Journal of Health Care Law and Policy

Volume 3 | Issue 2 Article 10

Cleveland v. Policy Management Systems Corporation: Triumph for the Working Disabled or Hollow Procedural Device?

Sarah N. Otwell

CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORPORATION: TRIUMPH FOR THE WORKING DISABLED OR HOLLOW PROCEDURAL DEVICE?

SARAH N. OTWELL*

In *Cleveland v. Policy Management Systems Corp.*,[1] the Supreme Court considered whether a plaintiff seeking to establish a prima facie case of employment discrimination under the Americans with Disabilities Act (ADA) is judicially estopped[2] from asserting such a claim based on his or her prior assertions of total disability for the purpose of establishing eligibility for Social Security Disability Benefits (SSDI). The Court, relying on key statutory language as well as enforcement guidance from the Equal Employment Opportunity Commission (EEOC)[3] and the Social Security Administration (SSA), held that receipt of disability benefits under SSDI does not inherently conflict with being considered a "qualified individual with a disability" under the ADA.[4] The Court's decision is beneficial for a plaintiff who may otherwise be precluded from bringing a suit under the ADA solely on the basis of his or her receipt of disability benefits by removing the judicially crafted barrier of estoppel. The Court ensured further protection for such plaintiffs' claims by holding that courts may not erect

---

* Sarah N. Otwell, J.D. candidate, 2001, University of Maryland School of Law.

1. Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597 (1999).

2. The doctrine of judicial estoppel is designed:

> to prevent a party from benefiting itself by maintaining mutually inconsistent positions regarding a particular situation . . . . [T]he doctrine is invoked to prevent a party from "playing fast and loose with the courts," from "blowing hot and cold as the occasion demands," or from "attempting to mislead the [courts] to gain unfair advantage."

King v. Herbert J. Thomas Mem'l Hosp., 159 F.3d 192, 196 (4th Cir. 1998) (citing Lowery v. Stovall, 92 F.3d 219, 223 (4th Cir. 1996)). In order to apply the doctrine:

> (1) The party to be estopped must be asserting a position that is factually incompatible with a position taken in a prior judicial or administrative proceeding; (2) the prior inconsistent position must have been accepted by the tribunal; and (3) the party to be estopped must have taken inconsistent positions intentionally for the purpose of gaining unfair advantage.

King, 159 F.3d at 196; *see also Lowery*, 92 F.3d at 224. This equitable doctrine is discretionary and should be applied by a district court on a case-by-case basis. *See King*, 156 F.3d at 196.

3. The Equal Employment Opportunity Commission is the federal agency charged with the authority to investigate and resolve discrimination complaints under the ADA. *See* 42 U.S.C. § 2000e-4 to e-12 (1994).

4. *See Cleveland*, 119 S. Ct. at 1600.

a "strong presumption against the [SSDI] recipient's success"[5] in an ADA suit by requiring him or her to meet a higher standard of proof than is normally required to defeat a defendant employer's motion for summary judgment.[6]

The Court's opinion is structured largely as an attempt to highlight the key differences in the design and intent of each program. While the Court provides ample support for its conclusion that there is no statutory or policy-based reason for judicially estopping an SSDI recipient from recovering under the ADA, its decision is not a total victory for those ADA claimants that have made applications for SSDI. To prevent dismissal of a claim on summary judgment, an ADA plaintiff must still present sufficient evidence of a valid claim under the statute.[7] Plaintiffs who successfully bring a suit under the ADA may still be precluded from recovering the full value of any damage award based on the persistent notion that such awards should be "set-off" by the amount of the claimant's SSDI benefit.[8] The import of the Court's decision to remove a substantial procedural barrier for ADA claimants should be tempered by an understanding of the additional and very real obstacles which still face a plaintiff seeking to fully recover for an employment discrimination violation.

Part I of this note provides an overview of the relevant portions of the ADA and the Social Security Act.[9] It also recounts the facts and issues of law in the Fifth Circuit's decision of *Cleveland v. Policy Management Systems Corp.*[10] Part II surveys the treatment of similar claims by lower federal courts.[11] Part III discusses the relatively straightforward reasoning of the Supreme Court in deciding the primary case.[12] Part IV examines the limited impact of this decision on the overall ability of SSDI recipients to successfully bring employment discrimination suits before a jury and to fully recover under the ADA.[13]

I. THE CASE

In order to understand the apparent contradiction in an SSDI recipient bringing a suit for damages against an employer under the ADA, it is first necessary to delve into the legislative intent and statu-

5. *Id.*
6. *See id.*
7. *See id.* at 1604.
8. *See infra* note 164.
9. *See infra* notes 15-51 and accompanying text.
10. 120 F.3d 513 (5th Cir. 1997).
11. *See infra* notes 52-116 and accompanying text.
12. *See infra* notes 117-142 and accompanying text.
13. *See infra* notes 143-192 and accompanying text.

tory scheme of each program. On the most basic level, the ADA and the SSDI programs were conceived to serve different groups of people based on the ability to work. The ADA was designed to serve as a "remedy for individuals who 'can' work and the disability benefit progra[m] for those who 'cannot' work."[14] Upon closer examination however, the distinctions between the two programs cannot be so neatly capsulated.

A. Overview of the Americans with Disabilities Act of 1990

The Americans with Disabilities Act of 1990[15] prohibits an employer from discriminating "against a qualified individual with a disability because of the disability."[16] It was designed "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[17] and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[18] The Act prohibits employers, subject to the Act's jurisdiction, from discriminating against an otherwise qualified individual on the basis of a disability in any area relating to his or her employment.[19] Under the ADA, a "disability" is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[20] A "qualified individual with a disability,"[21] is defined 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."[22] In order to assert an ADA violation successfully, in the ab-

---

14. Matthew Diller, *Dissonant Disability Policies: The Tension Between the Americans With Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1048 (1998).

15. *See* 42 U.S.C. §§ 12101-12213 (1994).

16. *Id.* § 12112(a).

17. *Id.* § 12101(b)(1).

18. *Id.* § 12101(b)(2).

19. *See id.* § 12112(a). The Act defines "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person." *Id.* § 12111(a)(5)(A). The term "employer" does not include the United States or a "bona fide private membership club" that is exempt from taxation. *See id.* at § 12111(a)(5)(B).

20. *Id.* §12102(2)(A). Disability may also include "a record of such impairment" or "being regarded as having such an impairment." *Id.* § 12102(2)(B) & (C). Major life activities include "functions such as caring for oneself, performing manual tasks . . . and working." 29 C.F.R. § 1630.2(i) (1999).

21. 42 U.S.C. § 12111(8) (1994).

22. *Id.* This section further provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential." *Id.* In addition, "reasonable accommodation" may include:

> making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of

sence of direct evidence of discrimination, a plaintiff must first make a prima facie[23] showing that he is a "qualified individual with a disability."[24]

B. Overview of the Social Security Disability Benefits Program

As part of the Social Security Administration, the Social Security Disability Benefits Program provides monetary benefits to disabled workers, dependents, and surviving spouses if the worker is insured for disability insurance benefits.[25] The SSA defines "disability" as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[26] An individual shall be determined to be under a disability "only if his physical or mental impairment[27] or impairments are of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy."[28] In order to determine whether a claimant is disabled, the SSA proceeds through a five-step administrative process "that embodies a set of presumptions about disabilities, job availability, and their interrelation."[29] An applicant for SSDI benefits must swear under oath that he or she is disabled for purposes of benefit determi-

---

equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12111(9)(A) & (B).

23. A prima facie case is defined as the plaintiff's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the plaintiff's favor. *See* BLACK'S LAW DICTIONARY 1189 (6th ed. 1990).

24. Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995).

25. *See* 42 U.S.C. § 423(a)(1) (1994). In addition, this section defines an eligible individual as one who "(B) has not attained retirement age; (C) has filed an application for disability insurance benefits, and (D) is under a disability." *Id.*

26. *Id.* § 423(d)(1).

27. A "physical or mental impairment" is one "that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." *Id.* § 423(d)(3).

