Id.* at 1009.

19. Brian Dockendorf, *Recent Developments: Employment Discrimination Law*, 26 WM. MITCHELL L. REV. 1279, 1289 (2000).

20. Since 1999, when *Cleveland* was decided, the Supreme Court has ruled seven times against employee plaintiffs in cases interpreting substantive provisions of the ADA, although most of these decisions include at least some language that has proven favorable to ADA plaintiffs. *See* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003); Clackamas Gastroenterology Assoc., P.C. v. Wells, 538 U.S. 440 (2003); Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002); US Airways, Inc. v. Barnett, 535 U.S. 391 (2002); Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002); Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc. 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999). To be sure, other decisions of the Court significantly implicating the ADA's employment provisions have been decided in favor of plaintiffs. *See, e.g.*, Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) (vacating dismissal of punitive damages claim under Title VII of the Civil Rights Act of 1964 and Title I of the ADA). But still other major decisions have come down adverse to ADA employment plaintiffs. *See, e.g.*, Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001) (limiting recovery of attorney's fees under the ADA and various other civil rights laws).

21. Don C.H. Kautzmann, Case Comment, *Compatibility of Claim: 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*

that *Cleveland*'s "reasonable tone should moderate the anti-plaintiff rhetoric that prevailed before the Supreme Court spoke."[22] Christine Neylon O'Brien wrote, "Plaintiffs' lawyers should breathe a sigh of relief after the United States Supreme Court's decision in *Cleveland*."[23] And Dominique Jones-Sam declared, "What is unquestionably great about the decision handed down in *Cleveland* is that it put an end to the era of confusion on the issue."[24]

Less sanguine observers argued, however, that *Cleveland*'s legacy would depend on how lower courts applied the Supreme Court's reasoning. And, the impact of *Cleveland* in the lower federal courts has been anything but a bonanza for SSDI recipients who invoke the ADA. Rather, the federal judiciary has continued to grant summary judgment against most reported ADA claims presented by SSDI recipients.[25] With few plaintiffs surviving summary judgment, a new era of confusion seems to have descended, leaving many advocates wondering "Did *Cleveland* really change anything?"

Disability Benefits, Cleveland v. Policy Management Systems Corp., 76 N. D. L. REV. 411, 423 (2000).

22. Jessica Barth, Note, *Disability Benefits and the ADA After* Cleveland v. Policy Management Systems, 75 IND. L.J. 1317, 1337 (2000).

23. Christine Neylon O'Brien, *The United States Supreme Court Resolves the Effect of Disability Benefit Claims Upon Americans with Disabilities Act Complaints in* Cleveland v. Policy Management Systems Corporation, 17 HOFSTRA LAB. & EMP. L.J. 115, 122 (1999).

24. Dominque Jones-Sam, Case Note, Cleveland v. Policy Management Systems*: A Step Towards Equity*, 27 S.U. L. REV. 63, 79 (1999).

25. Even if federal courts were to ease or end this stingy approach, in any event, the number of SSDI beneficiaries is unlikely to decline significantly due to the chance *Cleveland* affords to some to return to the workforce by suing a former employer for violating the ADA. Fewer than one in 500 SSDI recipients returns to work, despite program provisions adopted over the years to encourage this. *SSA Disability: Other Programs May Provide Lessons for Improving Return-to-Work Efforts: Hearing Before the Subcomm. on Soc. Sec. of the H. Comm. on Ways and Means*, 104th Cong. (2000) (statement of Barbara D. Bovbjerg, Assoc. Dir. Edu., Workforce, and Income Sec. Issues, Health, Edu., and Human Serv. Div.). After all, SSDI

> "address[es] a range of socioeconomic problems that lead to long-term unemployment among people with disabilities, particularly among middle-aged individuals with limited job skills. Many SSDI recipients would have trouble obtaining work even without their impairments. Accordingly, [SSDI], do[es] not remove large numbers of people from the work force who would, with appropriate accommodation, be able to simply go out and find jobs. For this reason the tensions between income support programs and the ADA appear more acute on a rhetorical level than they are in practice."

Diller, *supra* note 13, at 1009.

THE SUPREME COURT'S DECISION IN *CLEVELAND*

FACTUAL BACKGROUND

In January 1994, Carolyn Cleveland suffered a stroke, left work, and applied for SSDI benefits. Three months later, her condition having improved, Cleveland returned to work at Policy Management Systems Corporation (PMSC). Upon learning of this, the Social Security Administration (SSA) denied Cleveland's application. In July 1994, PMSC fired Cleveland. Cleveland subsequently appealed her SSDI denial, representing to the SSA that she was unable to work because of her disability. While awaiting a decision from the SSA, Cleveland filed an ADA claim against her former employer alleging that PMSC failed to reasonably accommodate her disability. One week later, the SSA awarded Cleveland SSDI benefits retroactive to the day of her stroke.[26]

LOWER COURT DECISIONS

The district court ruled that Cleveland had conceded in her SSDI benefits application that she was totally disabled. The trial judge granted summary judgment for PMSC without considering the merits of Cleveland's reasonable accommodation claim.[27] Although the Fifth Circuit Court of Appeals recognized that "it is at least theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive;"[28] the appellate panel affirmed the grant of summary judgment. In doing so, the Fifth Circuit noted: "To permit Cleveland to make such an argument in the face of her prior, consistent, and until now uncontested sworn representations to the SSA would be tantamount to condoning her advancement of entirely inconsistent positions, a factual impossibility and a legal contradiction."[29] The court of appeals concluded that the supposed conflicts between claims under the ADA and the SSDI program warranted application of a "rebuttable presumption"

26. *Cleveland*, 526 U.S. at 798-99.

27. *Id.* at 799.

28. Cleveland v. Policy Mgmt. Sys., 120 F.3d 513, 517 (5th Cir. 1997), *vacated*, 526 U.S. 795 (1999).

29. *Id.* at 518.

barring ADA claims by persons who had applied for, or received, SSDI benefits.

Prior to *Cleveland,* courts used various approaches to address apparently inconsistent positions taken by ADA claimants who sought or received SSDI benefits: judicial estoppel, a rebuttable presumption against ADA claims, or treating receipt of disability benefits as a material factor in determining whether an individual could perform the essential functions of a job, as required by the ADA. Regardless of the approach used, however, few ADA plaintiffs survived motions for summary judgment.

Judicial estoppel is an equitable doctrine invoked by a court at its discretion to prevent a party from asserting inconsistent positions.[30] Among other things, judicial estoppel is intended to "preserve the sanctity of the oath" and to "protect judicial integrity by avoiding the risk of inconsistent results in two proceedings."[31] Prior to *Cleveland,* the Third and Fourth Circuits applied judicial estoppel to prevent SSDI recipients from pursuing claims of disability discrimination,[32] and the Second Circuit invoked judicial estoppel to bar an age-bias suit by a SSDI beneficiary.[33]

Application of judicial estoppel often was accompanied by harsh words for a plaintiff viewed as trying to "speak out of both sides of her mouth with equal vigor and credibility before [the] court."[34] In *McNemar v. Disney Store,* the Third Circuit Court of Appeals wrote "[n]othing permits one to undermine the integrity of the judicial system 'by playing fast and loose with the courts by asserting inconsistent positions.'"[35]

Although the Eighth and Eleventh Circuits disavowed a *per se* rule applying judicial estoppel to bar ADA claims by SSDI recipients, both courts estopped ADA plaintiffs from denying the truth of any statements made in a disability application.[36]

---

30. Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6 (2nd Cir. 1999).

31. Simon v. Safelite Glass Corp., 128 F.3d 68, 71 (2nd Cir. 1997).

32. *See* McNemar v. Disney Store, 91 F.3d 610 (3rd Cir. 1996); Cathcart v. Flagstar, No. 97-1977, 1998 WL 390834 (4th Cir. Jun. 29, 1998) (dismissing claims under the ADA).

33. *See Simon,* 128 F.3d 68 (dismissing claim under Age Discrimination in Employment Act (ADEA)).

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

35. 91 F.3d at 621 (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 360 (3rd Cir. 1996)).

36. Downs v. Hawkeye Health Servs, Inc., 148 F.3d 948 (8th Cir. 1998); Talavera v.

The First, Fifth, and Seventh Circuits adopted a "rebuttable presumption" standard whereby an ADA claimant who received disability benefits could overcome summary judgment by offering affirmative evidence showing that he or she was qualified for a job.[37] The Eighth Circuit required an ADA plaintiff to present "strong countervailing evidence" that he or she was qualified, calling the claimant's burden "particularly cumbersome."[38]

Other federal circuit courts adopted a somewhat less aggressive approach when confronted with apparently inconsistent statements by ADA plaintiffs. The Sixth, Ninth, Tenth, and District of Columbia Circuits all considered statements made in SSDI applications to be material in determining if an ADA plaintiff was qualified.[39] Yet, these courts all indicated judicial estoppel *might* be appropriate under certain circumstances.[40]

THE SUPREME COURT'S DECISION

In *Cleveland*, the Supreme Court seemingly embraced a more sympathetic approach to ADA claims by SSDI recipients, unanimously concluding that "in context, [the ADA's and SSA's] seemingly divergent statutory [regimes] are often consistent, each with the other."[41] On this basis, the Court swept aside the option of a rigid rule of judicial estoppel. "[P]ursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim."[42] The Court rejected the Fifth Circuit's reasoning, concluding that "the two claims [asserted by Carolyn

---

Sch. Bd. of Palm Beach County, 129 F.3d 1214 (11th Cir. 1997).

37. Ivette Soto-Ocasio v. Fed. Express Corp., 150 F.3d 14 (1st Cir. 1998); *Cleveland*, 120 F.3d 513; Weigel v. Target Stores, 122 F.3d 461 (7th Cir. 1997).

38. *Downs*, 148 F.3d at 951 (quoting Dush v. Appleton Elec. Co., 124 F.3d 957 (8th Cir. 1997)).

39. Blanton v .Inco Alloys Int'l., 123 F.3d 916 (6th Cir. 1997); Lujan v. Pacific Maritime Ass'n., 165 F.3d 738 (9th Cir. 1999); Lowe v. Angelo's Italian Foods, No. 93-1233-JTR, 1998 WL 255051 (10th Cir. May 19, 1998); Swanks v. Wash. Metro. Area Transit Auth., 116 F.3d 582 (D.C. Cir. 1997).

