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I Can't Work, Just Kidding, I Can: The Effects That Applying for Disability Benefits Have on an ADA Claim

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Issues in the Third Circuit

"I CAN'T WORK. JUST KIDDING, I CAN.": THE EFFECTS THAT APPLYING FOR DISABILITY BENEFITS HAVE ON AN ADA CLAIM

I. INTRODUCTION

The Americans with Disabilities Act ("ADA") was signed into law on July 26, 1990 by President George Bush.[1] A primary purpose of the ADA is to protect disabled persons from discrimination in the workplace.[2] This law followed various government initiatives designed to compensate disabled individuals due to their inability to provide for themselves.[3] These initiatives included the Social Security Act, workers compensation programs and various disability insurance plans.[4]

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1. *See* 42 U.S.C. §§ 12101-12213 (1994) (providing amended version of statute); Anne E. Beaumont, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, 71 N.Y.U. L. REV. 1529, 1541 (1996) (discussing history of ADA); Richard C. Mariani & Kimberly E. Robertson, *Representation of Total Disability on Claims for Social Security Benefits: Powerful, But Not Conclusive Evidence that the Claimant Is Not a Qualified Individual with a Disability Under the ADA*, 29 U. MEM. L. REV. 651, 653-54 (1999) (describing basis of ADA law).

2. *See* 42 U.S.C. § 12101(a)(3) (stating "discrimination against individuals with disabilities persists in such crucial areas as employment"); Christine Neylon O'Brien, *To Tell the Truth: Should Judicial Estoppel Preclude Americans with Disabilities Act Complaints?*, 73 ST. JOHN'S L. REV. 349, 360-64 (1999) (analyzing purpose and requirements of ADA). *See generally* Heather Hamilton, *Judicial Estoppel, Social Security Disability Benefits and the ADA: The Circuits Diverge*, 9 DEPAUL BUS. L.J. 127 (1996) (stating Congress' intent to address disabled persons in workforce).

3. *See Equal Employment Opportunity Commission, Enforcement Guidance on the Effect of Applications for Disability Benefits on ADA Claims*, EEOC NOTICE 915.002, ¶6907, 5419-24 (Feb. 12, 1997) (discussing Social Security, workers' compensation and disability insurance plans) [hereinafter EEOC]; Beaumont, *supra* note 1, at 1545-50 (discussing purposes of Social Security and workers' compensation laws); Maureen C. Westman, *The Road Best Traveled: Removing Judicial Roadblocks that Prevent Workers from Obtaining Both Disability Benefits and ADA Civil Rights Protections*, 26 HOFSTRA L. REV. 377, 388-395 (1997) (discussing purposes behind various disability subsistence benefits).

4. *See* 42 U.S.C. § 1382c(a)(3)(B) (1994) (defining disability); EEOC, *supra* note 3, at 5419 ("In adding disability as a basis for benefits administered by the Social Security Administration (SSA) in 1956, Congress recognized society's obligation to provide assistance to people whose disabilities prevent them from achieving economic self-sufficiency."); *see also* DEL. CODE ANN. tit. 19, §§ 2301, 2304 (1995) (defining personal injury and requiring employers to pay workers' compensation to employees injured during course of employment); N.J. STAT. ANN. § 34:15-36 (West 1986) (defining disability for workers' compensation purposes); N.J. STAT. ANN. § 53:5A-10 (West 1986) (showing example of disability insurance plan); PA. STAT. ANN. tit. 77, § 411 (West 1992) (defining injury for purposes of workers' compensation); EEOC, *supra* note 3, at 5422 ("The workers' compensation definitions of 'disability' reflect the purposes of workers' compensation laws. Those laws provide a system for securing prompt and fair settlement of employees' claims

When analyzing ADA claims, courts have used the tests and burdens of proof that developed under other anti-discrimination laws.[5] One significantly litigated issue occurs when a plaintiff, claiming to be "disabled" and unable to work, applies for disability payments (*i.e.*, social security) and subsequently files an ADA claim stating that he or she was discriminated against because of this disability.[6] The apparent conflict exists between claiming to be unable to work under the disability statute and then filing an ADA claim, which requires the plaintiff to prove that he or she is qualified and able to do the job.[7] Courts often used judicial estoppel to prevent a plaintiff from maintaining an ADA claim after that same plaintiff had applied for disability benefits and claimed to be unable to work.[8]

Part II of this Brief will look at the background of the ADA, disability statutes and the Third Circuit's prior use of judicial estoppel under ADA claims where those plaintiffs had also applied for disability payments.[9] Part III will discuss the United States Supreme Court's recent ruling on this issue, as well as the Third Circuit's subsequent interpretation of that Supreme Court holding.[10] Finally, Part IV will give a practical analysis of how attorneys should deal with the issue of judicial estoppel in Third Circuit ADA cases.[11]

II. BACKGROUND

A. *Americans with Disabilities Act*

The ADA was enacted to rectify the problem of discrimination against disabled persons in the workplace.[12] The ADA prevents employers from

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against employers for occupational injury and illness."); *Id.* at 5423 ("The purpose of disability insurance plans is to provide partial wage replacements when an employee becomes unable to work as a result of illness, injury, or disease.").

5. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517 (1993) (discussing procedures of Title VII discrimination case); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (discussing burden shifting under Title VII); Mariani & Robertson, *supra* note 1, at 655-56 (showing that ADA claims use same shifting of burdens and procedures as other discrimination statutes).