28. *Id.* § 423(d)(2)(A). In addition, "[f]or the purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country." *Id.*

29. Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597, 1602 (1999). The five steps are summarized as follows:

Step One: Are you presently working? (If so, you are ineligible.) *See* 20 C.F.R § 404.1520(b) (1998).

nation.[30] An applicant who makes false statements or misrepresentations of fact on an application for SSDI benefits may be convicted of a felony and be subject to civil and criminal penalties.[31]

C. *The Fifth Circuit's Decision in Cleveland v. Policy Management Systems Corp.*

In August 1993, Policy Management Systems Corporation ("PMSC") hired Carolyn C. Cleveland.[32] In January 1994, Cleveland took a leave of absence from PMSC after having a stroke.[33] Unable to immediately return to work, Cleveland filed an application for Social Security disability benefits.[34] In support of her sworn application for SSDI benefits, Cleveland indicated that the stroke she suffered on January 7, 1994 left her unable to work and that she was still disabled at the time of filing her application.[35] Cleveland alleged that upon returning to PMSC in April 1994, she notified SSA that she would no longer need disability benefits.[36] Citing poor performance on the job, PMSC terminated Cleveland in August 1994.[37] In September 1994, Cleveland renewed her application for SSDI by filing a "Request for Reconsideration" in which she stated "I continue to be disabled,"[38] and a "Work Activity Report" in which she stated she was terminated

---

> 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 id.* § 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 id.* §§§ 404.1520(d), 404.1525, 404.1526.
>
> Step Four: If your impairment does not meet or equal a listed impairment, can you perform your "past relevant work?" (If so, you are ineligible.) *See id.* § 404.1520(e).
>
> Step Five: If your impairment does not meet or equal a listed impairment and you cannot perform your "past relevant work," then can you perform other jobs that exist in significant numbers in the national economy? (If not, you are eligible.) *See id.* §§ 404.1520(f), 404.1560(c).

Cleveland, 119 S. Ct. at 1602-03.

30. *See* 42 U.S.C. § 408(a) (1994).

31. *See id.* Such penalties can include monetary fines and imprisonment of up to five years. *See id.*

32. *See* Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 515 (5th Cir. 1997).

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *Id.*

because she could no longer do the job due to her condition.[39] Following the filing of a subsequent "Request for Reconsideration," an Administrative Law Judge ("ALJ") determined that Cleveland had become disabled on January 4, 1994 and continued to be disabled through the date of the ALJ's decision in September 1995.[40]

A week prior to the ALJ's decision to reinstate her SSDI benefits, Cleveland filed suit in the United States District Court for the Northern District of Texas against her former employer PMSC for wrongful termination in violation of the ADA and the Texas Labor Code.[41] PMSC argued that its motion for partial summary judgment[42] should be granted on the grounds that Cleveland had no prima facie case under the ADA.[43] It claimed that Cleveland's prior representations of disability for purposes of receiving SSDI benefits effectively estopped her from now claiming to be capable of performing her job.[44] The district court granted the employer's motion as to the ADA claim and dismissed Cleveland's state law claim without prejudice.[45] The district court reasoned that because Cleveland claimed she was totally disabled for SSDI purposes, she was precluded from making the inconsistent claim that she was able to "perform the essential functions" of her job in order to recover under the ADA.[46]

The Fifth Circuit affirmed the lower court's ruling on appeal but declined to hold that the receipt of SSDI benefits creates a per se rule which estops a plaintiff from bringing a cause of action under the ADA.[47] Rather, the court held that the application for, or the receipt of, Social Security benefits creates a rebuttable presumption that the

---

39. *See id.* Cleveland also continued to represent that she was "unable to work due to [her] disability." *Id.*

40. *See id.*

41. *See id.*; *see, e.g.*, Tex. Lab. Code Ann. § 21.051 (West 1996 & Supp. 1999).

42. The standard for granting a motion for summary judgment was articulated in the 1986 case of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), in which the Supreme Court held that:

> Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 322-23.

43. *See Cleveland*, 120 F.3d at 515.

44. *See id.*

45. *See id.*

46. *See* Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597, 1598 (1999) (citing 42 U.S.C. § 12111(8) (1994)).

47. *See Cleveland*, 120 F.3d at 517.

claimant or recipient of such benefits is judicially estopped from asserting that he is a "qualified individual with a disability."[48] Despite the Fifth Circuit's rejection of the district court's application of estoppel in this context, the Fifth Circuit nonetheless concluded that Cleveland's claim could not withstand PMSC's motion for summary judgment.[49] The Supreme Court granted certiorari to consider whether the law erects a special presumption that would significantly hinder an SSDI recipient from simultaneously pursuing an action for disability discrimination under the ADA claiming that she could perform the essential functions of her job with reasonable accommodation.[50] It also granted review of the Fifth Circuit's decision in order to consider the larger conflict among the circuits regarding the legal implications of permitting an SSDI recipient to bring suit for discrimination under the ADA.[51]

II. LEGAL BACKGROUND

Since the adoption of the ADA in 1990, federal courts have thoroughly examined the effect of receipt of disability benefits on the ability of a plaintiff to establish a prima facie claim under the ADA.[52] Despite the lack of agreement among federal courts, the varying approaches to this issue can be described as laying along several points of a continuum.[53] The most limiting of these approaches involves the use of judicial estoppel to prevent SSDI recipients from proceeding

---

48. *See id.* at 518. The court stated:

> We thus leave open the possibility that there might be instances in which the nature and content of the disability statement submitted to the SSA . . . would not absolutely bar a plaintiff from attempting to demonstrate that despite his total disability for Social Security purposes he is a "qualified individual with a disability."

Id. The court further qualified its holding by noting that while it is "theoretically conceivable that . . . the two claims would not necessarily be mutually exclusive," a SSDI recipient would likely only be granted recovery under the ADA in a "limited and highly unusual set of circumstances." *Id.* at 517.

49. *See id.* at 518 -19. The court found that because the plaintiff consistently represented to the SSA that she was totally disabled, "she has failed to raise a genuine issue of material fact rebutting the presumption that she is judicially estopped from now asserting that . . . she was nevertheless a 'qualified individual with a disability.'" *Id.*

50. *See* Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597, 1600 (1999).

51. *See id.* at 1601.

52. *See* Talavera v. School Bd., 129 F.3d 1214, 1217 (11th Cir. 1997) "Numerous other circuit and district courts have addressed this issue, including several district courts in this circuit. The holdings of these courts vary widely." *Id.*

53. *See* Rascon v. United States West Communications, Inc., 143 F.3d 1324, 1330 (10th Cir. 1998).

with otherwise valid claims under the ADA.[54] Other courts have addressed the issue but declined to articulate a particular position on the applicability of judicial estoppel to these cases.[55] The majority of courts which have dealt with ADA claims by SSDI recipients have rejected the propriety of employing judicial estoppel to resolve this preliminary question of law.[56]

A. The Application of Judicial Estoppel

The Third Circuit's decision in *McNemar v. Disney Store, Inc.*[57] provides an illustration of the most restrictive approach to ADA claims. One of the only courts to endorse the use of judicial estoppel in this situation,[58] the Third Circuit upheld Disney's motion to dismiss its former employee's claim of unlawful discrimination by holding that McNemar was judically estopped from asserting his claims under the ADA because of his prior sworn statements to various government agencies that he was totally and permanently disabled and unable to work.[59] Although the court noted that it had not previously applied judicial estoppel to similar facts,[60] it cited decisions from other federal courts which judicially estopped similarly situated plaintiffs from "speak[ing] out of both sides of [their] mouth with equal vigor."[61] As

---

54. *See, e.g.*, McNemar v. Disney Store, Inc. 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997); Budd v. ADT Sec. Sys., 103 F.3d 699 (8th Cir. 1996) (per curiam).

55. *See, e.g.*, Kennedy v. Applause, Inc., 90 F.3d 1477 (9th Cir. 1996); Dush v. Appleton Electric Co., 124 F.3d 957 (8th Cir. 1997).

56. *See, e.g.*, Griffith v. Wal-mart Stores, Inc., 135 F.3d 376, 382 (6th Cir. 1998); Weigel v. Target Stores, 122 F.3d 461, 467 (7th Cir. 1997); Robinson v. Neodata Servs., Inc., 94 F.3d 499, 502 n.2 (8th Cir. 1996); *Rascon*, 143 F.3d at 1332; *Talavera*, 129 F.3d at 1217; Swanks v. Washington Metro. Transit Auth., 116 F.3d 582, 587 (D.C. Cir. 1997).

57. 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 519 U.S. 1119 (1997) (HIV-positive former employee brought action under ADA against former employer, alleging discriminatory discharge based on his disability).

58. While other circuits have at times applied the doctrine of judicial estoppel to similar situations, subsequent case law in the same circuits dispels the notion that judicial estoppel is always an acceptable method of approaching this issue. *See Dush*, 124 F.3d at 962 n.8 (declining to reach the issue of judicial estoppel in the instant case, but noting that the Court had previously determined that judicial estoppel could properly be applied in similar situations).