40. *See, e.g., Swanks*, 116 F.3d at 587 ("ADA plaintiffs who in support of claims for disability benefits tell the Social Security Administration they cannot perform the essential functions of a job even with accommodation could well be barred from asserting, for ADA purposes, that accommodation would have allowed them to perform that same job."). *Accord* Barth, *supra* note 22 at 1328.

41. *Cleveland*, 526 U.S. at 797.

42. *Id.*

Cleveland] do not inherently conflict to the point where courts should apply a special negative presumption like the one applied by the Court of Appeals here."[43]

While absolving plaintiffs of having to surmount a "strong" or "special" presumption,[44] the Court identified another significant, specific requirement for plaintiffs seeking to survive summary judgment. The Court declared an ADA plaintiff "must explain why" his or her "SSDI contention that [he or] she was too disabled to work" was "consistent with [his or] her ADA claim that [he or] she could 'perform the essential functions' of [his or] her previous job, at least with 'reasonable accommodation.'" [45] The Court denied plaintiffs the option of standing mute with regard to the contents of his or her SSDI file. A plaintiff advancing evidence of qualifications to perform essential functions of a job allegedly denied by an employer, without more, would be deemed to "simply ignore the apparent contradiction that arises out of [an] earlier SSDI total disability claim."[46] This, in turn, would "appear to negate an essential of her ADA case, at least if she does not offer a sufficient explanation."[47]

Moreover, the Court defined "sufficient explanation" in such a way as to extenuate the issue of an ADA plaintiff's truthfulness: "to defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable

43. *Id.* at 802.

44. *Id.* at 797, 798, 802, 805. The Court also elsewhere described the Court of Appeals' approach as "a *special* presumption that would *significantly* inhibit a SSDI recipient from simultaneously pursuing an action for disability discrimination under the [ADA]," a "*strong* presumption against [a SSDI] recipient's success under the ADA," a "*special* judicial presumption [that] would *ordinarily* prevent a plaintiff like Cleveland from successfully asserting an ADA claim," and a "*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;'" *Id.* at 800 (quoting Cleveland v. Policy Mgmt. Sys. Corp., 120 F.3d 513, 517-19 (5th Cir. 1997), *vacated*, 526 U.S. 795) (The 5th Circuit held a plaintiff who applied for or received SSDI benefits had the "theoretically conceivable" task of showing "limited and highly unusual circumstances" that might justify overcoming "a rebuttable presumption" that he was "judicially estopped from asserting he is a 'qualified individual with a disability.'").

45. *Cleveland*, 526 U.S. at 798.

46. *Id.* at 806.

47. *Id.*

accommodation.'"[48]

The Court carefully confined its holding favorable to ADA plaintiffs in several other respects. In what has become key language in the lower federal courts, the Justices made clear that Carolyn Cleveland's case did *not* involve conflicting statements about factual matters:

> An SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, 'I am disabled for purposes of the Social Security Act.' And our consideration of this latter kind of statement consequently leaves the law related to the former, purely factual, kind of conflict where we found it.[49]

The Court also declined to opine how its ruling should be applied to "the interaction of either of the statutes before us with other statutes."[50]

ANALYSIS OF THE CLEVELAND DECISION

DANGERS FOR PLAINTIFFS IN CLEVELAND

While most of the *Cleveland* opinion is devoted to describing "many situations in which a SSDI claim and an ADA claim can comfortably exist side by side,"[51] the Court also planted seeds likely to bear an ample harvest for ADA defendants. Although the Court resisted *explicitly* endorsing an elevated burden of proof for ADA plaintiffs, the Court also plainly refused the relief sought by Cleveland and her supporting *amici,* including the United States. Their briefs urged the Court to affirm traditional summary judgment principles, to rely on the federal rules of evidence governing allegedly inconsistent admissions by a party plaintiff and to treat evidence from a SSDI beneficiary's file as just one piece of evidence whether an ADA plaintiff was "qualified."[52] Thus, the Court *implicitly* adopted a heightened

48. *Id.*

49. *Id.* at 803.

50. *Cleveland*, 526 U.S. at 802.

51. *Id.* at 803.

52. *See, e.g.*, Transcript of Oral Argument at *36-37, *Cleveland*, 526 U.S. 795 (No. 97-1008), 1999 WL 115176 ("QUESTION: . . . In the context of the summary judgment motion, although she doesn't explain the prior statement, she puts in a ton of evidence that demonstrates quite conclusively that her current condition can be accommodated. Does she

summary judgment standard for ADA plaintiffs who had received SSDI.[53]

On close examination, *Cleveland* seems schizophrenic as to an ADA plaintiff's need to justify prior statements supporting a SSDI award. On the one hand, the Court took pains to demonstrate that Cleveland herself posed merely an "appearance of conflict" between two definitions of disability. Further, the Court exhaustively reviewed how and why an assertion of "total disability" in a SSDI application might reflect "context-related legal conclusion[s]"[54] rather than binding admissions of fact, such as "directly conflicting statements about purely factual matters."[55] Yet, the Court's sole rationale for imposing an explanation requirement ignores this distinction.

The Court observed that various lower court decisions, admittedly only "in somewhat comparable circumstances," and involving, again admittedly "for the most part . . . purely factual contradictions," have held that apparently inconsistent statements in the same litigation – not as in *Cleveland,* in separate submissions in separate proceedings under different laws – seem to require an explanation, and preclude a trial absent the same.[56] Without supplying any convincing analysis, the Court

---

win or lose? MR. WALL [Counsel for Petitioner Carolyn Cleveland]: She wins."). *See also id.* at *17-18 (argument for the United States that at summary judgment, an ADA plaintiff's past sworn statement of disability need not be ignored, but should merely be considered as "a factor . . . in determining whether a reasonable tryer of fact could find for the plaintiff"). *Accord* Brief for Aids Policy Center for Children, Youth and Families, et al. as Amici Curie Supporting Petitioner, *Cleveland,* 526 U.S. 795 (1999) (No. 97-1008), 1998 WL 839955, *26-30; Brief for National Employment Lawyers Association, et al. as Amici Curiae Supporting Petitioner, *Cleveland,* 526 U.S. 795 (1999) (No. 97-1008), 1998 WL 848065, *23-26. (An ADA plaintiff's past sworn statement of disability also could be considered as a factor "to limit relief" if the plaintiff prevailed on her ADA claim, but was deemed to have dissembled to the SSA.).

53. *Cleveland,* 526 U.S. at 797. *Accord id.* at 797, 802 (rejecting a "*special* negative presumption" as "*strong*" as "the one applied by the Court of Appeals here") Hence, for example, the Court did *not* dismiss altogether the notion of subjecting ADA plaintiffs like Cleveland to *any* presumption, or of "inhibit[ing]" SSDI recipients from pursuing ADA claims to *any* degree; rather, the Court only rejected a "special" presumption that would "significantly" restrict Cleveland from prevailing at trial.. *See* Transcript of Oral Argument at *37, *Cleveland,* 526 U.S. 795 (No. 97-1008), 1999 WL 115176 (discussing how an explanation requirement would cause an "alteration in the summary judgment matrix"); *Id.* at *47 (noting Justice Breyer's view that even an ADA plaintiff who shows she is qualified for a job still loses at the summary judgment stage "if she does not establish that she was not lying previously").

54. *Id.* at 802.

55. *Id.*

56. *Id.* at 806.

simply asserted, "we believe a similar insistence upon explanation is warranted here, where the conflict involves a legal conclusion."[57] Why? The Court simply did not say.

It is tempting to conclude that Justice Breyer achieved unanimity in *Cleveland* by crafting an opinion with something for all his colleagues: a sharp critique of judicial estoppel, a roadmap informing at least some dual ADA/SSDI claimants how they might prevail, and a mildly-worded embrace of a presumption against pursuing both ADA and SSDI claims without a "sufficient explanation."[58] But the reasoning underlying this compromise remains elusive, except for the justifications advanced for approaches rejected by the Court. That is, other than a desire to "preserve the sanctity of the oath" and to "protect judicial integrity by avoiding the risk of inconsistent results in two proceedings," the primary rationales for judicial estoppel, there appears little basis for the explanation requirement established in *Cleveland*. The Court also expressed interest in keeping faith with the traditional prohibition against allowing a plaintiff to "create a genuine issue of fact . . . to survive summary judgment simply by flatly contradicting his or her own previous sworn statement," but failed to explain why this concern was relevant, if not to "preserve judicial integrity," given the Court's recognition that in many cases, a claim of "disability" supporting a SSDI award may be consistent with a subsequent ADA suit, and thus, any apparent inconsistency is quite different from factual contradictions federal courts have condemned in other civil cases.[59]

The *Cleveland* decision also is murky as to why a trial court reviewing a SSDI recipient's ADA claim must take responsibility for policing concerns of judicial integrity. After all, the best test of whether an ADA plaintiff is dissembling to the court is to assess her evidence that she was "qualified" to work at the time she allegedly suffered disability bias. Any prior, supposedly contrary, representations to SSA would not have been made to the court. If the ADA plaintiff is thought to have dissembled to

57. *Id.* at 807.

58. *See* Transcript of Oral Argument at *35, *Cleveland*, 526 U.S. 795 (1999) (No. 97-1008), 1999 WL 115176, (member of Court summarizing "Justice Breyer's assumption . . . that, even though in the summary judgment proceedings the plaintiff establishes that she currently could do the work with an accommodation . . . nonetheless if she does not establish that she was not lying previously she loses").

59. *Cleveland*, 526 U.S. at 806-807.

the SSA, but not to the court, it is the SSA, not the court, that has cause to demand an explanation. If SSA is not satisfied, it should take action regarding that claimant.