6. *See, e.g.*, McNemar v. Disney Store, Inc., 91 F.3d 610 (3d Cir. 1996) (discussing judicial estoppel of ADA claim).

7. *See id.* at 618 (showing court's belief that statements are inconsistent).

8. *See id.* (applying judicial estoppel to prevent inconsistent statements).

9. For a discussion of the historical background of the ADA, disability statutes and case law on judicial estoppel, see *infra* notes 12-57 and accompanying text.

10. For a discussion of the United States Supreme Court's recent stance on the issue of judicial estoppel in ADA cases, and the United States Court of Appeals for the Third Circuit's recent interpretation of that Supreme Court holding, see *infra* notes 58-133 and accompanying text.

11. For a discussion of how practitioners in the Third Circuit should analyze this issue, see *infra* notes 134-65 and accompanying text. *See* 42 U.S.C. § 12101(a)(3) (1994) (stating "discrimination against individuals with disabilities persists in such critical areas as employment").

12. *See* 42 U.S.C. § 12101(a)(3) (1994) (stating "discrimination against individuals with disabilities persists in such critical areas as employment").

discriminatorily hiring or firing disabled persons.[13] The statute strikes a balance between unfair prejudice against the disabled, and the employer's right to maintain high levels of productivity and employ a competent workforce.[14] The ADA accomplishes this balance by requiring the employer to make "reasonable accommodations" to allow a disabled person to perform the "essential functions" of a job.[15] Although, there has been much litigation as to what constitutes a "disability," "reasonable accommodation" and "essential function," those issues are not pertinent to the present discussion.[16]

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13. *See* 42 U.S.C. § 12112(a) (1994) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."); Mariani & Robertson, *supra* note 1, at 653 (discussing basic purpose and standards of ADA).

14. *See* Mariani & Robertson, *supra* note 1, at 655 ("Indeed, a person unable to work is not intended to be, and is not, covered by the ADA." (citing *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996))).

15. *See* 42 U.S.C. § 12112(b)(5)(A) (making discrimination in workplace applicable when employer fails to make reasonable accommodations for disabled employees); O'Brien, *supra* note 2, at 362 (discussing balance that ADA makes). One commentator summarized the balance and conflict between unlawful ADA discrimination and an employer's right to effectively run his or her business as follows:

> Under its employment provisions, the ADA allows a disabled person to sue an employer for failure to hire, or for termination from a present job, based on disability discrimination. It is difficult, however, to argue that a person who cannot walk, cannot talk, cannot see, is frequently ill, or even frequently depressed, does not have an impediment to job performance. Therefore, the ADA restricts its coverage to those cases where the employer's prejudice can be clearly distinguished from the actual diminished job performance of the disabled. The tool for making this determination is the concept of "reasonable accommodation."

Id.; *accord* 42 U.S.C § 12111(9) (defining and giving examples of what constitutes "reasonable accommodation" under ADA).

16. *See* 42 U.S.C. § 12111(9) (giving examples of reasonable accommodations). The statute states:

> The term "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 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.; *see* Hamlin v. Charter Township, 165 F.3d 426, 429 (6th Cir. 1999) (discussing whether front-line fire fighting is essential function of job of firefighter); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1163-64 (10th Cir. 1999) (discussing whether reassignment is reasonable accommodation); Pack v. KMart Corp., 166 F.3d 1300, 1305 n.5 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 45 (1999) (disagreeing with EEOC definition of disability); Laurin v. Providence Hosp., 150 F.3d 52, 56-57 (1st Cir. 1998) (discussing whether shift rotation was essential function of nursing); Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 783 n.3 (3d Cir. 1998) (supporting EEOC's definitions of disability); Aldrich v. Boeing Co., 146 F.3d 1265,

The mechanics of an ADA claim follow the procedures of most anti-discrimination statutes.[17] The plaintiff's prima facie case "must establish that: (1) he has a disability; (2) he is qualified for the position and can perform the essential functions of the position with or without a reasonable accommodation; and (3) the employer discriminated against him because of the disability."[18] The burden of production then shifts to the defendant employer to produce evidence of a nondiscriminatory business reason for the employment decision.[19] If the employer succeeds, then the burden of proof shifts back to the employee to show that the employer's reason was a "pretext" for discrimination.[20] In order to establish pretext, the employee must show that the employer's explanation is false, and that the real motivation for the decision was discrimination.[21]

B. *Disability Statutes*

The most common disability statute used to judicially estop ADA claims was the Social Security Act ("SSA").[22] Other types of disability statutes include workers' compensation laws and disability insurance plans.[23] While these statutes may have been created for different purposes and use different criteria than the SSA, they bring up the same issues and

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1272 (10th Cir. 1998) (discussing issue of reasonable accommodation), *cert. denied*, 526 U.S. 1144 (1999); EEOC COMPLIANCE MANUAL § 902 (defining disability for ADA purposes); Dennis Levandoski & Sheila Zakren, *Has the ADA Got Your Client Covered?*, TRIAL, Oct. 1999, at 35-41 (discussing generally disagreement between courts as to defining "disabilities," "essential functions" and "reasonable accommodations").

17. *See* 42 U.S.C. § 12117(a) ("The powers, remedies, and procedures set forth in [Title VII] shall be the powers, remedies, and procedures [of the ADA]."); Levandoski & Zakren, *supra* note 16, at 38 (noting ADA procedure mirrors Title VII, but noting ADA cases may place heavier burden on employers).