59. *See McNemar*, 91 F.3d at 616. The court further noted that "McNemar's statements on his disability benefits application are 'unconditional assertions as to his disability;' he should not now be permitted to 'qualify those statements where the application itself is unequivocal.'" *Id.* at 618 (citing Smith v. Midland Brake, Inc. 911 F. Supp. 1351, 1361 (D. Kan. 1995)); *see also* Scarano v. Central R.R. Co., 103 F.2d 510, 513 (3d Cir. 1953).

60. *See McNemar*, 91 F.3d at 616.

61. Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963, 970 (E.D.N.C. 1994) (holding that plaintiff was estopped from asserting that she was capable of performing the essential functions of her job, rendering her claim under the ADA insufficient as a matter of law); *see also* August v. Offices Unlimited, Inc., 981 F.2d 576, 582, 584 (1st Cir. 1992)

such, the Third Circuit determined that the district court did not abuse its discretion in applying the doctrine of judicial estoppel in this case.[62]

The Third Circuit further suggested that the intent of the statute barred plaintiffs who asserted that they were totally disabled from recovering under the ADA.[63] Echoing the district court's rejection of the holding in *Smith v. Dovenmuehle Mortgage., Inc.*,[64] the Third Circuit noted that "there is no indication that either the United States Congress or the New Jersey legislature intended to provide disability benefits to persons capable of obtaining gainful employment."[65] The court concluded that a favorable decision for the plaintiff in the instant action would permit a "double recovery" under the ADA and SSI, a form of recovery that "is the province of the legislature rather than this Court."[66]

Although there is no Fourth Circuit case specifically addressing the use of judicial estoppel when an SSDI recipient brings a subsequent claim under the ADA, a district court in *Lemons v. US Air Group, Inc.* found that the circuit's lack of a definitive stance on the issue

---

("[h]aving conceded that he was totally disabled at all relevant times . . . no reasonable fact finder could conclude that . . . he was a qualified handicapped person within the meaning of Mass. Gen. Laws. ch. 151B, § 4(16)"); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547, 555 (D. Kan. 1995) (finding that plaintiff was estopped from claiming that she could perform the essential functions of her job after having collected substantial benefits based on her own unambiguous representations of total disability).

62. *See McNemar*, 91 F.3d at 617. Because the doctrine of judicial estoppel is an equitable doctrine to be applied at the discretion of the district court, a district court's decision may only be reviewed for abuse of discretion. *See id.* at 617; *see also supra* note 2.

63. *See McNemar*, 91 F.3d at 618 ("Accordingly, a person unable to work is not intended to be, and is not, covered by the ADA."); *see also* 42 U.S.C. § 12113 (1994) which provides that:

> [i]t may be a defense to a charge of discrimination . . . that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation.

Id.

64. 859 F. Supp. 1138, 1141-43 (N.D. Ill. 1994) (holding that an employee receiving SSDI after being infected with AIDS was not judicially estopped from arguing that he was qualified under the ADA).

65. *McNemar*, 91 F.3d at 620 (quoting Dist. Ct. Op. at 11). And indeed, the Court was careful to note that an individual truly qualified under the ADA "who believes he or she has been the victim of discrimination 'retains the option of filing'" such a claim pursuant to the ADA statute. *Id.* (citation omitted).

66. *Id.* The court asserted that were it to permit a plaintiff to recover under both programs, such a decision would imply "that a person afflicted with HIV somehow should be permitted to misrepresent important information. The fact that the choice between obtaining federal or state disability benefits and suing under the ADA is a difficult one does not entitle one to make false representations with impunity." *Id.*

provided support for the court's decision to apply the doctrine of judicial estoppel in the instant case.[67] The district court reasoned that because the Fourth Circuit did not state that judicial estoppel could never be invoked in situations where one position is asserted before the SSA and a contrary one is made in connection with an ADA claim, it was within the discretion of the court to find estoppel appropriate in the case before it.[68] The district court derived further support for its use of judicial estoppel by citing other courts within the circuit that had reached the same decision.[69]

B. The Judicially Created Presumption

Echoing the position of the Fifth Circuit in *Cleveland v. Policy Management Systems Corp.*, some courts have taken the approach that while there is no per se rule precluding an SSDI recipient from bringing a claim under the ADA, there exists a strong presumption against permitting such a claim to proceed.[70] In *Dush v. Appleton Electric Co.*, the Eighth Circuit declined to resolve its stance on the issue of applying judicial estoppel in this context.[71] It did, however, recognize the trend among decisions in the circuit which "would appear to make it significantly more difficult to hold that judicial estoppel will, as a per se rule," prevent SSDI recipients from bringing claims under the ADA.[72] Notwithstanding the court's decision to adhere to the standards for summary judgment in this case, it noted that "[t]he burden faced by ADA claimants in this position is, by their own making, particularly cumbersome."[73]

Further, the Eighth Circuit stated that summary judgment should be granted for the defendant employer unless there is "strong countervailing evidence that the employee . . . is, in fact, qualified."[74] The

---

67. *See* Lemons v. US Air Group, 43 F. Supp. 2d 571, 579 (M.D.N.C. 1999).

68. *See id.*

69. *See id.* (citing Reigel v. Kaiser Foundation Health Plan, 859 F. Supp. 963 (E.D.N.C. 1994); Hindman v. Greenville Hosp. Sys., 947 F. Supp. 215 (D.S.C. 1996)).

70. *See, e.g.*, Dush v. Appleton Electric Co., 124 F.3d 957, 963 (8th Cir. 1997); Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277, 282 (S.D.N.Y. 1996).

71. *See Dush*, 124 F.3d at 962 n. 8 ("[W]e leave for another day the question of whether and to what extent judicial estoppel . . . will operate to prohibit someone who has formerly claimed to be 'totally disabled' from making out a prima facie ADA case.").

72. *Id.* The court cites other Eighth Circuit decisions that rejected the application of judicial estoppel to this situation. *See* Robinson v. Neodata Servs., Inc., 94 F.3d 499, 502 n.2 (8th Cir. 1996); Eback v. Chater, 94 F.3d 410, 412 (8th Cir. 1996).

73. *Dush*, 124 F.3d at 963.

74. *Id.* (citing *Mohamed*, 944 F. Supp. at 282 (holding judicial estoppel inappropriate for this kind of case because of the differing definitions of disability in the relevant statutes, but inferring a presumption against permitting SSDI claimants to pursue ADA claims)).

court asserted that normally the prior sworn representations of total disability carry sufficient weight by themselves to defeat a SSDI plaintiff's claim under the ADA.[75] By suggesting that receipt of Social Security disability benefits is sufficient preliminary evidence to prevent a plaintiff from succeeding on a claim under the ADA, the *Dush* court, like the Fifth Circuit in *Cleveland*, effectively created a presumption that the plaintiff is estopped from pursuing such a claim.

Like the *Dush* court, some appellate courts have recognized that judicial estoppel is a possible approach to the resolution of such claims but have declined to employ the doctrine in the instant cases. In *Simon v. Safelight Glass Corp.*,[76] the Second Circuit affirmed the lower court's determination that the plaintiff's statements to Social Security about his inability to work[77] judicially estopped him from establishing a prima facie case under the Age Discrimination in Employment Act of 1967.[78] However, the court did not decide the extent to which judicial estoppel applies to similar claims under the ADA.[79] In *Kennedy v. Applause, Inc.*, the Ninth Circuit found it unnecessary to decide the applicability of the doctrine of judicial estoppel to prevent the plaintiff from going forward with her claim because it found that the plaintiff would have been unable to muster any showing of a prima facie case under the ADA.[80] Based upon the plaintiff's own prior sworn statements that she was totally disabled coupled with medical evidence supporting this claim, the court concluded that she was wholly unable to work, regardless of accommodation.[81]

C. The Application of Summary Judgment

Other courts have openly criticized the application of judicial estoppel to ADA claims by SSDI recipients. These courts have cited the differing purposes of the Social Security Act and the ADA as the reason for rejecting judicial estoppel as an appropriate tool for resolving this preliminary phase of an ADA claim.[82] The Third Circuit recently indicated in *Krouse v. American Sterilizer Co.*, that its decision in *McNemar* is limited to the facts of that case and cannot be construed as

---

75. *See id.* (citing *Mohamed*, 944 F. Supp. at 282).

76. 128 F.3d 68 (2d Cir. 1997).

77. *See id.* at 74.