Finally, *Cleveland* did not address another issue that was of intense concern to the litigants in that case and directly relevant to the debate about how tough federal district courts should be in assessing ADA claims by SSDI recipients: whether an explanation requirement undermines the statutory goals of the ADA or the SSDI program. In particular, the *Cleveland* Court failed to discuss the goal of maximizing gainful employment of persons with disabilities and minimizing their dependence on the government for income support, which the United States and other parties characterized as core objectives of both the ADA and the SSDI programs.[60]

At oral argument, Justice Ginsburg described as "a very curious thing about this case" that the employer's support for sanctions against SSDI recipients who seek ADA relief, such that result in persons who are possibly able to work may remain on SSDI because they cannot press their ADA claims. Surely, she said, this "works against the Social Security Administration, because they don't want to carry this person on the disability roll if they can work." [61] By contrast, Justice Scalia argued, far less convincing, that such sanctions might deter dishonesty on the part of SSDI applicants. He suggested that persons who can

60. Further, the Court declined to follow the approach favored by agencies responsible for enforcing the ADA and the Social Security Act. Both the Equal Employment Opportunity Commission (EEOC) and the SSA maintain that statements regarding an individual's status in one context are not dispositive in another. According to EEOC "the determination of what, if any, weight to give to representations made in support of applications for disability benefits depends on the context and timing of the representations." Equal Employment Opportunity Commission, No. 915.002, *EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans With Disabilities Act of 1990* (1997), 1999 WL 33159167. Use of generalized terminology, or checking a box on a SSDI application, is unlikely to be a precise and accurate determination whether an applicant is a "qualified individual" for ADA purposes. *Id.* at 19-20. The SSA has long followed a similar, case-by-case approach. For example, when reviewing a SSDI application, the SSA "does not consider statements made in connection with the applicant's unemployment compensation claim (i.e. that he or she was able to work) when evaluating the claimant's credibility. A decision . . . must reflect all the evidence." U.S. Department of Health & Human Services, Social Security Administration, Office of Hearing and Appeals, October 26, 1993, "Memorandum To: All OHA Field Personnel . . .SUBJECT: Reminders," at 3.

61. Transcript of Oral Arguments at *22, *Cleveland*, 526 U.S. 795 (No. 97-1008), 1999 WL 115176.

work, who he asserted "don't belong on the [SSDI] rolls," contrary to the Court's analysis in its subsequent unanimous published opinion, and who presumably may wish to advance ADA claims some day, will be deterred from applying for SSDI and securing it by the possible loss of future ADA claims.[62] The likelihood of such deterrence seems highly remote given the difficulty of winning an ADA case, among other factors. But more importantly, the assumption underlying the deterrence discussion is that there is something inherently suspicious about persons, even a very small number of them, receiving SSDI benefits and claiming they can work. Yet that is exactly what the Court labored to refute in its unanimous decision.[63]

Regardless how uncertain *Cleveland*'s logical foundations now appear, the question remains: what impact has Cleveland had on motions for summary judgment in ADA and other similar cases brought by SSDI recipients?

SAFE HARBORS FOR ADA PLAINTIFFS WHO HAVE RECEIVED SSDI BENEFITS

Before assessing *Cleveland*'s impact, it is important briefly to review the categories of ADA cases the Supreme Court identified as legitimately brought by SSDI recipients.

First, the Supreme Court noted that courts reviewing ADA claims must consider whether a worker is a "qualified person with a disability," taking into account the employer's duty to provide "reasonable accommodation."[64] However, "[b]y way of contrast, when the SSA determines whether an individual is disabled for SSDI purposes, it does *not* take the possibility of 'reasonable accommodation' into account, nor need an applicant refer to the possibility of reasonable accommodation when she

62. *Id.* at *24.

63. Brief for Lawson, as Amici Curiae Supporting Petitioner, Lawson v. CSX Transp., Inc., 245 F.3d 916 (7th Cir. 2001) (No. 00-1179) at *18-19. (Indeed, the EEOC has taken the position that receiving SSDI has been "repeatedly recognized [as] probative evidence that an individual has a disability under the ADA.").

64. *Cleveland*, 526 U.S. at 803 (The ADA prohibits employers from discriminating against any "qualified individual with a disability" with regard to any "terms, conditions, and privileges of employment."); 42 U.S.C. § 12112(a) (1990); 42 U.S.C. § 12111(8) (1990) (The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.").

applies for SSDI."[65] The Court recognized that "the matter of 'reasonable accommodation' may turn on highly disputed workplace-specific matters; and a SSA misjudgment about that detailed, and often fact-specific matter would deprive a seriously disabled person of . . . critical financial support."[66] As a result, "[a]n ADA suit claiming that the plaintiff can perform her job with reasonable accommodation may well prove consistent with a SSDI claim that the plaintiff could not perform her own job (or other jobs) without it."[67]

Second, the SSA's need to efficiently administer a large benefits program has caused a majority of disability determinations to be made without assessing an applicant's actual ability to work, based on "a set of presumptions about disabilities, job availability, and their interaction."[68] The SSA employs a sequential, five-step process for determining if a SSDI applicant has a medical impairment so severe that he or she cannot engage in any "substantial gainful work that exists in the national economy."[69] If an applicant is out of work and can claim a "severe" impairment, he or she can earn SSDI benefits at "Step Three" by demonstrating that his or her condition "meet[s] or equal[s]" an "impairment on a specific (and fairly lengthy) SSA list."[70] The United States informed the Court at oral argument that "approximately 60 percent of all [SSDI] awards" are made at Step Three[71] "without any inquiry into their ability to do their past job or their ability to do other employment in the national economy."[72] Inquires are only made at Steps 4 and 5 if an applicant is found ineligible at Step 3.[73] The Court concluded that this analytical method "inevitably simplif[ies], eliminating consideration of many differences potentially relevant to an individual's ability to perform a

65. *Cleveland*, 526 U.S. at 803 (citation omitted).

66. *Id. See* Brief of United States et al. as Amici Curiae Supporting Petitioner, *Cleveland*, 526 U.S. 975 (1999) (No. 97-1008), 1998 WL 839956, 10-11; n.2 & 13.

67. *Id.*

68. *Id.* at 804.

69. 20 CFR §§ 404.1520, 404.1560 (2004).

70. *Cleveland*, 526 U.S. at 804 (citing 20 CFR §§ 404.1520 (b), (c) (2005)). (Step One requires a negative response to the query "Are you presently working?"; Step Two requires a negative response to the query "Do you have a "severe" impairment, i.e., one that significantly limits your ability to do basic work activities?").

71. *Id.*

72. *Id.*

73. *Id.*

particular job,"[74] which is the focus of the ADA disability determination process.

In addition, the Court identified three other major reasons why an ADA claimant should not have his or her suit dismissed simply by virtue of having sought SSDI benefits:

- "[T]he SSA sometimes grants SSDI benefits to individuals who not only can work, but are working. For example, to facilitate a disabled person's reentry into the workforce, the SSA authorizes a 9-month trial-work period during which SSDI recipients may receive full benefits."[75]
- "The nature of an individual's disability may change over time, so that a statement made about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision."[76]
- An individual who has merely applied for, but not received SSDI benefits should not be estopped from asserting an ADA claim because "any inconsistency in the theory of the claims is of the sort normally tolerated by our legal system."[77]

POST-*CLEVELAND* DECISIONS

Initially, the Court's pragmatic approach in *Cleveland* suggested a victory for ADA plaintiffs. The decision seemed to reconcile goals of the ADA and the SSDI program, rather than forcing

74. Cleveland, 526 U.S. at 804.

75. *Id.* at 805. Congress has since enacted, and SSA has since implemented still other SSDI program provisions "to facilitate . . . reentry into the workforce" by persons with disabilities. *See, e.g.*, The Ticket to Work and Work Incentives Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (1999). "The Ticket to Work and Self-Sufficiency Program" intended "to expand the universe of service providers available to individuals who are entitled to Social Security benefits . . . based on disability or blindness in obtaining the services necessary to find, enter and retain employment." 20 CFR § 411.105 (2005).

76. *Cleveland*, 526 U.S. at 805.

77. *Id.* (citing FED. R. CIV. P. 8(e)(2) allowing the assertion of alternative theories of liability). Thus, plaintiffs generally may advance alternative theories, regardless of inconsistency. However, the Court also said ADA plaintiffs should be held to specific facts asserted in a SSDI application. After briefly discussing the limited effect of merely applying for SSDI, the Court added, "And, as we said, we leave the law with respect to purely factual contradictions where we found it." *Id.* at 805. As a result, even unsuccessful SSDI applicants may be held to detailed factual statements made in writing to SSA when pursuing an ADA claim.

individuals to choose between them. Immediately following the Court's decision, some commentators even criticized *Cleveland* on grounds that plaintiffs could too easily take advantage of the minimal requirements necessary to reconcile their seemingly contrary positions as to whether they were "disabled."[78]

Since *Cleveland*, however, only a few reported decisions have permitted SSDI recipients to survive summary judgment on ADA claims. *Cleveland* now is most often cited to justify application of judicial estoppel to prevent ADA plaintiffs from denying "factual matters" pertaining to their SSDI applications. Indeed, it appears that inconsistencies between statements in a SSDI application and an ADA complaint often are readily, if at times improperly, characterized and construed as questions of fact, thereby enabling ADA defendants to distinguish *Cleveland* and earn summary judgment. Indeed, *Cleveland*'s benefits for ADA plaintiffs are strikingly less evident in reported decisions than was predicted when *Cleveland* issued. Rather, it may be that *Cleveland*'s benefits for plaintiffs most significantly consist of the absence of a judicial estoppel defense in cases in which it might once have been asserted, such as where an ADA plaintiff applied for, but was ultimately denied SSDI benefits.

SUMMARY JUDGMENT FOR DEFENDANTS

Following *Cleveland*, the Second, Third, and Seventh Circuit Courts of Appeal all have applied various forms of estoppel to prevent ADA plaintiffs from asserting *factually* inconsistent positions.[79] In *Motley v. New Jersey State Police*, the Third Circuit focused on *Cleveland*'s distinction between conflicting legal conclusions and purely factual disputes. Whereas *Cleveland*'s

78. Jane M. Keenan, *A Social Security Claimant's Statement that She is Disabled and Unable to Work Does Not Necessarily Preclude a Subsequent ADA Wrongful Termination Claim:* Cleveland v. Policy Management Systems Corporation, 38 DUQ. L. REV. 685 (2000).

79. Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1 (2nd Cir. 1999); Motley v. N.J. State Police, 196 F.3d 160 (3rd Cir. 1999); Devine v. Bd. of Comm'rs of Elkhart County, 49 F. App'x 57 (7th Cir. 2002); Opsteen v. Keller Structures, Inc., 408 F.3d 390, 392 (7th Cir. 2005) (noting plaintiff "acknowledge[d] that his current position [was] factually inconsistent with [that] maintained in his application for benefits," the court concluded plaintiff "wants to have things two ways, depicting himself as mentally incompetent in order to obtain disability benefits but as mentally capable in order to secure employment. . . . he seeks to maintain both gloomy and optimistic medical evaluations . . . and to benefit from different sources based on these incompatible positions. *Cleveland* holds that courts need not tolerate this maneuver.").

SSDI application contained blanket statements of disability, Motley offered detailed descriptions of his specific injuries and his inability to work.[80] As a result, the Court of Appeals concluded that the inconsistencies in Motley's record involved a factual dispute regarding his physical capacities. Hence, *Cleveland* did not apply and Motley was precluded from pursuing an ADA claim.[81]

The court in *Motley* also noted that *Cleveland* held that "where factual inconsistencies between claims exist, as opposed to context-specific legal conclusions, . . . the law remains, 'where [the *Cleveland* Court] found it.'"[82] The Third Circuit concluded that Motley's efforts to reconcile his inconsistent statements were insufficient to survive summary judgment. The court faulted Motley's failure to address his own detailed statements of disability, declaring "It is difficult to get around the conclusion that, in at least one of the fora, Motley was not completely honest."[83]

The dissent in *Motley* urged a remand, as in *Cleveland* itself, for the plaintiff to have an opportunity to explain seemingly inconsistent statements. Indeed, the reasoning of Judge Rendell's dissent supports a remand whenever an ADA plaintiff is denied a chance to explain because of alleged inconsistencies being addressed for the first time on appeal. The district court in *Motley* failed to consider an explanation from the plaintiff because its decision predated *Cleveland.*[84]

---

80. *Motley*, 196 F.3d at 166.

81. *Id.* at 167. The Court of Appeals also concluded that the disability retirement determination process at issue, unlike a SSDI eligibility review, "took the fundamental job requirements for state police officers, along with reasonable accommodations, such as light duty, into account . . . ." *Id.* at 166.

82. *Id.* at 164. (citing *Cleveland*, 526 U.S. at 1601-02). *Cf.* Murphey v. City of Minneapolis, 358 F.3d 1074 (8th Cir. 2004) (distinguishing *Motley*, reasoning that a plaintiff could not be precluded from pursuing an ADA claim by his physician's detailed statement of bases for his claiming total and permanent disability).

83. *Id.* at 166. The Third Circuit also noted that if a plaintiff was only required to point out the different definitions of disability under each statute, summary judgment could never be granted. *Id.* at 165. *See also* Musarra v. Vineyards Dev. Corp., 343 F. Supp. 2d 1116, 1122 (M.D. Fl. 2004) (admonishing SSDI recipient who brought ADA claim for "[c]learly . . . attempting to perpetrate a sham.").

84. *Motley*, 196 F.3d at 168 (Rendell, J., dissenting) ("It is not for the court upon defendant's raising of this inconsistency, to decide on its own whether the inconsistency can be reconciled. How can we, now, after *Cleveland*, deny this opportunity which is clearly mandated?"). *Cleveland* was decided after the district court granted summary judgment against Motley, but before the Court of Appeals ruled. As a result, Judge Rendell maintained, Motley should have an opportunity to explain inconsistencies based on

By contrast, courts grant summary judgment for defendants, as in *Sullivan v. Raytheon Co.*, upon concluding a plaintiff "has offered *no evidence* to explain [a] discrepancy" between factual assertions supporting ADA and SSDI claims.[85] Plaintiffs are presumed to know of their duty to explain, regardless of whether the parties or the court ever squarely addressed the issue.[86] Defendants likewise have a corresponding duty to present "evidence of any particular inconsistent assertions" that the plaintiff allegedly made.[87]

In *Mitchell v. Washingtonville Central School District*,[88] the Second Circuit also upheld the use of judicial estoppel to prevent an ADA plaintiff from asserting inconsistent *factual* positions. Mitchell argued that the district court's application of judicial estoppel to prevent him from pursuing his ADA claim violated principles set forth in *Cleveland*. However, the Court of Appeals found that "if the requirements for judicial estoppel are otherwise met, Mitchell may be prevented from claiming, as a factual matter, that he could stand and walk at work on the basis

---

standards discussed in *Cleveland*. *Id.* at 168-71.

85. 262 F.3d 41, 47 (1st Cir. 2001), *cert. denied*, 534 U.S. 1118 (2002) (emphasis added). *See also* Degroat v. Power Logistics, 118 F. App'x 575, 575 (3rd Cir. Dec. 10, 2004) (dismissing ADA claim where plaintiff who received SSDI benefits did not reconcile inconsistent statements, but simply "re-explain[ed] his injuries and condition"); Bass v. County of Butte, No. CIV-S-02-2443 DFL/CG, 2004 WL 1925468, at *4 (E.D. Ca. Aug. 6 2004) (finding that ADA plaintiff never explained "how she can be unable to perform any 'substantial gainful work' but yet be able to perform her dispatch job with accommodation").

86. In *Sullivan*, the court did not say whether the issue was ever joined in the district court. In *Lane v. BFI Waste Systems*, 257 F.3d 766 (8th Cir. 2001), the Court of Appeals affirmed a summary judgment for BFI, declaring that the plaintiff "proffered *no evidence* below to harmonize his inconsistent statements" to SSA and the trial court. "Even though Mr. Lane did not have the guidance of *Cleveland* below," the court reasoned, "he was required by then-existing case law to provide evidence to reconcile his seemingly contradictory statements." *Id.* at 770 (emphasis added). The Court of Appeals also rejected explanations provided by plaintiff in his appellate reply brief. *Id.* at 771-72.

87. Tullos v. City of Nassau Bay, 137 F. App'x 638, 647 (5th Cir. 2005) (expressing a need, under *Cleveland*, to evaluate "specific assertions [plaintiff] made to obtain [SSDI] benefits, along with his explanation for any inconsistencies;" without the former, the court said, it could not consider defendant's challenge to plaintiff's assertion that he was "a qualified individual under the ADA"). Moreover, the Tenth Circuit recently sustained a trial court's refusal to permit an employer to introduce documentary evidence for a jury to resolve the issue of alleged factual inconsistencies between ADA and SSDI claims. The appeals court sustained the exclusion of this evidence, thereby precluding jury consideration of an estoppel argument, and observed that "Cleveland does not necessarily mandate their admission." Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1254 (10th Cir. 2005).

88. 190 F.3d 1 (2nd Cir. 1999).

of prior factual assertions to the contrary."[89] Because the District Court's application of judicial estoppel was based on Mitchell's factual assertions, its decision was consistent with *Cleveland.*

In *Devine v. Board of Commissioners of Elkhart County,*[90] the plaintiff argued that he *could* work at the time of his termination, despite prior contrary statements to the SSA and at his own deposition. The court seems to have been persuaded that these factual inconsistencies warranted summary judgment and application of judicial estoppel, which the court explained, "'bars a litigant who has obtained a judgment on the basis of proving one set of facts from obtaining a judgment by turning around and proving that the facts were actually the opposite of what he had proved in the prior case.'"[91] However, the Seventh Circuit misstated clear principles articulated in *Cleveland,* mistakenly suggesting that the Supreme Court's 1999 decision precluded the plaintiff's reliance on "seemingly inconsistent *positions*"- that is "sworn statement[s]" that "he could do the work," and his "knowing decision" to pursue a "theory" of SSDI eligibility premised on an assertion of "disability" different from that on which he based his ADA case.[92] Yet *Cleveland* plainly held that while it is proper for a court to estop an ADA claim based on "conflicting statements about purely factual matters," estoppel may not premised on "a context-related legal conclusion [such as] 'I am disabled for purposes of the Social Security Act.'"[93]

Devine poses an instance in which mechanical application of the "factual inconsistencies" holding in *Cleveland* appears unjust. The Sixth Circuit seemed to recognize that Mr. Devine was able to continue working, albeit with great difficulty, despite severe impairments related to AIDS.[94] Further, the court's summary of

89. *Id.* at 16.

90. 49 F. App'x 57 (6th Cir. 2002).

91. *Id.* at 61 (citing Reynolds v. City of Chicago, 296 F.3d 524, 529 (7th Cir. 2002)).

92. *Id.* at 60-62.

93. *Cleveland,* 526 U.S. at 802.

94. *See Devine,* 49 F. App'x at 62 ("Indeed, the record suggests that Devine was truthful on his disability application and that he is a gravely ill man, *one who continued working long past the point that others might have quit.*") (emphasis added). Plaintiff told SSA, *inter alia*: "I was diagnosed ... 7-14-98. From that date to the point I stopped working I would miss quite a lot of work due to infections & [other] symptoms. I finally stopped working... 10-99. I tried to keep working as long as possible to keep my insurance.... I am not working at all, because of my condition.... [T]he side effects & symptoms of my infections continue to prevent me from working." These statements may

the record indicates that Devine never conveyed to the SSA a detailed, unequivocal statement of his inability to work at the time of his discharge.[95] Indeed, the Court of Appeals specifically noted that Devine "point[ed] out that he was working as a jail officer when he was fired and, except for a number of absences, was performing the job well."[96] The Seventh Circuit erred in failing to explain why the record in *Devine* fell short of posing a genuine issue of material fact on the issue of the plaintiff's qualifications. The court invoked what it described as "the point of the judicial estoppel doctrine," and seemingly relied on moral condemnation, rather than legal reasoning consistent with the *Cleveland* decision. The court declared: "Devine, like the plaintiff in *Lee*, 'made a knowing decision upon his discharge to apply for disability benefits on the theory that he could not do the work.'"[97]

In *Lee v. City of Salem*, unlike in *Devine*, the Seventh Circuit clearly and extensively discussed the difference between legal and factual inconsistencies, and concluded that the plaintiff had failed to follow *Cleveland*'s guidance regarding how to "resolve" an inconsistency between "context-related legal conclusions" made in support of ADA and SSDI claims.[98] The *Lee* court reversed a judgment for the plaintiff, on grounds that the plaintiff

> d[id] not account for his previous statements by explaining, for example, that the SSA does not consider the possibility of reasonable accommodations, so that when he claimed he was unable to return to his job for the city, he was simply saying that he could no longer do that job unless the city accommodated him . . . . . Instead, he accepts the natural import of [his]

---

show incapacity at the time they were written, but they seem ambiguous as to Devine's status when he was discharged; yet the Court of Appeals concluded this testimony "conflicted with [his] claim that he is a qualified individual with a disability under the ADA, because [he] could not be both unable to work and capable of performing the essential duties of a jail officer." *Id.* at 61.