18. Mariani & Robertson, *supra* note 1, at 655 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)).

19. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993) (identifying test for Title VII claim); Krouse v. American Sterilizer Co., 126 F.3d 494, 500-01 (3d Cir. 1997) (using burden-shifting articulated in *Hicks* for ADA claim), *cert. denied*, 120 S. Ct. 1718 (2000); Mariani & Robertson, *supra* note 1, at 655 (citing *McDonnell Douglas*, 411 U.S. at 801).

20. *See Hicks*, 509 U.S. at 509-10 (developing "pretext" procedure); *Krouse*, 126 F.3d at 500-01 (endorsing *Hicks* pretext analysis for ADA claim).

21. *See Hicks*, 509 U.S. at 509 (establishing how to prove "pretext"); *Krouse*, 126 F.3d at 500-01 (adopting *Hicks* for ADA claim); Mariani & Robertson, *supra* note 1, at 656 ("To establish pretext, the plaintiff must come forth with sufficient evidence to show that (1) a discriminatory reason motivated the employer rather than the employer's proffered legitimate reason; or (2) the defendant's proffered explanation is 'unworthy of credence.'").

22. *See* 42 U.S.C. § 423 (1994) (establishing Social Security program).

23. *See* DEL. CODE ANN. tit. 19, §§ 2301, 2304 (1995) (requiring workers' compensation); N.J. STAT. ANN. § 34:15-36 (West 1988) (defining disability for workers' compensation); N.J. STAT. ANN. § 53:5A-10 (West 1986) (showing example of disability insurance plan); PA. STAT. ANN. tit. 77, § 411 (West 1992) (defining injury for purposes of workers' compensation).

problems regarding judicial estoppel under the ADA.[24] Disability programs are established to provide income to those individuals who are unable to work for themselves.[25] Commentators have urged that statutes like the SSA were set up in accordance with stereotypical notions depicting disabled persons as inferior and unable to provide for themselves.[26] This characterization contrasts with the ADA's purpose of giving disabled individuals the equal opportunity to work and provide for themselves.[27]

To receive some type of social security payment (Social Security Disability Insurance, "SSDI," or Supplemental Security Income, "SSI"), an individual must show that his or her physical or mental impairment is "of such severity that [he or she] is not only unable to do [his or her] previous work but cannot, considering [his or her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ."[28] For administrative purposes, the SSA's application process has a five-step inquiry, which allows for general presump-

24. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 800-05 (1999) (discussing judicial estoppel of ADA claim regarding Social Security benefits); Motley v. New Jersey State Police, 196 F.3d 160, 162-63 (3d Cir. 1999) (discussing judicial estoppel of ADA claim regarding prior disability insurance plans); *Krouse*, 126 F.3d at 498 (discussing judicial estoppel of ADA claims in regards to workers' compensation); EEOC, *supra* note 3, at 5418 ("The definitions of the terms used in the Social Security Act, state workers' compensation laws, disability insurance plans, and other disability benefits programs are tailored to the purposes of those laws and programs. Therefore, representations made under those laws and programs are not determinative of coverage under the ADA.").

25. *See* EEOC, *supra* note 3, at 5419 ("[The Social Security Act's] purpose is to provide a basic level of financial support for people who, because of disability, cannot support themselves."). The purposes of workers' compensation laws are similar. *See id.* at 5422 (discussing purpose of workers' compensation laws is to provide prompt compensation for employees injured at work). The purposes of disability statutes also do not mirror the purposes of the ADA. *See id.* at 5423 ("The purpose of disability insurance plans is to provide partial wage replacement when an employee becomes unable to work as a result of illness, injury, or disease.").

26. *See* O'Brien, *supra* note 2, at 360 (discussing history of SSA). One commentator discussed the somewhat stereotypical justification for SSDI as follows:

> [D]isabled individuals were institutionalized and treated as deranged or incompetent, a practice which continued well into the 1970s. The disabled were included with the homeless, the desperately poor, and the insane, as objects of charity for whom society had an obligation to provide support. Not until 1956 did the government add those with disabilities to the Social Security programs through the creation of SSDI. This program did not radically depart from the historic presumptions and stereotypes about the disabled. It provided federal financial assistance to those who, by accident of birth, trauma, or disease, were unable to provide for themselves.

Id.

27. *See* 42 U.S.C. § 12101 (1994) (listing findings and purposes of Congress in enacting ADA); O'Brien, *supra* note 2, at 361 (noting purpose of SSA was "not to rectify employment misunderstandings").

28. Mariani & Robertson, *supra* note 1, at 657; *accord* 42 U.S.C. § 423(d)(2)(A) (1994) (defining what level of disability is needed to obtain Social Security benefits).

tions as to whether an individual is disabled under the statute.[29] Under this inquiry, there is no factual assessment of the disabilities of each individual or of the essential functions or requirements of each particular job.[30] For example, an individual who has the HIV virus or is blind has a "listed" disability under the five-step analysis and is automatically eligible for disability payments.[31] There is also no inquiry into whether the applicant's former employer can make "reasonable accommodations" so as to allow the applicant to continue employment.[32] These are just a few examples illustrating that the purposes, procedures and definitions used in other disability statutes do not necessarily mirror those of the ADA.[33]

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29. *See* 20 C.F.R. § 404.1520 (1999) (giving five-step analysis to be used by Social Security Administration in determining whether applicant should be granted Social Security benefits); EEOC, *supra* note 3, at 5520-21 (listing five questions to be asked in application for benefits); Mariani & Robertson, *supra* note 1, at 657-58 (describing application evaluation). Specifically, the five-step analysis asks:

> (1) Is the claimant currently engaging in "substantial gainful activity"? (If the answer is yes, the claim is denied; if the answer is no, the claim continues to the next step.)
>
> (2) Does the claimant have a "severe" impairment? (If the answer is no, the claim is denied; if the claimant has an impairment that significantly limits his/her ability to work—that is, it is "severe"—the claim continues to step 3.)
>
> (3) Does the claimant have an impairment that is equivalent to any impairment the SSA has listed as so severe that it automatically preclude substantial gainful activity? (If the claimant has an impairment that is medically the equivalent of a listed impairment, the claimant is presumed disabled by the SSA and benefits are granted; if the claimant does not have a listed impairment, the claim proceeds to step 4.)
>
> (4) Does the impairment prevent the claimant from performing his/her "past relevant work"? (If the claimant can perform his/her past relevant work, the claim is denied; if the claimant cannot perform such work, the claim continues to step 5.)
>
> (5) Does the impairment prevent the claimant from performing any other type of work? (If the SSA determines that the claimant is able to perform work which exists in the national economy, the claim is denied; if the SSA determines that the claimant is unable to perform other work, considering his/her age, education, and past work experience, benefits are granted.)

EEOC, *supra* note 3, at 5420-21.

30. *See* EEOC, *supra* note 3, at 5415-16 (discussing non-fact specific generalizations used under SSA that are in contrast to factual inquiries made under ADA).

31. *See* 20 C.F.R. pt. 404, subpt. P, app. 1, §§ 2.00(A), 14.00(D) (listing visual impairments and HIV infections as diseases that automatically allow Social Security benefits to be awarded).

32. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 803 (1999) (stating major difference between ADA cases and SSA decision is that SSA does not analyze issue of "reasonable accommodation").

33. *See generally* EEOC, *supra* note 3 (discussing justifications for abandoning use of judicial estoppel in ADA claims).

C. *Historical Use of Judicial Estoppel of ADA Claims in the Third Circuit*

The language of the ADA is silent regarding the significance of a plaintiff's assertions of total disability under another statute.[34] Thus, the courts are left to resolve the apparent conflict between the statutes: the plaintiff, on the one hand, wants social security disability payments because he or she is *unable* to work and, on the other hand, claims that he or she was discriminated against because he or she is *able* to work.[35] The circuit courts have used different versions of judicial estoppel, or "preclusion of inconsistent positions," to dismiss ADA claims because of the apparent conflict.[36] This section takes a brief look at how the Third Circuit

34. *See* 42 U.S.C. §§ 12101-17 (1994) (failing to indicate Congress' intent as to effect of prior assertions of disability on ADA claims).

35. *See* Westman, *supra* note 3, at 401 ("[The SSA and ADA] statutes . . . are silent as to their impact on each other.").

36. *See* Wilson v. Chrysler Corp., 172 F.3d 500, 503-05 (7th Cir. 1999) (estopping claim because of inconsistent positions, but noting SSA application does not conclusively result in estoppel); Flowers v. Komatsu Mining Sys., Inc., 165 F.3d 544, 557 (7th Cir. 1999) (finding benefits not relevant to this particular ADA case); McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 562-63 (5th Cir. 1998) (using "rebuttable presumption" standard); Cleveland v. Policy Mgmt. Sys. Corp., 120 F.3d 513, 518 (5th Cir. 1998) (creating "rebuttable presumption" standard), *rev'd*, 526 U.S. 795, 802-06 (1999); Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376, 381-82 (6th Cir. 1998) (holding ADA claims not automatically barred because of prior disability statement), *cert. denied*, 526 U.S. 1144 (1999); Downs v. Hawkeye Health Serv., Inc., 148 F.3d 948, 952 (8th Cir. 1998) (requiring "strong countervailing evidence" of being qualified individual when prior statement seems contradictory); Moore v. Payless Shoe Source, Inc., 139 F.3d 1210, 1213 (8th Cir. 1998) (holding plaintiff's evidence could not overcome prior statement of being unable to work), *cert. denied*, 120 S. Ct. 589 (1999); Johnson v. Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998) (denying plaintiff's claim because of inconsistent claims under summary judgement, but noting judicial estoppel may be appropriate when plaintiff's inconsistent statements "amount to an affront of the court"); Aldrich v. Boeing Co., 146 F.3d 1265, 1268-69 (10th Cir. 1998) (holding payment of private disability benefits does not automatically bar ADA claim, but may be relevant to determining plaintiff's status as "qualified individual"); Rascon v. US West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998) (holding SSA benefits don't automatically estop ADA claim, but are relevant); Taylor v. Food World, Inc., 133 F.3d 1419, 1423 (11th Cir. 1998) (stating use of judicial estoppel depends on particular facts of each case including specific statements made in disability benefits application); Krouse v. American Sterilizer Co., 126 F.3d 494, 503 (3d Cir. 1997) (discussing disagreement over judicial estoppel in realm of ADA claims); Blanton v. Inco Alloys Int'l, Inc., 123 F.3d 916, 917 (6th Cir. 1997) (refusing to adopt per se use of judicial estoppel); McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 1164 (7th Cir. 1997) (finding disability claim is not conclusive in estopping ADA claim); Weigel v. Target Stores, 122 F.3d 461, 467-68 (7th Cir. 1997) (holding benefits relevant, but not conclusive and denied use of estoppel); Dush v. Appleton Elec. Co., 124 F.3d 957, 963 (8th Cir. 1997) (prior statement showed plaintiff was unable to work for ADA purposes); Talavera v. School Bd., 129 F.3d 1214, 1220 (11th Cir. 1997) (holding judicial estoppel in ADA claim is not automatically used because of prior disability statement, but depends on facts of each case); Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 587 (D.C. Cir. 1997) (holding sworn statement as to disability was relevant to case, but not relevant for purposes of summary judgment), *cert. denied*, 120 S. Ct. 614 (1999); D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 5 (1st Cir. 1996) (refusing to estop plaintiff); McNemar v. Disney

used judicial estoppel to deal with the conflicting statements made under the ADA and disability statutes.[37]