78. *See* 29 U.S.C. §§ 621-634 (1994 & Supp. I 1995).

79. *See Simon*, 128 F.3d at 74.

80. *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 n.3 (9th Cir. 1996).

81. *See id.* at 1482.

82. *See* Rascon v. United States West Communications, Inc., 143 F.3d 1324, 1330 (10th Cir. 1998) (citing Krouse v. American Sterilizer Co., 126 F.3d 494, 502 (3d Cir. 1997)).

creating a per se rule of judicial estoppel.[83] The *Krouse* court asserted that "district courts in this circuit are misapplying *McNemar* without first considering the unique facts of that case . . . . Courts should not assume that *McNemar* always bars an individual's ADA claims merely because prior representations or determinations of disability exist in the record."[84] In *Talavera v. School Board,* the Eleventh Circuit noted that beyond the *Krouse* court's discussion of *McNemar,* no other court of appeals had thus far held that a plaintiff asserting total disability for the purpose of receiving disability benefits is per se estopped from bringing a claim under the ADA.[85]

Rather than adopt the restrictive approach to an ADA claim by a recipient of SSDI put forth in *McNemar,* the majority of appellate courts that have addressed this issue agree that judicial estoppel may not be used to preclude a plaintiff from presenting relevant evidence in support of a prima facie case under the ADA.[86] In support of this position, courts point to the fact that there is nothing "inherently inconsistent" in being an SSDI recipient and bringing a suit under the ADA.[87] In a memo issued by the Social Security Administration in an attempt to resolve this issue, Associate Commissioner Daniel L. Skolar indicated that definitions of "disability" under the Social Security Act and the ADA are not synonymous.[88] In an Enforcement Guidance Memo supporting this position, the EEOC further stated that "because of the fundamental differences in the definitions used in the ADA and the terms used in disability benefits programs, an individual can meet the eligibility requirements for receipt of disability benefits and still be a 'qualified individual with a disability' for ADA purposes."[89]

---

83. *See Krouse,* 126 F.3d at 503 n. 5.

84. *Id.* The court in *Krouse* further indicated that the Third Circuit's "Judge Becker is persuaded . . . that *McNemar* was wrongly decided, and believes that the court should reconsider it at its first opportunity." *Id.* at 503 n.4.

85. *See* Talavera v. School Bd., 129 F.3d 1214, 1218 (11th Cir. 1997).

86. *See Rascon,* 143 F.3d at 1332 ("[w]e join the majority of circuits and hold that statements made in connection with an application for social security disability benefits cannot be an automatic bar to a disability discrimination claim under the ADA."); *see also Talavera,* 129 F.3d at 1220 ("[w]e agree with the majority of our sister circuits that a certification of total disability on an SSD benefits application is not inherently inconsistent with being a 'qualified individual with a disability' under the ADA.")

87. *Talavera,* 129 F.3d at 1220.

88. *See* Daniel L. Skoler, Assoc. Comm'r Soc. Sec. Admin., Disabilities Act Info. Mem. at 1 (June 2, 1993) (No. SG3P2)).

89. EEOC, *EEOC Enforcement Guidance of the Effect of Representations for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the Americans With Disabilities Act of 1990,* No. 915.002 (Feb. 12, 1997) (visited Jan. 24, 2000) <http://www.eeoc.gov/docs/qidreps.txt>.

One of the first courts to recognize the fundamental difference between the two programs was the Seventh Circuit in its decision in *Overton v. Reilly*.[90] In response to a claim brought pursuant to sections 501 and 504 of the Rehabilitation Act of 1973,[91] the court found that the determination that the plaintiff was disabled was relevant evidence of the severity of Overton's handicap, but could not be construed as a judgment that the plaintiff was unable to perform his job at the EPA.[92] The court held that the additional evidence that the plaintiff presented to support his claim that he could perform the essential functions of his position with reasonable accommodation raised a genuine issue of material fact sufficient to defeat the defendant's motion for summary judgment.[93]

The decision in *Swanks v. Washington Metropolitan Transit Authority*[94] provided further indication that while receipt of Social Security disability benefits does not preclude bringing a claim under the ADA, it may still be relevant to a determination of the existence of a genuine claim.[95] The court explained that the five-step process by which an applicant is found eligible for SSDI gives no consideration to a claimant's ability to work with "reasonable accommodation,"[96] a concept critical to the determination of whether a claimant is a "qualified individual with a disability" under the ADA.[97] It further noted that even "[t]he fact that an individual may be able to return to a past relevant job, provided that the employer makes accommodations, is not relevant . . . ."[98] Thus, the fact that a plaintiff may receive an unrelated disability benefit does not necessarily bar an award of ADA relief.[99] The court, in reversing the defendant's motion for summary judgment, cautioned that this decision should not be construed to mean that courts, when deciding the merits of an ADA suit, may not

---

90. 977 F.2d 1190 (7th Cir. 1992).

91. 29 U.S.C. §§ 791, 794 (1988) (providing federal employees the right to bring a cause of action for employment discrimination).

92. *See Overton*, 977 F.2d at 1196.

93. *See id.*

94. 116 F.3d 582 (D.C. Cir. 1997).

95. *See id.* at 587.

96. *See id.*; *see supra* note 29.

97. *See Overton*, 977 F.2d at 586.

98. *Id.* at 585. The court explained:

> a finding of ability to do past relevant work is only appropriate if the claimant retains the capacity to perform either the actual functional demands and job duties of the particular past relevant job . . . or the functional demands and job duties of the occupation as generally required . . . throughout the national economy.

Id. (citing Skoler, *supra* note 88, at 2).

99. *See id.* at 585.

consider a plaintiff's statements made for the purpose of obtaining disability benefits.[100] It recognized that an ADA plaintiff who is considered totally disabled by SSA standards may be unable to perform the essential functions of his or her job, even with reasonable accommodation.[101] Under those circumstances, the plaintiff would be unable to establish a prima facie case under the ADA.[102] Several other appellate courts have followed suit, finding that prior assertions of total disability, while not sufficient to estop a plaintiff from bringing a cause of action under the ADA, may still be considered relevant to a determination that the plaintiff is "a qualified individual with a disability."[103]

In *Griffith v. Wal-mart Stores, Inc.*, the Sixth Circuit reasoned that judicial estoppel should not apply because the SSA does not ask whether the applicant could have worked with reasonable accommodation during the time period under consideration.[104] The ability of an individual to work with some accommodation is simply irrelevant to a determination of eligibility for SSDI.[105] The court also indicated that there is no space on the SSA disability application for an individual to further explain that he or she in fact may be capable of continuing to perform a job if granted a reasonable accommodation.[106] It warned that the doctrine of judicial estoppel should be "applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement."[107] The court was reluctant to proscribe the admission of any evidence tending to show that the plaintiff was capable of performing the essential functions of his position. Rather, it found that prior assertions of total disability made to

---

100. *See id.* at 587.

101. *See id.*

102. *See id.*

103. *See* Rascon v. United States West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998); *see also* Talavera v. School Bd., 129 F.3d 1214, 1220 (11th Cir. 1997) ("Whether in any particular situation there is an inconsistency . . . will depend upon the facts of the case, including the specific representations made in the application for disability benefits and the nature and extent of the medical evidence on the record."); Robinson v. Neodata Servs., Inc. 94 F.3d 499, 501 n.2 (8th Cir. 1996) ("[a]t best, the Social Security determination was evidence for the trial court to consider in making its own independent determination").

104. *See* Griffith v. Wal-mart Stores, Inc., 135 F.3d 376, 382 (6th Cir. 1998), *cert. denied*, 119 S. Ct. 2018 (1999).