95. *Id.* at 61.

96. *Id.*

97. *Id.* at 61-62 (citing Lee v. City of Salem, 259 F.3d 667, 677 (7th Cir. 2001)).

98. 259 F.3d at 672-76. *Accord* Feldman v. Am. Mem'l Life Ins. Co., 196 F.3d 783, 791 (7th Cir. 1999) (affirming summary judgment for employer; plaintiff must show "apparent inconsistency [between her statements supporting ADA and SSDI] claims can be resolved with reference to variance between the definitions of 'disability' contemplated by the ADA and SSDI.").

> statements (that he could no longer work as a sexton, period), contends that he so believed at the time he applied for benefits, and indicates that he has since had a change of heart.[99]

This approach by an ADA claimant has been held to violate the ruling in *Cleveland* that a plaintiff "cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement."[100]

PLAINTIFFS SUCCESSFUL IN SURVIVING SUMMARY JUDGMENT

A small number of plaintiffs have successfully relied on the rationales advanced in *Cleveland* as justifying ADA claims by SSDI recipients. However, it is noteworthy that a number of courts have characterized such rulings as upholding narrow "exceptions" to a general trend of ADA claim preclusion.

SSA Did Not Consider Ability to Work with Reasonable Accommodation

A SSDI application may comfortably co-exist with an ADA claim when an individual makes only conclusory statements on a SSDI application. Indeed, in *Cleveland,* the Supreme Court recognized that general statements of disability are consistent with an individual's claim that he could have continued to work with a reasonable accommodation, because the SSA "does not take the possibility of 'reasonable accommodation' into

---

99. Lee, 259 F.3d at 676.

100. Holtzclaw v. DSC Communications Corp., 255 F.3d 254, 259 (5th Cir. 2001) (quoting *Cleveland*, 526 U.S. at 806) (affirming summary judgment for defendant employer). *See also* Herrera v. CTS Corp., 183 F. Supp. 2d 921, 929 (S.D. Tx. 2002) (rejecting plaintiff's explanation that *now* he could perform the essential functions of the job in question); Lincoln v. Momentum Sys. Ltd., 86 F. Supp. 2d 421, 428-29 (D. N.J. 2000) (dismissing plaintiff's ADA claims because plaintiff failed to explain inconsistent statements of disability made in benefit applications); Donahue v. Occidental Chem. Corp., No. Civ. A. 98-1803, 1999 WL 1277537, at *6-7 (E.D.La. Dec. 27, 1999) (holding that the plaintiff failed to provide a sufficient explanation of why he contradicted his prior sworn statement); Allen v. Pacific Bell, 212 F. Supp. 2d 1180 (C.D. Ca. 2002); Swanson v. Medical Action Indus., Inc., 343 F. Supp. 2d 496, (W.D.N.C. 2004) (rejecting ADA plaintiff's explanation that he could "possibly" perform another job where his prior statements at a social security hearing and deposition were inconsistent with the former claim).

account."[101] The same is true if an ADA claimant describes his or her disabilities but never actually tells the SSA he or she is unable to work.[102]

The Fourth, Fifth and Sixth Circuits have rejected an employer's prayer for summary judgment, or judgment notwithstanding the verdict, where an ADA plaintiff made assertions pertaining to disability status in a SSA application that were not specific and where the plaintiff also claimed an ability to work with reasonable accommodation.

In *Giles v. General Electric Co.*,[103] the court acknowledged that "[the plaintiff's] SSDI application asserted that he has 'recurrent disk herniation, resulting with [sic] leg pain & numbness,' 'inability to walk more than 1 1/2 blocks,' and a 'perm[anent] [weight] restriction.' The application also stated that Giles has '[c]hronic pain' and that he 'can't walk or stand long.'"[104] Although some courts might have found these statements sufficiently detailed to justify granting judgment for the defendant, the Fifth Circuit accepted the plaintiff's explanation that his statements to the SSA did not take into consideration the possibility of a reasonable accommodation. In essence, the plaintiff made the same argument as Carolyn Cleveland concerning the different legal definitions of disability. The court concluded: "Giles's SSDI application is similar to those in *Cleveland* . . ., in that it contains no specific assertions resisting his explanation that he could perform his job with reasonable accommodation . . . ."[105]

Likewise, in *EEOC v. Stowe-Pharr Mills, Inc.*, the Fourth Circuit held that the plaintiff's statement to the SSA that '"I [am] unable to work because of my disabling condition' did not take into account whether [the plaintiff] could have worked with a reasonable accommodation."[106] Thus, the plaintiff was not

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

102. *See, e.g.*, Hannah v. County of Cook, No. 03-CV-6648, 2005 WL 1026716, at *2 (N.D. Ill. Apr. 27, 2005) (refusing to bar plaintiff's ADA claim based on judicial estoppel because her "application for total temporary worker's compensation benefits does not include a statement that she was unable to work").

103. 245 F.3d 474, 484 (5th Cir. 2001).

104. *Id.*

105. *Id.* at 485. As an initial matter, the court also found that the plaintiff was not precluded from bringing an ADA claim because his application for SSDI benefits was ultimately denied by the SSA. *Id.* at 483.

106. 216 F.3d 373, 379 (4th Cir. 2000). The court also noted that, when applying for SSDI benefits, the plaintiff told the SSA intake worker that she could work with reasonable

precluded from pursuing her ADA discrimination claim.[107] Similarly, receipt of state-funded disability retirement benefits did not preclude an ADA claim by a teacher who, at the time of her retirement, had sought reasonable accommodation, "to which the school [system] did not respond."[108] Also, in the Second Circuit, receipt of private long-term disability benefits and SSDI benefits did not bar disability bias claims by a movie-industry manager who was refused accommodation and terminated.[109]

In *Olds v. United Parcel Service, Inc.*, the Sixth Circuit reversed a summary judgment for the defendant employer, and rejected UPS' claim that "Olds is precluded from demonstrating that he [was] qualified to work because an administrative law judge found him entitled to [SSDI] benefits."[110] The court deemed Olds' identification of two specific accommodations UPS could have provided to permit him to continue working as "satisfactory" explanations of any alleged inconsistencies.[111]

---

accommodation. This statement, while powerful evidence for plaintiff, was not critical: "nor need [a SSDI] applicant [who later seeks to rely on the ADA] refer to the possibility of reasonable accommodation when she applies for SSDI."

107. *Id. Accord* Fox v. General Motors Corp., 247 F.3d 169, 178 (4th Cir. 2001).

108. Dotson v. Pike County Bd. of Educ., 21 F. App'x 368, 370 (6th Cir. 2001).

109. Parker v. Columbia Pictures Indus., 204 F.3d 326, 332-36 (2nd Cir. 2000). Several other courts have similarly found that plaintiffs were not estopped from bringing claims where they could have performed the essential functions of the job with a reasonable accommodation. *See, e.g.*, Nodelman v. Gruner & Jahr USA Publ'g, No. 98 CIV. 1231, 2000 WL 502858, at *8-9 (S.D.N.Y. April 26, 2000). *Accord* Felix v. N.Y. City Transit Auth., 154 F. Supp. 2d 640, 651 (S.D.N.Y. 2001) (refusing to apply judicial estoppel to prevent SSDI recipient from bringing ADA claim where the situation did not involve "directly conflicting statements about purely factual matters;" granting summary judgment for defendant on other grounds); Burke v. Iowa Methodist Med. Ctr., Civ. No. 4-99-CV-30634, 2001 WL 739595, at *5-7 (S.D. Iowa Feb. 22, 2001) (noting that plaintiff was not judicially estopped from bringing an ADA claim because she could have performed the work with a reasonable accommodation; however, summary judgment for the defendant was appropriate where plaintiff failed to request an accommodation); Thompson v. E.I. Dupont de Nemours & Co., 140 F. Supp. 2d 764, 776 n.9 (E.D. Mich. 2001), *aff'd*, 70 F. App'x 332 (6th Cir. 2003) (refusing to apply judicial estoppel where defendant had not identified any "purely factual contentions made by Plaintiff in connection with his application for SSDI benefits that contradict factual assertions he has made in this case."); Johnson v. Hoechst Celanese Corp., 127 S.W.3d 875, 880-82 (Tex. App. 2004) (as in *Cleveland*, "plaintiffs' seemingly ruinous statements regarding their total disability [supporting award of private long-term disability benefits] c[ould] be construed as legal conclusions, rather than factual conclusions" and did not include "additional specific factual statements that belie[d the] claim that [they] could perform [their] job[s] with accommodation," and thus, did not preclude state disability bias claim under Texas Commission on Human Rights Act).

110. 127 F. App'x 779, 783 (6th Cir. 2005).

111. *Id.* at 784.