Judicial estoppel was developed to "protect the integrity of the courts by 'preventing parties from playing fast and loose with the courts in assuming inconsistent positions.'"[38] The Third Circuit developed a two-part in-

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Store, Inc., 91 F.3d 610, 617 (3d Cir. 1996) (estopping plaintiff's ADA claim); Budd v. ADT Sec. Sys., Inc., 103 F.3d 699, 700 (8th Cir. 1996) (granting summary judgment against plaintiff because SSDI application demonstrated he was unable to work); Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996) (granting summary judgment because plaintiff's SSDI application and doctor's testimony indicated an inability to work); August v. Offices Unlimited, Inc., 981 F.2d 576, 584 (1st Cir. 1992) (granting summary judgment against plaintiff bound by statements made for disability benefits); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (refusing to use judicial estoppel because SSA statute and ADA can coexist, though SSA claim is relevant to determine seriousness of handicap); Mariani & Robertson, *supra* note 1, at 665-72 (discussing circuit split). One commentator summarized the difference of opinion as follows:

> [T]he ADA and the SSA, when read together, appear to clearly provide a "window" for some persons to pursue claims under the ADA—despite having represented that they are "totally disabled," as they must, to qualify for SSA benefits. While there did not seem to be any real dispute among the circuits as to whether this window existed, there was a dispute as to how wide open it should be. On the one side, the Third and Fifth Circuits considered the window to be barely cracked. On the other side, the District of Columbia Circuit, like the EEOC, considered the window to be wide open. The First, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits took positions in between the two sides.

Id. at 665-66; *accord* Hamilton, *supra* note 2, at 137-49 (discussing circuit split by categorizing circuits into three approaches); O'Brien, *supra* note 2, at 353 n.21 (noting various circuit approaches to EEOC's position that judicial estoppel should not be used); Jorge M. Leon, Note, *Two Hats, One Head: Reconciling Disability Benefits and the Americans with Disabilities Act of 1990*, 1997 U. ILL. L. REV. 1139, 1147-53 (1997) (discussing disagreement among circuits).

37. *See, e.g., Krouse*, 126 F.3d at 498; *McNemar*, 91 F.3d at 616-19.

38. Hamilton, *supra* note 2, at 134-35 (citing *McNemar*); *see* Lawrence B. Solum, *Caution! Estoppel Ahead: Cleveland v. Policy Management Systems Corporation*, 32 LOY. L.A. L. REV. 461, 474-95 (1999) (discussing history and purpose of judicial estoppel); Kimberly Jane Houghton, Comment, *Having Total Disability and Claiming It, Too: The EEOC's Position Against the Use of Judicial Estoppel in Americans with Disabilities Act Cases May Hurt More than It Helps*, 49 ALA. L. REV. 645, 650 (1998) (discussing purposes of judicial estoppel). Judicial estoppel has been applied in a variety of contexts, but as commentators and courts have noted, decisions that use judicial estoppel usually have the following five factors present:

> (1) The two positions must be taken by the same party; (2) the positions must be taken in judicial or quasi-judicial administrative proceedings; (3) the record of the two proceedings must clearly reflect that the party to be estopped intended the triers of fact to accept the truth of the facts alleged in support of the positions; (4) the party taking the positions must have been succeeded in maintaining the first position and must have received some benefit thereby in the first proceeding; (5) the two positions must be totally inconsistent.

Muellner v. Mars, Inc., 714 F. Supp. 351, 357 (N.D. Ill. 1989) (quoting *Department of Trans. v. Grawe*, 447 N.E.2d 467, 471 (Ill. App. Ct. 1983)). *See* Hamilton, *supra* note 2, at 135 (discussing use of estoppel); O'Brien, *supra* note 2, at 357 (citing *Muellner* to summarize traditional elements present when judicial estoppel is invoked).

quiry to determine whether the courts should estop a plaintiff from asserting conflicting positions.[39] First, the plaintiff must actually assert inconsistent positions.[40] Second, the plaintiff must have made the inconsistency in "bad faith—*i.e.*, with intent to play fast and loose with the court."[41]

The United States Court of Appeals for the Third Circuit's most significant application of judicial estoppel to an ADA claim occurred in *McNemar v. Disney Store, Inc.*[42] In that case, the plaintiff was HIV positive.[43] The employer stated that the employee was dismissed because he had taken cash from the store register.[44] After McNemar was dismissed, he applied for and received Social Security benefits, New Jersey state disability payments and a disability exemption from his student loan from the Pennsylvania Higher Education Agency.[45] In his effort to receive these benefits, McNemar and his physicians swore "under penalty of perjury that he has been totally and permanently disabled and unable to work" for a period beginning five weeks before his dismissal.[46]

The Third Circuit used judicial estoppel to uphold the lower court's granting of summary judgment in favor of the employer.[47] The court found that the purpose of judicial estoppel is "to protect the integrity of the courts" and believed estoppel was needed in cases like McNemar's to

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39. *See McNemar*, 91 F.3d at 618 (discussing *Ryan* test); *Krouse*, 126 F.3d at 501 (citing Third Circuit's two-part test for use of judicial estoppel); Ryan Operations G.P. v. Santium-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996) (articulating two part analysis to be used in Third Circuit judicial estoppel cases); Scarano v. Central R.R. Co., 203 F.2d 510, 513 (3d Cir. 1953) (establishing concern of litigants "playing 'fast and loose with the courts'").