105. *See id.*

106. *See id.* The forms "require the applicant merely to check off boxes without comment, or . . . to fill in blanks with little room given for elaboration." *Id.*

107. *Id.* (citing Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990) (footnote omitted)).

the SSA should be analyzed under the traditional principles of summary judgment.[108]

In *Talavera v. School Board of Palm Beach County,* the Eleventh Circuit further explained its rejection of the application of judicial estoppel in this situation by drawing a distinction between presenting as evidence a plaintiff's prior representations of total disability and asserting a position at trial inconsistent with these prior statements.[109] The court noted that "an ADA plaintiff is [still] estopped from denying the truth of any statements made in her disability application. Our basis for this holding is that an ADA plaintiff should not be permitted to disavow any statements she made in order to obtain SSD benefits."[110] While a plaintiff may be permitted to present additional evidence to support a prima facie case under the ADA, that additional evidence may not take the form of false representations designed to advance the plaintiff's cause, precisely the kind of position that the doctrine of judicial estoppel is designed to prevent.[111]

Even in those courts that reject the use of judicial estoppel in favor of applying the principles of summary judgment in analyzing the preliminary merits of an SSDI recipient's ADA claim, plaintiffs who are permitted to present additional evidence in support of their claim under the ADA are not guaranteed a favorable decision. In *Blanton v. Inco Alloys International, Inc.*, the court clarified its earlier holding on the same issue stating that while it rejected judicial estoppel as an appropriate approach to this issue, it did find that "in light of the overwhelming weight of the medical evidence, as well as Blanton's own admissions, we find that Blanton was unable to perform his former position of extrusion press crew leader as a matter of law."[112]

Despite a court's refusal to apply judicial estoppel to an SSDI plaintiff's claim, summary judgment may still prevent a claimant from pursuing his or her case. The Seventh Circuit noted in its decision of *Weigel v. Target Stores* that although it recognized that a determination of disability under the Social Security Administration does not preclude a plaintiff from bringing a claim under the ADA, in order to succeed on a motion for summary judgment the claimant must present an affirmative showing of his or her ability to perform the essential

---

108. *See Griffith,* 135 F.3d at 383. The court then held that the plaintiff had presented sufficient proof to establish a genuine issue of material fact that would defeat the defendant's motion for summary judgment. *See id.*

109. *See* Talavera v. School Bd., 129 F.3d 1214, 1220 (11th Cir. 1997).

110. *Id.*

111. *See supra* note 2.

112. Blanton v. Inco Alloys Int'l, Inc., 123 F.3d 916, 917 (6th Cir. 1997) ("Blanton II") (citing Blanton v. Inco Alloys Int'l, Inc., 108 F.3d 104, 107 (6th Cir. 1997) ("Blanton I")).

functions of the position.[113] Without such a showing there is no genuine issue of material fact as to whether the plaintiff is a "qualified individual" under the ADA, and the employer will be entitled to judgment as a matter of law.[114] In *Weigel*, the plaintiff was unable to show that she could perform the essential functions of her position, with or without reasonable accommodation.[115] Without evidence to support the claim that she was capable of working despite her disability, the court denied her appeal from the district court's grant of summary judgment in favor of the defendant.[116]

III. THE COURT'S REASONING

In *Cleveland v. Policy Management Systems Corp.*, the Supreme Court reversed the Fifth Circuit's decision in a unanimous ruling by holding that "the law [does not] erect a strong presumption against the [SSDI] recipient's success under the ADA."[117] It then reiterated the position taken by the majority of the circuits that receipt of SSDI benefits does not automatically estop the recipient from bringing an ADA claim.[118] The Court further noted that "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side" to require the application of a special judicial presumption which would prevent a plaintiff like Cleveland from asserting her claim under the ADA.[119]

Writing for the Court, Justice Breyer first addressed the Fifth Circuit's assertion that "claims under both Acts would incorporate two directly conflicting [factual] propositions, namely 'I am too disabled to work' and 'I am not too disabled to work.'"[120] According to the Fifth Circuit, a plaintiff may overcome the presumption against such a direct factual conflict only in a limited and highly unusual set of circumstances.[121] The Supreme Court countered this conclusion by explaining that "[a]n 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 purpose of the Social Security

113. *See* Weigel v. Target Stores, 122 F.3d 461, 468 (7th Cir. 1997).
114. *See id.*
115. *See id.* at 469.
116. *See id.*
117. Cleveland v. Policy Management Systems Corp., 119 S. Ct. 1597, 1600 (1999).
118. *See id.*
119. *Id.* at 1602.
120. *Id.*
121. *See id.* at 1601 (citing Cleveland v. Policy Management Sys. Corp, 120 F.3d 513, 517 (5th Cir. 1997)).

Act.'"[122] Thus, a plaintiff's claim that she is eligible under SSDI does not inherently conflict with a claim under the ADA to the extent that courts may apply a "special negative presumption" like the one applied by the Fifth Circuit in *Cleveland*.[123]

The Court then discussed the manner in which the Social Security Administration reaches this "legal conclusion" of disability for the purpose of awarding disability benefits.[124] It first noted that an eligibility determination for SSDI purposes does not take the possibility of "reasonable accommodation" into account, nor need an applicant even refer to the possibility of reasonable accommodation when applying for disability benefits.[125] The "omission [of a detailed investigation of a plaintiff's work situation] reflects the facts that the SSA receives more than 2.5 million claims for disability benefits each year."[126] The sheer volume of requests for support, coupled with its limited administrative resources prevent the SSA from making a more detailed analysis of workplace-specific issues like "reasonable accommodation."[127] The Court reasoned that because the question of "reasonable accommodation" in the workplace is simply not among those posed to SSDI applicants, "an ADA suit claiming that the plaintiff can perform her job with reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) without it."[128]

The Court then presented three examples in which a plaintiff could be considered eligible under both Acts. The Court first pointed to the five-step SSA questionnaire designed primarily to facilitate the processing of large numbers of SSDI claims.[129] Although the SSA's

---

122. *Id.* at 1601-02. The Court distinguishes the issue in this case from one involving a conflict of purely factual matters such as "the light was green/red" or "I can/cannot raise my arm over my head." *Id.*

123. *Id.* at 1602.

124. *See id.*

125. *See id.*

126. *Id.*

127. *See id.*

128. *Id.*

129. *See id.* at 1602; *see also supra* note 29. According to the statute, the SSA will consider the vocational background of an applicant for disability benefits only if "we cannot decide whether you are disabled on medical evidence alone." 20 C.F.R. § 404.1560(a) (1998). In considering the applicant's past relevant work experience:

> [w]e will first compare your residual functional capacity with the physical and mental demands of the kind of work you have done in the past. If you still have the residual functional capacity to do your past relevant work, we will find that you can still do your past work, and we will determine that you are not disabled, without considering your vocational factors of age, education, and work experience.

reliance on this streamlined checklist was developed as a method of efficiently processing a large number of benefit applications, "[the] presumptions embodied in these questions . . . inevitably simplify, eliminating consideration of many differences potentially relevant to an individual's ability to perform a particular job."[130] The Court recognized that under the current system, an individual may validly be deemed disabled by the SSA and still retain the capacity to perform the essential functions of a job if provided a reasonable accommodation.[131]

The Court further indicated that under the statute, an SSDI recipient is permitted to return to work for a nine-month trial period without losing his or her benefits.[132] The Court found that this provision reflected the fact that the "SSA sometimes grants SSDI benefits to individuals who not only can work, but are working."[133] The Court suggested that this provision, by extending the grant of disability benefits to a working individual, is clearly an example of a situation in which a plaintiff may legally be considered "disabled" within the meaning of the Social Security Act and still assert that she is a "qualified individual with a disability" under the ADA.[134]

Id. § 404.1560(b). If the SSA finds that "you can no longer do the kind of work you have done in the past, we will then consider your residual functional capacity together with your vocational factors of age, education, and work experience to determine whether you can do other work." *Id.* § 404.1560(c). The SSA defines "residual functional capacity" as "what you can still do despite your limitations." *Id.* § 404.1545.

130. *Cleveland*, 119 S. Ct. at 1603.

131. *See id.*

132. *See id.* The "trial work period" is defined as:

> a period during which you may test your ability to work and still be considered disabled. During this period, you may perform "services". . . in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months. However, after the trial work period has ended we will consider the work you did during the trial work period in determining whether your disability ended at any time after the trial work period.

20 C.F.R. § 404.1592(a) (1998). Under this section, "services" are defined as "any activity, even though it is not substantial gainful activity, which is done by a person in employment or self-employment for pay or profit, or is the kind normally done for pay or profit." *Id.* § 404.1592(b); *see also* Lopez v. Cohen, 295 F. Supp. 923, 923 (S.D. Tex. 1969) (finding participation of disability insurance claimant in "trial work program" under this section could not be considered as evidence of lack of disability); Johnson v. Secretary of Health and Human Servs., 948 F.2d 989, 992 (6th Cir. 1991) (finding disability claimant's work performed during "trial work period," during which disability benefits recipient could attempt to work without losing his or her entitlement to benefits, may not be used to support finding that disability ceased during trial work period until those services had been performed for a nine-month period); *see generally* 42 U.S.C. §§ 422(c), 423(e)(1) (1994).

133. *Cleveland*, 119 S. Ct. at 1603.