On the other hand, when a SSDI application, or evidence assembled in the SSDI review process, includes facts or statements undermining an ADA plaintiff's assertion that she can do a job with reasonable accommodation, a facially "sufficient" explanation of pleading inconsistencies may be undermined, and judicial estoppel properly applied.[112] Where a court bases such a conclusion on plaintiff's failure to present colorable evidence that she could do her former job at the time of her discharge, notwithstanding later assertions of total disability to the SSA, summary judgment for the employer would appear warranted under *Cleveland*.[113] However, in weighing a plaintiff's evidence that he or she is qualified in light of statements to the SSA regarding her disability, a trial court should not supplant the jury's fact-finding role. Thus, it would appear presumptively improper for a court to overturn a pro-

112. *See* Reed v. Petroleum Helicopters, Inc., 218 F.3d 477, 480 (5th Cir. 2000) (in SSDI review process plaintiff "made specific factual statements . . . inconsistent with her claim that she could fly a helicopter" this was an essential job function that she could not perform even with reasonable accommodation); Lamb v. Qualex, Inc., 33 F. App'x 49, 56 (4th Cir. 2002) (affirming judgment that plaintiff "was not a 'qualified individual' inasmuch as he could not perform the essential functions of his job [even] with reasonable accommodation"); Lloyd v. Hardin County, 207 F.3d 1080, 1084 (8th Cir. 2000) (affirming summary judgment for employer; rejecting plaintiff's explanation of inconsistencies between ADA and SSDI claims as "insufficient," as assertion plaintiff could do job with reasonable accommodation was faulty, in that the proposed accommodation would require reallocation of essential job functions); Moore v. Payless Shoe Source, Inc., 187 F.3d 845, 848 (8th Cir. 1999) (reinstating summary judgment for employer; rejecting plaintiff's new, post-*Cleveland* explanation that her ADA claim was premised on the assertion that she could perform her former job with reasonable accommodation; noting lack of evidence that Moore timely advised Payless "what accommodation specific to her position and workplace was needed"); DiSanto v. McGraw-Hill, Inc., 220 F.3d 61, 64 (2nd Cir. 2000) (affirming judgment for employer where discharged worker receiving SSDI failed to reconcile claim that he could work with accommodation and unqualified statement to SSA that he had been "unable to work" since the months prior to his discharge); Lukacinsky v. Panasonic Serv. Co., Civ. No. 03-40141-FDS, 2004 WL 2915347, *22 n.34 (D. Mass. Nov. 29, 2004). *Accord* Opsteen v. Keller Structures Inc., 408 F.3d 390, 392 (7th Cir. 2005) (observing that "[i]n order to obtain long-term disability benefits" under his employer's plan governed by ERISA, plaintiff "had to demonstrate that he could not do his work *even with a reasonable accommodation*" and that plaintiff secured such benefits because his "wife made that representation on his behalf, with considerable medical support . . . . This is exactly the sort of factual contradiction that *Cleveland* forbids").

113. *See, e.g,* Dorsey v. City of Chicago, No. 01-C-2552, 2005 WL 1340811, at *11 (N.D. Ill. June 6, 2005) ("[p]laintiff has failed to produce affirmative evidence that demonstrates [she] could perform the essential functions of [her former job] with or without reasonable accommodations," and so gave insufficient "explanation" of conflicting representations of serious disability to the SSA and a private disability insurer); *see also* Kozlowski v. Penn National Insurance, No. Civ. A. 1:04-CV-0716, 2005 WL 1163148, at *2-3 (M.D. Pa. May 17, 2005).

plaintiff verdict in a *Cleveland* case on grounds that record facts concerning an ADA "disability" cannot be reconciled with facts supporting a SSDI application to the court's satisfaction.[114] This is especially so when plaintiff's case includes colorable proof both that he or she was "qualified" under the ADA when he or she lost her job, and that his or her SSDI benefits are well-supported by evidence of current disability.[115] Rather, the sound course would seem to be to let "the jury hear[] all the evidence, including [the plaintiff's] explanation for the [allegedly] contradictory claims," and to assure the jury is "instructed on the *Cleveland* standard."[116] A sound general rule would be for trial courts to entertain summary judgment against plaintiffs for failure to sufficiently explain "factual inconsistencies" between ADA claims and a SSDI application only "when the evidence unequivocally indicates that the plaintiff could not have performed his or her job at the time of termination even with [an] accommodation."[117]

Temporal Differences Explain Asserted Inconsistencies Between A Plaintiff's Statements Regarding Ability to Work

In *Cleveland,* the Supreme Court acknowledged that "an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision."[118] It follows that a plaintiff who asserts on a SSDI application that he or she became

---

114. *See, e.g., DiSanto*, 220 F.3d at 64 (affirming reversal of jury verdict for employee on grounds that the discharged worker receiving SSDI failed to reconcile substantial evidence that he could work with accommodation when discharged, and had developed a disabling depression since then, in light of a single statement to the SSA that he had been "unable to work" ten months prior to his discharge).

115. The *DiSanto* court appears to have thrown out a plausible verdict for plaintiff simply to vindicate the proposition that plaintiff should not have had both an ADA claim and SSDI benefits for any period of time in which he claimed to be a qualified employee under the ADA. An alternative remedy would have been to require plaintiff to reimburse SSA for unwarranted benefits received, or perhaps simply to supervise plaintiff affording SSA notice of an inconsistency. SSA could then seek reimbursement.

116. Voeltz v. Arctic Cat, Inc., 406 F.3d 1047, 1050-51 (8th Cir. 2005) (affirming a verdict for the plaintiff given "sufficient record evidence for the jury to conclude that Voeltz's ADA claim was not inconsistent with his application for disability benefits").

117. *Lukacinsky*, 2004 WL 2915347, at *22 n.34 (citing Kelly v. Lockheed Martin Servs. Group, 198 F. Supp. 2d 136, 140 (D. P. R. 2002)).

118. *Cleveland*, 526 U.S. at 805.

unable to work at some point *after* the adverse employment action was taken, may not be precluded from bringing an ADA claim. [119]

Thus, a plaintiff was not precluded from pursuing an ADA claim due to receiving SSDI benefits given "evidence of the marked improvement in [his] condition due to the success of the experimental cancer treatment" in which he enrolled, and of which he informed his employer, prior to his termination and his subsequent SSDI award.[120]

In *Fox v. General Motors Corp.*,[121] the Fourth Circuit allowed an ADA plaintiff, who filed a disability application shortly after being terminated, to pursue his claim of disability discrimination, which concerned harassment at work prior to his discharge. On his application, Fox stated that his disability began only after he was fired. Fox bolstered this claim by asserting he could have worked with reasonable accommodation.[122]

The Sixth Circuit, on the other hand, was less understanding of an ADA plaintiff who filed for SSDI benefits only one day after being terminated.[123] The plaintiff attempted to explain alleged inconsistencies by arguing that his termination had a devastating emotional effect upon him, which seriously impaired his physical health. The appeals court

---

119. *See, e.g.*, Felix v. New York City Transit Auth., 154 F. Supp. 2d 640, 652 (S.D. N.Y. 2001) (as in *Cleveland*, the plaintiff "stated that her condition had worsened" between the time of her discharge, which was the basis for her ADA claim, and the time of her SSDI application; thus, "her statements were accurate 'in the time period in which they were made,' *Cleveland*, 526 U.S. at 807."). *Accord* Jokiel v. Alpha Baking Co. Inc., No. 03 C 3845, 2005 WL 1563215, *3 n.4 (N.D. Ill. 2005) (in case of plaintiff terminated April 30, 2002, and awarded SSDI as of October 2002, but who sought disability benefits as of his date of termination, the court ignored as irrelevant to the plaintiff's ADA claim defense contentions regarding representations to SSA, because plaintiff's "claim of being completely disabled as of April 30, 2002, is not necessarily inconsistent with his position that he would have been able to perform his job with an accommodation for his alleged disability before that date"). *See also* Markus v. Teachers Ins. & Annuity Ass'n College Retirement Equities Fund, No. 03-Civ. 646 (NRB), 2005 WL 742635, at *4 (S.D.N.Y. March 29, 2005) ("As [Title VII] plaintiff never represented to the SSA that she was disabled in 1994, she is not estopped [under *Cleveland*] from claiming . . . that she was capable of performing her job at that time.").

120. Wells v. Dist. Lodge 751, 5 F. App'x 605, 606-07 (9th Cir. 2001).

121. 247 F.3d 169 (4th Cir. 2001).

122. *Id.* at 178. The Court of Appeals treated Fox's request for workers compensation for temporary total disability from the State of West Virginia as if it were a SSDI application.

123. Williams v. London Util. Comm'n, 375 F.3d 424 (6th Cir. 2004).

rejected this explanation, stating: "It is incongruous that Mr. Williams was able to perform his job requirements when he was terminated on February 28, but he was unable to perform the same work as of March 1."[124] Thus, a temporal explanation for inconsistent statements under *Cleveland* may be of limited use where the immediate impetus for seeking SSDI benefits was a worker's termination.[125]

SSDI Benefits Were Awarded Based on a "Listed Impairment" Presuming Inability to Work

When determining whether an applicant is eligible to receive SSDI benefits, the SSA uses a five step procedure which asks an applicant:

- *Step One*: Are you presently working? (If so, you are ineligible.) *See* 20 CFR § 404.1520(b)(1998).
- *Step Two*: Do you have a "severe impairment," i.e. one that "significantly limits" your ability to do basic work activities? (If not, you are ineligible.) *See* § 404.1520(c).
- *Step Three*: Does your impairment "mee[t] or equa[l]" an impairment on a specific (and fairly lengthy) SSA list? (If so, you are eligible *without more.*) *See* §§ 404.1520(d), 404.1525, 404.1526.
- *Step Four*: If your impairment does not meet or equal a listed impairment, can you perform "past relevant work?" (If so, you are ineligible.) *See* § 404.1520(e).
- *Step Five*: If [you answered "no" at Steps Three and Four], then can you perform [any] other jobs that exist in significant numbers in the national economy? (If not,

124. *Id.* at 429.

125. *But cf. Lukacinsky*, Civ. No. 03-40141-FDS, 2004 WL 2915347, at *23 (accepting ADA plaintiff's explanation that he became disabled on the date of his termination, given that he "was actually working and performing the essential function of his job prior to, and at the time of, his termination," and further, given that the SSA did not consider the possibility of his working with a reasonable accommodation). Other courts have also limited or rejected a plaintiff's temporal explanation. *See, e.g.*, Townley v. Blue Cross & Blue Shield of Mich., 254 F. Supp. 2d 661, 666-68 (E.D. Mich. 2003) (SSA awarded disability benefits as of the date of discharge to an applicant with a "history of illness, including major depression"; the trial court in Townley's ADA case rejected her explanation that her condition deteriorated upon termination, in light of deposition testimony that she could not work, even with accommodation, and statements to her private disability insurer to the same effect).

you are eligible.) *See* §§ 404.1520(f), 404.1560(c).[126]

Cleveland recognized that at Step Three, SSDI benefits are awarded to applicants having a listed impairment by virtue of a presumption that having a listed impairment implies inability to work, rather than by actually considering documentation of their inability to work.[127]

In *Kieley v. Heartland Rehabilitation Services*, the Sixth Circuit reversed a grant of summary judgment against an ADA plaintiff receiving SSDI benefits because he had a "listed" impairment as set out in Step Three.[128] The court of appeals held that a "reasonable juror" could conclude Mr. Kieley applied for and received SSDI benefits based on his blindness, "not on the basis of an inability to work."[129]

SSA Approval of SSDI Benefits for Persons Able to Work

The *Cleveland* Court also recognized that "the SSA sometimes grants SSDI benefits to individuals who not only can work, but are working."[130] For example, an individual may receive full SSDI benefits for up to nine months after reentering the workforce, in order to facilitate reentry.[131] The right to invoke ADA protections may be especially relevant for a SSDI recipient who faces discrimination upon seeking to reenter the workforce. Thus, employers should be precluded from asserting both a job applicant is not qualified to work and from asking to dismiss an applicant's ADA claims, simply because he or she receives SSDI benefits.