40. *See Ryan*, 81 F.3d at 361 (developing test).

41. *Id.* According to the Third Circuit, "[j]udicial estoppel, sometimes called the 'doctrine against the assertion of inconsistent positions,' is a judge-made doctrine . . . . It is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from 'playing 'fast and loose with the courts.'" *Id.* at 358 (citing *Scarano*, 203 F.2d at 513).

42. 91 F.3d 610 (3d Cir. 1996).

43. *See id.* at 613 (discussing facts of case).

44. *See id.* at 614-15 (showing formal company policy of discharge for such infractions, and statement from high ranking personnel officers "that McNemar should not be penalized less severely than other employees in similar situations simply because of his disclosure [that he was HIV positive]").

45. *See id.* at 615-16 (noting statements made in connection with applications for all three programs).

46. *See id.* at 615 (stating his doctors indicated that he was totally disabled and unable to work for period beginning five weeks before his discharge).

47. *See id.* at 617 (upholding district court's use of estoppel because its use was within the court's discretion); McNemar v. Disney Stores, Inc., No. CIV.A. 94-6997, 1995 WL 390051, at *4 (E.D. Pa. June 30, 1995) (stating "it is the province of the legislature rather than this Court to authorize such a double recovery . . . . This Court fails to understand how the ADA's goals would be thwarted by rejecting the principles of judicial estoppel in this case.").

prevent plaintiffs from "'speak[ing] out of both sides of [their] mouth with equal vigor and credibility before [the] court.'"[48]

The court found that the plaintiff failed to establish a prima facie case because the assertions made under the disability statutes indicating an inability to work showed that the plaintiff was not a "qualified" individual under the ADA.[49] Further, the court believed that the purpose of the disability statute was not to give benefits to individuals who were capable of working and providing for themselves.[50] Also, the court rejected the notion that there was a significant difference in the definitions of disability under the statutes.[51] The court put little weight on the fact that AIDS was a "presumptive disability" or the fact that no fact-sensitive investigation into the plaintiff's condition or job requirements were necessary under the SSA.[52] Instead, the court emphasized the fact that the plaintiff had made his previous statements of his inability to work to the United States,

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48. *McNemar*, 91 F.3d at 616, 618 (quoting *Reigel v. Kaiser Found. Health Plan*, 859 F. Supp. 963, 970 (E.D.N.C. 1994)).

49. *See id.* at 618-19 (upholding district court's finding that plaintiff failed to make prima facie case). In invoking judicial estoppel, the court noted that it had not had the opportunity to invoke the doctrine in an ADA claim. *See id.* (noting that Third Circuit had not previously applied judicial estoppel to similar facts). The court, however, agreed with the district court that at that time, "'most federal courts agree that an employee who represents on a benefits application that he is disabled is judicially estopped from arguing that he is qualified to perform the duties of the position involved.'" *Id.* at 618 (quoting *McNemar*, 1995 WL 390051, at *3). The court relied on several other federal cases that supported its use of judicial estoppel. *See id.* at 619 (listing other decisions that supported use of judicial estoppel in context of ADA claims); August v. Offices Unlimited., Inc., 981 F.2d 576, 582-84 (1st Cir. 1992) (denying plaintiff opportunity to claim to be "qualified individual" after claiming to be "totally disabled" in applying for disability benefits); Garcia-Paz v. Swift Textiles, 873 F. Supp. 547, 554 (D. Kan. 1995) (estopping ADA claim after plaintiff applied for long-term disability benefits); Kennedy v. Applause, Inc., No. CV 94-5344, 1994 WL 740765, at *3-4 (C.D. Cal. Dec. 6, 1994) (estopping plaintiff who claimed to be completely disabled); Reigel, 859 F. Supp. at 967-70 (estopping plaintiff under ADA claim because of previous assertion of disability). The court found little significance in a case relied upon by the plaintiff to prevent invocation of judicial estoppel. *See McNemar*, 91 F.3d at 619 n.8 (rejecting *Overton v. Reilly*, 977 F.2d 1190, 1196 (7th Cir. 1992) where court refused to preclude plaintiff's claim under Rehabilitation Act of being qualified to work despite prior SSA determination). The court noted that the present case was distinguishable from *Overton* because there was evidence that the plaintiff in *Overton* had actually worked despite the disability and because *Overton* did not expressly deal with judicial estoppel. *See id.* (finding little precedential value in *Overton*). More important, the court found *Overton* to be of little value because the Seventh Circuit subsequently invoked judicial estoppel in another similar case. *See id.* (citing *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 191-92 (7th Cir. 1995)).

50. *See McNemar*, 91 F.3d at 620 (finding no indication that Congress or New Jersey legislature intended to give disability benefits to those who could work and any "double recovery" should be authorized by legislation).

51. *See id.* (rejecting argument that definitions of disability are different).