134. *See id.*

The Court then noted that the assertion of both claims could merely be considered an example of a party legitimately "'sett[ing] forth two or more statements of a claim or defense alternately or hypothetically.'"[135] It stated that "if an individual has merely applied for, but has not been awarded, SSDI benefits, any inconsistency in the theory of the claim is of the sort normally tolerated by our legal system."[136] Indeed, at the time the plaintiff brought her ADA claim against PMSC, she had not yet received a final determination from the Administrative Law Judge as to her eligibility for SSA disability benefits.[137]

The Court concluded that it would not place a judically created burden on a recipient of SSDI benefits by constraining his or her opportunity to bring an ADA suit to "some limited and highly unusual set of circumstances."[138] The Court then turned to the standard of proof required of such a plaintiff who seeks to bring a claim under the ADA. It indicated that to overcome a defendant's motion for summary judgment, a plaintiff must explain how that SSDI contention of disability is consistent with her ADA claim that she could perform the essential functions of her former position, at least with "reasonable accommodation."[139] The Court cautioned that a plaintiff who fails to proffer a sufficient explanation for claiming disability on an application for SSDI benefits will not meet the burden of proof required to establish a prima facie case under the ADA.[140] Like many of the lower courts, the Supreme Court recognized that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of a prior assertion of total disability for the purposes of obtaining SSDI eligibility.[141] The Court relied upon the well-established standard of summary judgment when it concluded that

> where [as here,] the conflict involves a legal conclusion . . . [the plaintiff's] explanation must be sufficient to warrant a

---

135. *Id.* (citing Fed. Rule Civ. Proc. 8(e)(2)).

136. *Id.*

137. *See supra* note 40 and accompanying text.

138. *Cleveland,* 119 S. Ct. at 1603 (citing Cleveland v. Policy Management Sys. Corp, 120 F.3d 513, 517 (5th Cir. 1997)).

139. *See id.* at 1603. "An ADA plaintiff [still] bears the burden of proving that she is a 'qualified individual with a disability' – that is, a person 'who, with or without reasonable accommodation, can perform the essential functions' of her job" (citing 42 U.S.C. § 12111(8) (1994)). *Id.*

140. *See id.*

141. *See id.* "[L]ower courts . . . have held, with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement . . . without explaining the contradiction or attempting to resolve the disparity." *Id.*

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 accommodation."[142]

IV. ANALYSIS

In *Cleveland*, the Supreme Court clarified and adopted the position of the majority of circuits that have addressed the issue of recovery by an SSDI recipient under the ADA. Its holding reiterates the notion that courts must adhere to the established principles of summary judgment with respect to permitting such plaintiffs to pursue an ADA claim.[143] More importantly, by removing judicially-crafted barriers to a plaintiff's ADA claim, the Court reinforces the importance of furthering the ADA's goal of ending and preventing employment discrimination. The Court implies that the opportunity to expose discriminatory behavior should be determined by the validity of the complainant's case, not by his or her status for purposes of a federal welfare program. The Court has already indicated that "[t]he objectives of [anti-discrimination statutes] are furthered when even a single employee establishes that an employer has discriminated against him or her."[144]

Further, the Court's decision marks an important point of integration between the admittedly inconsistent goals and purposes of the SSA and the ADA. The SSA disability programs are based on the premise that disability provides a legitimate excuse for the obligation to contribute to society through gainful employment.[145] These programs developed in response to the need to provide income support to members of the "worthy poor," individuals who, by reason of a disabling condition, are properly exempt from participating in the work force.[146] The ADA, on the other hand, recognizes and attempts to permit and encourage disabled individuals to remain in the workforce and thus continue contributing to the national economy.[147] The Court's decision highlights the two programs' common goal of pro-

142. *Id.* at 1604.

143. *See id.*

144. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358-59 (1995) (discussing the importance of individual lawsuits in enforcing rights granted under Title VII and the Age Discrimination in Employment Act of 1967 (ADEA)).

145. *See* Diller, *supra* note 14, at 1014.

146. *See id.*

147. *See id.*

moting work activity among disabled individuals.[148] By declining to apply judicial estoppel or other judicially-imposed barriers to bringing an ADA suit based upon receipt of disability benefits, the Court implies that even individuals formerly considered unable to work under the SSA not only have the capacity to return to the work force, but should be encouraged to do so.[149] This decision is a key component of the federal government's overall intent to encourage recipients of federal disability benefits to lessen their dependence on these benefits by returning to the workforce.[150] The Court's decision can be seen as an attempt to break down stereotypes of "the disabled" as unable to work or otherwise contribute to society.[151]

On its face, this decision is a triumph for disabled Americans who work, or wish to work, but face the threat of employer discrimination. The Court's decision ensures that from a procedural standpoint an SSDI recipient seeking damages for employment discrimination is held to the same standard of proof as any other plaintiff presenting a prima facie case under the ADA. Analysts suggest that the *Cleveland* decision will result in more cases going to trial.[152] It remains to be seen, however, "whether . . . courts will continue to use their authority to weed out questionable ADA claims on summary judgment or whether the courts will become more hesitant about granting summary judgment dismissals and instead allow cases to go to trial before a jury."[153] An ADA claimant still bears the substantial burden of proving that he or she can perform the essential functions of the job, with or without reasonable accommodation, despite the prior sworn assertion in an SSDI application that he or she is "unable to work." The Court's decision to remove additional procedural burdens from SSDI recipients bringing employment discrimination suits ultimately has lit-

148. As evidence of this common goal, the Court focuses on the SSA's work-incentive provisions that permit a beneficiary to continue receiving monetary support while working. *See* Maureen C. Weston, *The Road Best Traveled: Removing Judicial Roadblocks That Prevent Workers From Obtaining Both Disability and ADA Civil Rights Protection*, 26 HOFSTRA L. REV. 377, 439 (1997).

149. *See id.*

150. *See* H.R. REP. NO. 106-393 (1999). The "Ticket to Work and Work Incentives Improvement Act of 1999" was designed to create incentives for disabled Americans to return to work by providing for extended health care coverage and increased access to employment preparation and placement services. While this bill was signed into law several months after the Supreme Court's decision in *Cleveland*, it represents an attempt by the federal government to encourage more disabled Americans otherwise dependent on SSDI to return to work.

151. *See id.*

152. *See* Jonathan R. Mook, *High Court ADA Ruling Could Result in More Cases Going to Trial*, 7 No. 2 EMPLOYMENT L. STRATEGIST 1 (June 1999).

153. *Id.*

tle impact on the plaintiff's overall responsibility to present a valid cause of action. It is likely that lower courts will continue to stringently scrutinize all ADA claims and dismiss them in the summary judgment phase.[154]

Further, while this decision may appear to "open the floodgates" and create a surge in the number of ADA cases filed in federal court, the EEOC itself will continue to represent a serious obstacle to an individual claimant's ability to even bring a claim, let alone obtain judicial relief. Title I of the ADA adopts the remedial scheme of Title VII of the Civil Rights Act.[155] This system requires individual claimants to file charges of employment discrimination with the EEOC prior to filing actions in court.[156] Since the passage of the ADA in 1990, the EEOC has received over seventy-two thousand charges of disability discrimination.[157] Of the fifty-two thousand dispositions that the EEOC has pursued, over forty-four thousand cases were administratively closed by the EEOC or resulted in findings of no reasonable cause.[158] The individual claimant may still decide to proceed on his or her own by requesting a "right to sue" letter from the EEOC after 180 days of filing the claim, regardless of whether the agency has taken action.[159] But without the support of the EEOC, the individual claimant alone must face "civil litigation, with all its attendant vagaries" as the only means of attaining relief under the ADA.[160] While the EEOC's method of screening potential ADA suits may prevent unfounded claims of employment discrimination from being litigated, it may also discourage plaintiffs with valid claims from coming forward. The Supreme Court's decision to remove procedural barriers impacts only those plaintiffs fortunate enough to reach the federal court system.

It also remains to be seen whether federal courts in which SSDI recipients bring successful ADA claims will permit those plaintiffs to recover the full value of any compensatory monetary award or instead will "offset" or reduce that award by the amount of the plaintiff's SSDI benefit. By confining its decision to removing court-imposed limits on an SSDI recipient seeking to pursue an ADA claim, the Court's decision in *Cleveland* provides only a portion of what will ultimately be

---

154. *See id.* at 2.

155. *See* 42 U.S.C. § 2000e-4 to e-6, e-8, e-9, 12117 (1999).