---

126. *Cleveland*, 526 U.S. at 804 (emphasis added).

127. *Id. See* 20 C.F.R. Pt.404, Subpt. P, Appx. 1 (2005) ("Listing of Impairments"). Brief of AIDS Policy Center for Children, Youth and Families; *et al*, as Amici Curiae Supporting Petitioners, Cleveland, 526 U.S. 795, 1997 U.S. Briefs 4008, *24 (noting some of many listed impairments that do not preclude persons from working: blindness; paraplegia; severe hearing or speech loss; forms of chronic anemia; mental retardation; and AIDS).

128. 359 F.3d 386, 389 (6th Cir. 2004).

129. *Id.* at 390.

130. *Cleveland*, 526 U.S. at 805.

131. *See* 42 U.S.C. § 422(c) (1998). According to the SSA, "[t]he trial work period allows you to test your ability to work for at least 9 months. During your trial work period, you will receive your full disability benefit regardless of how much you earn as long as you continue to be disabled." Social Security Online, The Work Site, *available at* http://www.socialsecurity.gov/work/ResourcesToolkit/workincentiveschart.html#TWP. *See also* Pub. L. 106-170, The Ticket to Work and Work Incentives Improvement Act of 1999 (discussing Ticket to Work Program).

An ADA Claimant Has Applied For, But Not Received, SSDI Benefits

The Fourth Circuit relied in part on *Cleveland* in affirming a trial court's denial of judgment as a matter of law to General Electric Co. (GE), following a jury verdict against GE and in favor of a GE machinist who spent nearly two years on a long-term disability pension due to back pain, but was denied both SSDI benefits and an "unqualified release to work" when his private pension benefits were exhausted.[132] The court of appeals refused to disturb the district court's rejection of GE's judicial estoppel argument based on the plaintiff's representations to the SSA and his private disability insurer that he was unable to work. An unsuccessful SSDI application did not justify estoppel, the court ruled, because "the inconsistency between Giles's prior statements and his assertions in [his ADA] litigation" was "the sort normally tolerated by our legal system . . . [whereby] a person may not be sure in advance upon which legal theory she will succeed, and so [is] permit[ted] to 'set forth two or more statements of a claim or defense . . . alternately . . . .'"[133]

Since *Cleveland*, several courts have identified still other grounds for permitting ADA claims by SSDI recipients to proceed. For instance, in *Thompson v. E.I. Dupont de Nemours & Co.*, a federal trial court held that judicial estoppel was inappropriate to bar an ADA claim where plaintiff "was told *both* that he was being placed into total and permanent disability retirement, *and* that he was required, under the terms of the [private] disability plan, to apply for SSDI benefits."[134] The court explained:

> Even assuming that Plaintiff already anticipated, at that early date, that he would pursue an ADA claim against his employer, it would have been rather bold of him to assume that he ultimately would prevail on that claim, so that he could safely disregard Defendant's instruction that he apply for SSDI benefits and thereby risk forfeiting the benefits he would, if all else failed, receive under Defendant's total and permanent [private] disability plan. The Court does not read

132. *Giles*, 245 F.3d at 479-481.

133. *Id.* at 483-84 (quoting Cleveland, 526 U.S. at 805).

134. 140 F. Supp. 2d 764, 777-78 (E.D. Mich. 2001), *aff'd*, 70 F. App'x 332 (6th Cir. 2003).

> *Cleveland*'s "explanation" requirement as compelling a litigant in Plaintiff's position to run such a risk in order to preserve the viability of his ADA claim.[135]

In *Felix v. New York City Transit Authority,* another federal trial court found the plaintiff's "contradictory positions" were sufficiently explained by "evidence that the SSA intake officer may have misunderstood, or misadvised with regard to, [plaintiff's] initial statements concerning her disability."[136]

THE RELEVANCE OF CLEVELAND TO OTHER CLAIMS OF DISABILITY-BASED WORKPLACE BIAS

For the most part, the reasoning in *Cleveland* has been applied wholesale by federal courts assessing employer efforts to dismiss ADA claims by asserting they are irretrievably undermined by plaintiff assertions of disability and inability to work in seeking disability benefits from private insurers or state or local governments.[137]

Yet, some courts have discerned such material differences between SSDI and other disability benefit schemes as to conclude *Cleveland* does *not* foreclose disability bias claims. For instance, in *Murphey v. City of Minneapolis,* the Eighth Circuit declared *Cleveland* inapplicable and overruled a trial court's recognition of a preclusive effect on an ADA claim, because the appeals court found Minnesota's decision to continue public employee disability retirement benefits significantly "divergent" from SSDI's provisions. In Minnesota, a recipient of such benefits may continue to receive them, even after he or she return to work, if a worker receives less in salary in his or her new job than he or she received prior to the start of his or her disability benefits.[138]

---

135. *Id.*

136. 154 F. Supp. 2d 640, 652 (S.D. N.Y. 2001) (citing Stowe-Pharr Mills, 216 F.3d 373, 376, (in which the appeals court permitted ADA and SSDI claims "where the plaintiff-applicant informed [a SSA] intake officer that she could work with an accommodation but, upon the officer's advice, her application stated otherwise [*i.e.,* it stated that she was 'unable to work']").

137. *See, e.g.,* Fogleman v. Greater Hazleton Health Alliance, 22 Fed.Appx. 581, 586 n.9 (3rd Cir. 2004) (following *Cleveland* in finding an ADA claim not foreclosed by plaintiff's statements in her worker's compensation record "that she was fully disabled," but rather, by her failure to offer evidence "how she could nevertheless perform the essential functions of her job with or without accommodation.").

138. 358 F.3d 1074, 1080 n.10 (8th Cir. 2004).

A 2003 Third Circuit decision, *Detz v. Greiner Industries, Inc.*, endorsed *Cleveland*'s analysis as fully applicable in a case under the Age Discrimination in Employment Act (ADEA) and an analogous Pennsylvania age bias law.[139] Ralph Detz lost his job and later sought and received SSDI, as of the date of his termination, based on evidence he had multiple impairments: depression, lung problems, high blood pressure, and loss of use of his left arm and hand.[140] When Detz sued for age bias, the district court ruled for Greiner, applying judicial estoppel to Detz's claims. The District Court also ruled that *Cleveland* applied to the plaintiff's ADEA claim. The trial court "found that while Detz might have survived summary judgment if he had offered a sufficient explanation of the apparent inconsistency between his two positions, he failed to adequately reconcile the positions."[141] The Court of Appeals affirmed, noting:

> While *Cleveland* only specifically addressed a conflict between SSDI and ADA claims, the analysis is not limited in its application to cases involving those particular statutory and administrative schemes. Like an assertion that one is a 'qualified individual' for ADA purposes, a declaration that one is a 'qualified individual' under the ADEA is a 'context-related legal conclusion.' Therefore, a prima facie showing under the ADEA that conflicts with earlier statements made to the SSA is subject to the same analysis . . . the District Court here properly observed that 'scenarios may exist in which it is possible for a plaintiff's ADEA claim to be consistent with his or her earlier [SSDI] application . . . .' For example, a person who files for and is granted SSDI benefits several months after his discharge would not be precluded from advancing a successful ADEA claim against his employer where his disability did not prevent him from working at the time of his discharge, but where it subsequently worsened to a point where he is no longer able to perform that work. It is true that these scenarios might be less common with ADEA claims than . . . under the ADA,

139. 346 F.3d 109, 115-121 (3rd Cir. 2003).

140. *Id.* at 112.

141. *Id.* at 114. (quoting *Detz*, 224 F. Supp. 2d at 917) (SSDI awarded Detz benefits at Steps 4 & 5 of its review process, in which it expressly considers ability to work, not at Step 3, based on a "listed impairment.").

> because the ADEA does not include any additional considerations for identifying 'qualified individuals' that might be analogized to the 'reasonable accommodation' language of the ADA.... This does not, however, render *Cleveland* any less applicable....[142]

At least two federal district courts have applied *Cleveland*'s analysis to age discrimination claims in the workplace in a similar manner.[143]

THE RELEVANCE OF CLEVELAND TO EFFORTS AT THE STATE LEVEL TO IMPOSE JUDICIAL ESTOPPEL

Recent events in Minnesota have dramatized another respect in which *Cleveland* continues to influence legal rights and economic prospects of persons with disabilities. In *Huston v. Commissioner*, an intermediate state appellate court relied on *Cleveland* in striking down, as violating Title II of the ADA, a provision of Minnesota's unemployment insurance (UI) law requiring UI recipients to forfeit benefits for any week in which they also received SSDI benefits, based on an "irrebuttable presumption" that receiving SSDI proves beneficiaries are "unable to work and as such are automatically disqualified from receipt of unemployment benefits."[144] Such a posture was untenable, the state court opined, given *Cleveland*'s analysis of SSDI procedures, and in particular, Step Three of the eligibility determination process, at least as applied to individuals who secure SSDI "based on a categorical impairment where the SSA undertakes no [actual] assessment of the applicant's actual ability and availability to work."[145] The Minnesota appellate court declared:

> We recognize that application for or receipt of SSDI

142. *Id.* at 117.

143. *See* McClaren v. Morrison Mgmt. Specialists, Inc., 316 F. Supp. 2d 489, 500-504 (W.D. Tex. 2004); Johnson v. Exxon Mobil Corp., No. 02 C 5003, 2004 WL 419897, (N.D. Ill. Feb. 2, 2004). *See also Nodelman*, No. 98 CIV. 1231 (LMM), 2000 WL 502858, at*11-12 (applying *Cleveland* analysis to ADEA claim, despite pre-*Cleveland* decision applying judicial estoppel in such circumstances: *Detz*, 224 F. Supp. 2d at 919 (E.D. Pa. 2002); opining that "were the Second Circuit now faced with this issue, it might, in light of *Cleveland*, decide it differently").