52. *See id.* (finding presumptions irrelevant because plaintiff still had to say "under penalty of perjury that he was physically unable to work").

New Jersey and Pennsylvania governments all under the threat of perjury.[53]

The decision in *McNemar* generated a considerable amount of criticism from academics and other circuits.[54] Generally, the decision was perceived to adopt a *per se* rule that individuals claiming some sort of total disability were judicially estopped from making their prima facie case of being a "qualified individual" under the ADA.[55] As a result, district courts throughout the Third Circuit upheld *McNemar* as the law, but many courts factually distinguished the cases.[56] This was especially true after the Court

53. *See id.* (stressing penalty of perjury as justification for estoppel).

54. *See* Rascon v. US West Communications, Inc., 143 F.3d 1324, 1330-32 (10th Cir. 1998) (noting *McNemar*, but refusing to adopt judicial estoppel); Krouse v. American Sterilizer Co., 126 F.3d 494, 502-03 n.3 (3d Cir. 1997) (showing *McNemar* has been subject of considerable criticism); Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 587 (D.C. Cir. 1997) (disagreeing with Third Circuit's reasoning); Smith v. Lindenmeyr Paper Co., No.CIV.A. 95-3973, 1997 WL 312077, at *4 n.5 (E.D. Pa. June 4, 1997) (noting criticism of decision and believing Third Circuit will soon readdress issue); EEOC, *supra* note 3, at 5425 (finding *McNemar* holding "especially troubling"); Mariani & Robertson, *supra* note 1, at 670 (noting *McNemar* has been "subject to some criticism"); O'Brien, *supra* note 2, at 357 (criticizing *McNemar* as not being consistent with use of judicial estoppel); Solum, *supra* note 38, at 495 (urging Supreme Court to reject use of judicial estoppel); Westman, *supra* note 3, at 423-24 (analyzing why judicial estoppel should not be used in ADA cases); Marney Collins Sims, Comment, 34 HOUS. L. REV. 843, 870 (1997) (criticizing use of estoppel).

55. *See* Talavera v. School Bd., 129 F.3d 1214, 1217-18 (11th Cir. 1997) (noting perception that *McNemar* adopted a per se rule); Dush v. Appleton Elec. Co., 124 F.3d 957, 961 (8th Cir. 1997) (stating *McNemar* adopted "judicial estoppel as a per se bar"); Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1441-42 (N.D. Cal. 1996) (perceiving *McNemar* as per se bar); EEOC, *supra* note 3, at 5425 (disapproving of *McNemar* because there was no "individualized inquiry mandated by the ADA"); Regina M. Grattan, *Putting the Remedial Back into Remedy: A Rejection of Judicial Estoppel for ADA Claimants Receiving Social Security Disability Benefits*, 66 GEO. WASH. L. REV. 836, 838 (1998) ("The U.S. Court of Appeals for the Third Circuit held that the receipt of disability benefits automatically bars a claim under the ADA."); Robert C. Ludolph & Barbara Eckert Buchanan, *Second Thoughts on Conflicting Disability Representations and Handicap Claims: Heads You Win Tails You Lose*, 77 MICH. BUS L.J. 1054, 1058 (1998) (comparing *McNemar* with other courts that did not adopt per se rule).

56. *See* Long v. Sears Roebuck & Co., 105 F.3d 1529, 1548 (3d Cir. 1997) (analogizing *McNemar* ADA use of estoppel to claim under Older Workers Benefit Protection Act); Dayoub v. Penn-Del Directory Co., 48 F. Supp. 2d 486, 490-91 & n.3 (E.D. Pa. 1999) (questioning and distinguishing case from *McNemar*); Daliessio v. Depuy, Inc., No.CIV.A. 96-5295, 1998 WL 24330, at *6 (E.D. Pa. Jan. 23, 1998) (casting doubt as to validity of *McNemar*); Mensah v. Resources for Human Dev., No. 97-2517, 1997 WL 792901, at *5 (E.D. Pa. Dec. 23, 1997) (distinguishing *McNemar*); Marsaglia v. L. Beinhauer & Son, Co., 987 F. Supp. 425, 429-30 nn.4-5 (W.D. Pa. 1997) (upholding use of judicial estoppel while also taking into account concerns that are basis of criticism); Lindenmeyr Paper Co., 1997 WL 312077, at *4 & n.5 (upholding use of judicial estoppel because of *McNemar* holding, even though criticism of *McNemar* was noted); DeJoy v. Comcast Cable Communications Inc., 968 F. Supp. 963, 983 (D.N.J. 1997) (following *McNemar*, but did not invoke judicial estoppel because facts were different); Erit v. Judge, Inc., 961 F. Supp. 774, 779 (D.N.J. 1997) (preventing inconsistent statements by using judicial estoppel).

of Appeals for the Third Circuit later, in dicta, expressed concern that the criticism of *McNemar* may suggest that the case was wrongly decided and that the court should re-evaluate the issue as soon as possible.[57]

III. RECENT CASES

A. *The U.S. Supreme Court's Stance*

Due to the disagreement among the circuits and the criticism of decisions like *McNemar*, the United States Supreme Court finally settled the issue of how to apply judicial estoppel under the ADA in *Cleveland v. Policy Management Systems Corp.*[58] The case settles any conflict among the circuits as to what test to apply.[59] Nevertheless, how the circuits apply the test may differ.[60]