156. *See* 42 U.S.C. § 2000e-5(f) (1999).

157. *See* Diller, *supra* note 14, at n.239; *see also ADA Charges Received by EEOC Through June 1996*, NAT'L DISABILITY L. REP., Jan. 16, 1997, at 3.

158. *See* Diller, *supra* note 14, at 1052.

159. *See* 42 U.S.C. § 2000e-5(f)(1999).

160. Diller, *supra* note 14, at 1054.

needed to reduce employment discrimination of the disabled.[161] In order to achieve the goal of ending employment discrimination of the disabled, the ADA granted successful claimants the ability to recover compensatory and punitive damages against the defendant employer.[162] The provision of monetary awards in the case of ADA violations serves two primary purposes: to permit the victim of discrimination to be made "whole" by recovering for his or her injuries, and to enforce compliance with the statute by requiring employers to accept financial responsibility for any violations.

Some have speculated that the Court's decision in *Cleveland* will lead to more plaintiffs receiving an impermissible "double recovery"[163] under both programs. The basis for the argument against double recovery in this context is that a plaintiff who receives a monetary award as part of a successful ADA claim should have that award "set-off" or reduced by the amount of his or her disability benefit.[164] According to this theory, a plaintiff receiving disability benefits is already being fully compensated for his or her inability to work, thus he or she is not entitled to be made "more than whole" by additional compensation provided under the ADA. This logic suffers from the same deficiencies as the argument advanced by the defendant in *Cleveland*, namely that plaintiffs should not be permitted to benefit by making directly conflicting statements regarding his or her ability to work.

Although the Court did not specifically address damages in *Cleveland v. Policy Management Systems Corp.*, its reasoning and discussion of the issues in the case permits the reader to infer the Court's position on the question of an ADA plaintiff's recovery. By finding that there

---

161. While outside the scope of its opinion, the Court also did not address the impact of this decision on employers. This decision may prompt an employer to take further steps to protect itself from liability in the face of such a claim. For example, employers may seek to take advantage of the statutory provision which permits "consideration [to] be given to the employer's judgment as to what functions of a job are essential" when determining whether a plaintiff meets the requirements for a "qualified individual with a disability." 42 USC § 12111(8) (1994). The statute further provides that "if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." *Id.*

162. *See infra* notes 168-186 and accompanying text.

163. "Double recovery" has been defined as "recovery which represents more than the total maximum loss which all parties have sustained." BLACK'S LAW DICTIONARY 491 (6th ed. 1990).

164. *See, e.g.*, Swanks v. Washington Metro. Transit Auth., 116 F.3d 582, 587 (D.C. Cir. 1997) ("Set-offs [based on previously awarded disability benefits] may provide a way to prevent windfall recoveries while guaranteeing disabled persons the full protection of both Acts."); Overton v. Reilly, No. 90 C 412, 1993 U.S. Dist. LEXIS 20890, at 27 (N.D. Ill. Aug. 13, 1993) (ordering, in the damages phase of trial, that the plaintiff's front pay award shall be offset by the amount of Social Security disability compensation the plaintiff will receive).

are "many situations in which an SSDI claim and an ADA claim can comfortably exist side by side"[165] the Court implies not only that an SSDI recipient should be permitted to go forward with an ADA claim but that receipt of Social Security disability benefits should have no impact on the amount of damages an otherwise successful plaintiff may ultimately recover under the ADA. The legislative histories of the ADA and the SSA provide further support for the notion that Congress intended to authorize "double recovery" for successful plaintiffs under the ADA.[166] An examination of the collateral source rule[167] also suggests that for those SSDI recipients who receive a favorable judgment in an ADA suit, lower courts should refrain from reducing any award of damages by the amount of the plaintiff's disability benefit.

While there are additional sources of support for the notion that plaintiffs should not have their ADA damage awards set-off by the amount of an unrelated disability benefit, the lack of clear guidance to lower courts on the issue of damage awards severely weakens the statutory imposition of monetary sanctions as a mechanism for ADA enforcement. Further, plaintiffs who receive less than a complete damage award are "cheated" out of the opportunity to fully recover for their injuries as a result of employment discrimination. In the absence of a comprehensive scheme for enforcing all provisions of the ADA, the Court's decision marks a limited victory for those seeking a substantive tool in the fight to end employment discrimination.

A. Statutory Support for Full Recovery Under the ADA

As part of the Civil Rights Act of 1991,[168] Congress granted plaintiffs the opportunity to recovery monetary damages under the ADA.[169] The ADA provides substantial opportunity for legal redress for individuals who can prove that they have been discriminated against because of their disability. Successful plaintiffs may recover from their

---

165. Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597, 1602 (1999).

166. *See infra* notes 168-186 and accompanying text.

167. The collateral source rule provides that "payment which a plaintiff receives for his or her loss from another source is not credited against the defendant's liability for all damages resulting from its wrongful or negligent act." Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 83 (3d Cir. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 920A(2) (1979)).

168. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in various sections of 29 U.S.C., 28 U.S.C., and 42 U.S.C.).

169. *See* Robert Belton, *Monetary and Nonmonetary Remedies in Employment Discrimination Cases*, C108 A.L.I.-A.B.A. CONTINUING EDUC. 731, 733 (1995).

employer pursuant to 42 U.S.C. § 1981a.[170] The ADA provides that these individuals may be entitled to "injunctive relief, such as reinstatement or an order to reasonably accommodate, and may additionally recover compensatory and punitive damages."[171]

In order to recover punitive damages, the complaining party bears the burden of showing that the employer "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[172] Unless the employer can respond to this claim by demonstrating that it made a good faith effort to provide a reasonable accommodation to the qualified individual with a disability,[173] the plaintiff may recover compensatory and punitive damages based on his or her claim.[174] The statute sets limits on the amount of compensatory damages awarded "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses,"[175] as well as the amount of punitive damages that an individual complainant may recover based upon the

---

170. *See* The Civil Rights Act of 1991 § 102(a) (codified at 42 U.S.C. § 1981(a) (1999)). The relevant portion of the statute provides that:

> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000e-5 or 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)], from the respondent.

42 U.S.C. § 1981a(a)(2)(1994).

171. Weston, *supra* note 148, at 400; *see also* 42 U.S.C. § 12117 (1994).

172. 42 U.S.C. § 1981a(b)(1) (1994). However, a complainant may not recover punitive damages pursuant to this statute against a government, government agency, or political subdivision. *See id.*

173. *See* 42 U.S.C. § 1981a(a)(3) (1994). The relevant portion of the statute provides that:

> [i]n cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12112(b)(5)] or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

Id.

174. *See supra* note 170.

175. 42 U.S.C. § 1981a(a)(3) (1994).

size of the respondent employer's business.[176] According to the EEOC, "other nonpecuniary losses could include injury to professional standing, injury to character and reputation, injury to credit standing, loss of health and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct."[177]

Prior to the Civil Rights Act of 1991, the majority of courts declined to award legal remedies under Title VII of the Civil Rights Act of 1964.[178] Thus, "no matter how egregious the discrimination, victims were unable to recover compensatory damages despite the emotional suffering, physical pain, and related medical expenses that can accompany such stigmatizing treatment."[179] Although equitable remedies were available under the former Title VII, they were "all but a legal fiction for those victims of non-racial discrimination who chose to stay on the job; back pay, reinstatement, or hiring provided meager relief for those employees."[180] By adding these later provisions that authorized the recovery of monetary damages in addition to equitable forms of relief, Congress clearly intended for plaintiffs to be remunerated for both financial losses and harm resulting from illegal workplace discrimination. In light of the congressional intent to provide monetary recovery to such plaintiffs, there seems to be no support for the argument that this recovery should be limited based upon financial support received from unrelated sources.

---

176. *See id.* The amount of compensatory and punitive damages awarded under this section shall not exceed, for each complaining party:

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Id.

177. Belton, *supra* note 169, at 767 (citing EEOC, *EEOC Advance Policy Guidelines: Availability of Compensatory and Punitive Damages Under the Civil Rights Act of 1991*, (July 14, 1992) (visited Jan. 24, 2000) <http://www.eeoc.gov/docs/damages.txt>).

178. *See* Douglas M. Staudmeister, *Grasping the Intangible: A Guide to Assessing Nonpecuniary Damages in the EEOC Administrative Process*, 46 AM. U. L. REV. 189, 198 (1996).

179. *Id.* at 198-99.