144. Huston v. Comm'r of Employment & Econ. Dev., 672 N.W.2d 606, 609 (Minn. Ct. App. 2003) (discussing MINN. STAT. ANN. § 268.085 subd. 4) (West 2003).

145. *Id.* at 611.

> benefits normally represents a determination, first by the applicant and ultimately by the SSA, that the applicant is not able to work and is out of the job market. In administering the unemployment compensation program, the state of Minnesota may legitimately use the federal SSDI program as a reference for simplifying determinations of who is attached to the job market. But, the statute goes too far in making the presumption irrebuttable. The applicant for unemployment benefits should be able to make his case.[146]

The case was remanded for further proceedings, but the State appealed.

Joshua Huston has a severe hearing impairment, and on that basis alone, under "Step Three," the SSA awarded him SSDI benefits. Yet Huston also was able to work, and only sought SSDI when he was laid off and his state UI benefits ran out. Although nothing had changed to make him unable to work, and without conducting an actual examination of his employability, Minnesota sought to recover the full amount of $15,552 it had paid him in UI benefits. An administrative law judge later set a lower amount of $7,012 for the State's recovery.[147] Yet such a sum still would amount to a crushing debt and repayment burden for many unemployed persons, who typically are able to save little, or nothing, of what they receive in public benefits such as workers compensation or SSDI.

Huston's case squarely demonstrates that *Cleveland* is a brake on potential mischief by state legislatures so intent on budget-balancing that they try to do so on the backs of persons with limited income and serious physical or mental impairments, many of whom struggle to earn a living on the margins of the labor market. Because Huston received SSDI benefits, however, his case did not directly implicate other, more troubling, language in the Minnesota statute requiring UI recipients to return UI benefits for any week for which they merely *applied* for SSDI benefits. In a prior case, an intermediate appellate court upheld Minnesota's right to recover UI benefits from a mere SSDI applicant.[148]

---

146. *Id.*.

147. *Id.* at 608.

148. *See* Roloff v. Comm'r of the Dep't of Employment and Econ. Dev., 668 N.W.2d 12, 16-17 (Minn. Ct. App. 2003).

Minnesota appealed the *Huston* decision and Huston cross-appealed. *Amici curiae* supporting Huston urged the Minnesota Supreme Court to find that *Cleveland* precludes even a rebuttable presumption that a SSDI recipient is unable to work.[149] Further, one of the *amici* asked the Minnesota Supreme Court to declare the *Roloff* decision inconsistent with the ADA, as interpreted in *Cleveland*, because it requires disgorgement of State UI benefits paid to mere SSDI *applicants*, based on an unfounded, irrebutable presumption that an applicant's assertion of "disability" in order to comply with the SSDI program requirements constitutes an admission of inability to work, and thus, ineligibility for UI.[150] However, before the Minnesota Supreme Court ruled, the state legislature amended the law. Then, the State reversed course and agreed that Huston was entitled to the unemployment benefits he had received. Both parties agreed to withdraw their appeals.

The amended statute retains a provision requiring repayment of UI benefits received if an individual merely applies for SSDI and includes an explicit presumption that SSDI recipients are "unable to work and [are] unavailable for suitable employment."[151] On these grounds, at least, the new law still clashes with *Cleveland*, and thus, would seem open to a future legal challenge.

The amendment to Minnesota statute § 268.085(4) also creates a new procedure for an UI recipient/SSDI applicant to rebut a presumed inability to work, by providing "a statement from an appropriate health care professional who is aware of the applicant's Social Security disability claim and the basis for that claim, certifying that the applicant is able to work and available for suitable employment."[152] Such a statement would reconcile UI requirements, that a recipient be able and available to work, with SSDI requirements, by obliging a certifying doctor to be "aware of the applicant's Social Security disability claim and the

149. *Huston*, 672 N.W.2d at 612 (the appellate court criticized the Minnesota Legislature for failing to give "individuals who are disabled, filing for or receiving SSDI benefits, . . . an opportunity to rebut the presumption that they are unable to work" in seeking UI benefits from the State).

150. The principal author of this article filed an *amicus* brief on behalf of AARP supporting Huston, and asking the Minnesota Supreme Court to disavow *Roloff*. Mid-Minnesota Legal Assistance also filed an *amicus* brief supporting Huston, who was represented by University Legal Services at the University of Minnesota.

151. MINN. STAT. ANN. § 268.085(4) (West Supp. 2004).

152. § 268.085(4)(b)(2).

basis for [it]."[153] Depending on how strictly the procedure is implemented, it may be either a more demanding or a more lenient "explanation requirement" than the one adopted in *Cleveland*. This scheme poses the question whether Minnesota courts will allow a doctor's letter to substitute for the sort of judicial scrutiny undertaken in *Cleveland*. Or, will such letters just be more evidence for courts to weigh, case-by-case, on the issue of eligibility for UI benefits?[154]

CONCLUSION

Cleveland seemed to be a major victory for ADA plaintiffs. They were no longer *per se* barred from pursuing a disability-bias claim by their prior receipt of, or application for, SSDI benefits. Even though courts were instructed to grant defendants summary judgment when plaintiffs failed to offer a "sufficient explanation" for factual statements, or even some legal assertions, about their "disability" status, *Cleveland* set a favorable tone by explaining numerous ways that ADA and SSDI claims could be reconciled.

Six years later, *Cleveland* provides a reliable, albeit different roadmap for ADA defendants seeking summary judgment against claimants who have received SSDI benefits. Judicial estoppel, or its equivalent, continues to be applied to prevent SSDI recipients from bringing ADA claims, especially where a SSDI recipient has made the sort of statement to SSA about her disability that can be characterized as "purely factual," and moreover, as an admission of a complete inability to work.

Overall, the Supreme Court's decision in *Cleveland* provides no more than modest relief to the class of ADA plaintiffs seeking and/or receiving SSDI benefits. Most poignant, and contrary to Congressional intent in enacting the ADA and the SSDI program, is that *Cleveland* is of little help to many disabled workers who have been terminated, desperately need income, can still perform well in some jobs, and would prefer gainful

153. *Id.*

154. An intermediate appellate court in Michigan likewise has applied *Cleveland* in interpreting state anti-bias law. In Carpenter v. Snacktime Serv., Inc., No. 252434, 252761, 2005 WL 763308, at *8-9 (Mich. Ct. App. April 5, 2005), the Court of Appeals of Michigan held a plaintiff was estopped from bringing a disability-bias claim against her employer under the state's Persons with Disabilities Civil Rights Act due to factually inconsistent statements about her ability to work made during her state worker's compensation hearing.

employment to a monthly SSDI check.

The *Cleveland* Court described many instances in which an ADA claim and receipt of SSDI benefits may comfortably co-exist, and the lower federal courts and state courts generally have abided by this specific guidance. Further, because of *Cleveland*, many disability recipients presumably have never had to face claims of judicial estoppel when they sue for disability bias on the job. Finally, *Cleveland* has proven of value in resisting the effort by at least one state legislature, in Minnesota, to cut its deficit by reducing aid for displaced workers who also apply for and/or receive SSDI benefits.

But each of the categories of cases in which *Cleveland* said ADA and SSDI claims are consistent is narrow. The prospect of pressing both claims is daunting in view of the realities facing many disabled individuals who have lost their jobs. Practically speaking, disabled persons considering challenging their termination in an ADA suit face a long delay in having such a case resolved, as well as the strong possibility of losing. Thus, in many instances they have little choice but to apply for disability benefits. A weak financial condition is strong incentive to seek disability benefits effective on or about the date of their termination. Yet as many court decisions have shown, to take both these steps is to jeopardize an ADA claim and possibly undermine an entitlement to disability benefits. Further, to make only general assertions of disability on a SSDI application in order to avoid possible harm to a subsequent ADA suit also may detract from an applicant's chances of securing benefits.[155]

The problems with *Cleveland* are many and varied. They include insufficient judicial appreciation of the differences between ADA and SSDI standards of "disability."[156] These

155. Generally, individuals who describe specific ailments and discuss in detail their difficulties working are more likely to convince the SSA that their impairments are severe enough for them to qualify for SSDI. *See, e.g.*, Social Security Administration, "What You Should Know Before You Apply For Social Security Disability Benefits," *available at* https://s044a90.ssa.gov/apps6a/i3369/ee001-fe.jsp ("Can I do anything to speed up the decision? Yes. You can speed things up by making sure you have the information listed on the checklist for your interview .... Bring the documents and information with you. If you are having a telephone interview, have all of the information with you when you call .... You may also shorten your interview time by using the enclosed Medical and Job Worksheet prior to the interview .... You should also bring in any medical records you have, and bring in all of the medicine you are taking.").

156. *See* Hugo Benitez-Silva, Moshe Buchinsky & John Rust, *How Large Are the Classification Errors in the Social Security Disability Award Process?*, NBER Working Papers No. W10219 *available at* http://www.nber.org/papers/w10219 (January 2004)

difficulties are compounded by undue judicial concern with possible inconsistencies between statements employed to support ADA and SSDI claims.

Some courts have simply shown inadequate attention to the central issue in ADA employment cases brought by SSDI recipients: whether the plaintiff actually was qualified to do the job in question at the time of the challenged termination or other adverse employment action by the employer. In such instances, courts often have been too quick to find a SSDI application factually inconsistent with a plaintiff's disability bias claims. The result has been unwarranted summary judgments for employers.

Decisions applying *Cleveland* also reflect insufficient judicial appreciation for the fact that both the ADA and the SSDI reflect Congress's commitment to encourage and permit disabled individuals to continue working whenever possible. Ironically, inadequate efforts to give life to this objective have made it harder—not easier—for the minority of SSDI recipients who *can* work to invoke the ADA to prevent their movement from the workforce to long-term reliance on income support from the government. Despite *Cleveland*'s extensive documentation regarding how ADA and SSDI claims may be reconciled, some judges continue to give short shrift to ADA claims by SSDI recipients.

("[E]ven if individuals truthfully report whether they are capable of working or not, they may be using a different standard or 'threshold' of disability than the SSA.").

***