180. *Id.* at 199. "Moreover, equitable relief failed to redress injuries to professional standing or reputation resulting from intentional discrimination." *Id.*

Congress also expanded the forms of relief available under the ADA in an effort to further require employers to abandon their discriminatory practices.[181] Prior to facing the threat of monetary damages in the event of a successful claim for ADA violations, employers had no practical deterrent to discriminating against the disabled.[182] A major goal of the ADA was "to ensure that the Federal Government plays a central role in enforcing the standards [of the ADA] on behalf of individuals with disabilities."[183] A reduction in the amount of damages an otherwise liable employer is required to pay undermines the implied objectives of punishment and deterrence.[184]

The Social Security statute also supports the notion that recovery is permitted and even encouraged under both programs. Although the legislative history makes no mention of the issue of "double recovery," the SSA's continuation of benefits during a trial period of work suggests that the "SSA appreciates the unpredictability of employment outcomes for the disabled and thus provides some measure of double-dipping under that statutory scheme."[185] Indeed, the work-incentive provisions providing subsidization of a trial return to the work force is one of the only areas in the Social Security Act that considers the notion that disability and work may not be mutually exclusive.[186]

B. Application of the Collateral Source Rule to ADA Claims

In addition to the statutory provision for monetary awards under the ADA, the doctrine of the collateral source rule is based upon the premise that a successful plaintiff should be entitled to recover the entire amount of his or her damage award against a defendant employer that has been adjudged liable for its actions. The collateral source rule "focuses on what the tortfeasor and the collateral source should pay, not on what the plaintiff should receive. Indeed, its most obvious effect is that, in the interest of other social policies, it allows the plaintiffs to be made more than whole for the wrongs committed

---

181. *See id.*

182. *See id.* at 199-00.

183. 42 U.S.C. § 12101(b)(3) (1994).

184. *See* Weston, *supra* note 148, at 439. "Precluding disability discrimination claims, regardless of the merits of the underlying claims, simply because of statements made on disability benefit applications, permits an employer to escape liability even if it unlawfully discriminated or denied a reasonable accommodation to an otherwise qualified employee." *Id.*

185. Christine Neylon O'Brien, *To Tell the Truth: Should Judicial Estoppel Preclude Americans With Disabilities Act Complaints?* 3 ST. JOHN'S L. REV. 349, 371 (1999); *see supra* notes 132-134 and accompanying text.

186. *See* Diller, *supra* note 14, at 1019.

against them."[187] In the context of an ADA claim, an application of the collateral source rule permits an otherwise eligible SSDI recipient successful in a suit for employment discrimination against his or her employer to recover the full value of any resulting damage award, even while continuing to receive his or her disability benefit.

Lower federal courts have been inconsistent in their application of the collateral source rule to cases involving Title VII violations and third-party income sources.[188] An examination of the treatment of the collateral source rule by lower federal courts reveals that funds received from collateral or third party sources are generally not considered deductible from an award of damages for employment discrimination.[189] Some courts have declined to offset damage awards by the amount of a collateral income source by holding that the legislature, not the court system, retains the authority to determine when such a reduction is appropriate.[190] Ironically, some of the courts which have suggested that such double recovery could be prevented through set-offs at the trial court level have also dismissed judicial estoppel as a viable method of resolving these cases.[191]

---

187. EEOC v. O'Grady, 857 F.2d 383, 389-90 (7th Cir. 1988) (internal citations omitted).

188. *See* Abigail Cooley Modjeska, EMPLOYMENT DISCRIMINATION LAW 3d § 12:09 (1998). Examples of third-party income sources include unemployment benefits, Social Security benefits, pension benefits in which the plan is distinct from the employer, and disability benefits. *See id.*

189. *See, e.g.*, NLRB v. Gullett Gin Co., Inc., 340 U.S. 361, 364-65 (1951) (holding that the failure to deduct unemployment benefits from a back pay award did not constitute impermissibly making the plaintiff more than "whole"); Maxfield v. Sinclair Int'l., 766 F.2d 788, 795 (3d Cir. 1985) (holding that Social Security benefits could not be set off against damages awarded in an ADEA suit), *cert. denied*, 474 U.S. 1057 (1986); McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 215 (3d Cir. 1984) (finding that neither unemployment nor pension benefits could be deducted from a back pay award in an ADEA suit), *vacated and remanded on other grounds*, 469 U.S. 1202 (1985); Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 82 (3d Cir. 1983) (holding that back pay awards may not be reduced by the amount of a plaintiff's unemployment benefits in a Title VII action); Hamlin v. Charter Township, 165 F.3d 426, 436 (6th Cir. 1999) (holding that the collateral source benefits should not be deducted from a jury's damage award for ADEA discrimination violations); *Grady*, 857 F.2d at 391 (finding it not an abuse of the lower court's discretion to refuse to offset a back pay award in an ADEA claim by the plaintiff's pension benefits); Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1114 (8th Cir. 1993) (holding that unemployment benefits should not have been deducted from award of back pay following successful ADEA claim).

190. *See, e.g., Craig*, 721 F.2d at 85 (rejecting argument that decision whether to offset should be left to the discretion of district courts, preferring instead to adopt uniform rules that further statutory aims); *Gaworski*, 17 F.3d at 113-14 (asserting majority rule that courts have no discretion to deduct unemployment benefits); Dominguez v. Tom James Co., 113 F.3d 1188, 1191 (11th Cir. 1997) (holding that courts have no discretion to deduct unemployment benefits, but noting that some circuits have left decision to district courts).

191. *See supra* note 164.

An application of the collateral source rule in this context is consistent with and furthers the policy arguments articulated in the ADA's legislative history. By permitting set-offs of ADA damage awards, an employer who is otherwise liable under the statute receives an inadvertent benefit by paying less in damages than intended by the jury's order. The plaintiff in turn is not rendered "whole" as Congress contemplated when it authorized the expansion of ADA remedies to include monetary damages.[192] Once an SSDI recipient re-enters the workforce, he or she should be afforded the same protection against unlawful employment discrimination as any other working individual. If a disabled individual is able to mount a successful claim under the ADA, he or she should not be penalized by receiving a smaller damage award simply because of the receipt of an unrelated monetary benefit.

V. CONCLUSION

In *Cleveland v. Policy Management Systems Corp.*, the Supreme Court adopts the prevailing opinion among the circuits on the issue of ADA claims brought by recipients of Social Security Disability Insurance. According to the Court, a plaintiff deemed disabled for purposes of SSDI is not judicially estopped from presenting additional evidence that he or she is still a "qualified individual with a disability" under the ADA. The Court further held that a plaintiff's receipt of SSDI does not permit courts to erect a strong legal presumption against the ability of that plaintiff to successfully bring a claim under the ADA. While this decision appears to ease the ability of plaintiffs with ADA claims to recover for their injuries, its impact is limited to those plaintiffs whose claims have already reached the court system. Moreover, even though an SSDI recipient may be permitted to assert a cause of action under the ADA, the Court's decision provides no guarantee that the plaintiff will be able to provide evidence sufficient to meet the standard of proof required to overcome a defendant employer's motion for summary judgment.

Despite the limited impact that the decision may have on the number of SSDI recipients who ultimately are able to bring claims for ADA violations, the Court's reasoning does shed some light on the ability of successful plaintiffs to recover the full value of an ADA damage award. Although the Court does not address the issue of recovery in such a case, were it to apply its reasoning to the question of damages, it is likely the Court would have found that a plaintiff who suc-

192. *See* Belton, *supra* note 169, at 733.

cessfully brings an ADA claim against an employer should not have the resulting damage award offset by the amount of the plaintiff's SSDI benefit. The Court's reasoning in *Cleveland*, based in large part on furthering the ADA's goal to end employment discrimination of the disabled, is consistent with the idea of ensuring that plaintiffs are "made whole" following an injury, as embodied by the collateral source rule doctrine. However, without judicial guidance as to the proper use of the collateral source rule in the context of ADA claims, the import of the Court's decision to SSDI recipients with legitimate claims of employment discrimination risks being rendered meaningless by lower federal courts who choose to set-off ADA damage awards by the amount of a plaintiff's disability benefit. In order to successfully accomplish the ADA's goal of ending employment discrimination of the disabled, the Court's decision to reduce procedural barriers to SSDI recipients should be supplemented by the uniform application of a rule precluding the deduction of SSDI benefits from an ADA monetary damages award. By guaranteeing successful plaintiffs the recovery of a complete ADA damage award, the collateral source rule offers a practical method of ensuring that ADA violators pay the full value of the sanctions entered against them and that victims of employment discrimination are "made whole" for their injuries.