1. *Facts*

Carolyn Cleveland worked at Policy Management Systems.[61] Her job was to do background checks on prospective employees.[62] Cleveland suffered a stroke, which injured her memory, concentration and speaking skills.[63] She took a leave of absence and three weeks later applied for SSDI payments, claiming to be unable to work.[64] Approximately three months later her condition improved and her physician cleared her to return to work; at which time, she began to work for Policy Management again.[65] She reported this development to the Social Security Administration.[66] Three months later, her application was denied because she had

57. *See Krouse*, 126 F.3d at 502-03 (noting criticism of *McNemar*, but refusing to address issue of whether it was correctly decided, because plaintiff did not need to prove he was "qualified individual"). The opinion stated "Judge Becker is persuaded by the authorities [criticizing *McNemar*] that *McNemar* was wrongly decided, and believes that the court should reconsider it at its first opportunity." *Id.* at 503 n.4. After *Krouse*, several district court opinions questioned whether *McNemar* was still good law. *See Dayoub*, 48 F. Supp. 2d at 490 ("[The] Court of Appeals for the Third Circuit has cast doubt on the continuing validity of *McNemar*."); *Daliessio*, 1998 WL 24330, at *6 (casting doubt on *McNemar* after *Krouse*).

58. 526 U.S. 795 (1999).

59. *See id.* at 800 (granting certiorari to settle "disagreement among the Circuits about the legal effect upon an ADA suit of the application for, or receipt of, disability benefits").

60. *See* Mariani & Robertson, *supra* note 1, at 666 ("Although [the prior circuits' tests] may have been effectively overruled by *Cleveland*, [the prior approaches] nevertheless provide a preview as to how the courts of appeals may determine when a plaintiff's explanation is 'sufficient' [under *Cleveland*].").

61. *See Cleveland*, 526 U.S. at 799 (discussing facts of case); *Employment: Otherwise Qualified*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 532, 532-33 (1999) (discussing facts and holding of case) [hereinafter *Employment*].

62. *See Cleveland*, 526 U.S. at 799 (noting plaintiff began job in August).

63. *See id.* (stating stroke occurred on Jan. 7, 1994).

64. *See id.* (claiming to be "disabled" and "unable to work").

65. *See id.* (noting plaintiff's improved condition).

66. *See id.* (noting disclosure two weeks after plaintiff returned to work).

begun working again.[67] Four days after the denial of social security benefits, Policy Management fired her.[68]

Two months after the dismissal, Cleveland asked the Social Security Administration to reconsider her application.[69] She stated, "I was terminated due to my condition and I have not been able to work since. I continue to be disabled."[70] She also noted that she tried to return to work for a brief time, but "Policy Management Systems terminated her because she 'could no longer do the job' in light of her 'condition.'"[71] Ultimately, Cleveland was awarded benefits retroactively to the day she had the stroke.[72] Two weeks before the Social Security Administration made the benefits decision, Cleveland filed an ADA lawsuit claiming "Policy Management Systems had 'terminat[ed]' her employment without reasonably 'accommodat[ing] her disability.'"[73] Specifically, she stated that she had asked for additional training and extra time to complete her work, but that the employer denied these requests.[74]

The United States District Court for the Northern District of Texas refused to hear the merits of Cleveland's ADA claim because the court felt her application and receipt of SSDI benefits demonstrated that she was totally disabled.[75] Therefore, she was estopped from claiming she was a "qualified individual" who could perform the "essential functions" of the job.[76] The United States Court of Appeals for the Fifth Circuit affirmed the granting of summary judgment in favor of the employer.[77] The standard used by the court was that an application for disability benefits creates a "rebuttable presumption that the claimant . . . is judicially estopped from asserting that he is a 'qualified individual with a disability.'"[78] The court noted that the continued claims of total disability created this presumption, and Cleveland failed to produce any evidence to rebut that pre-

67. *See id.* (discussing facts of case).

68. *See id.* (noting plaintiff's dismissal).

69. *See id.* (noting plaintiff's new statement).

70. *Id.*

71. *Id.*

72. *See id.* (noting SSA's granting of disability benefits to Cleveland).

73. *Id.*

74. *See id.* (discussing which reasonable accommodations Cleveland was denied).

75. Cleveland v. Policy Mgmt. Sys. Corp., 120 F.3d 513, 519 (5th Cir. 1997), *aff'g* Cleveland v. Policy Mgmt. Sys. Corp., 3:95-CV-2140-H. (N.D. Tex. 1997), *vacated by* 526 U.S. 795 (1999).

76. *See id.* at 518-19 (affirming district court holding that granted summary judgment against plaintiff because she failed to show she was "qualified individual" under ADA).

77. *See id.* at 519 (affirming analysis of district court).

78. *Id.* at 518.

sumption.[79] The Supreme Court granted certiorari to determine the proper use of judicial estoppel in an ADA case.[80]

2. *Analysis*

A unanimous United States Supreme Court held that the presumptive rule developed by the Fifth Circuit was incorrect.[81] The Court believed that the negative presumption was the result of the lower court's belief that the Social Security statute and the ADA could not comfortably exist side by side because they "inherently conflict."[82] The Supreme Court felt otherwise and stated there are several reasons why the two statutes can "comfortably exist side by side" and are not "wholly inconsistent," therefore concluding that the negative presumption leading to judicial estoppel was incorrect.[83]

The first reason proffered by the Court was that the determination of whether an individual qualifies for Social Security disability benefits does not take into account reasonable accommodations that an employer could make which would enable a disabled person to continue working.[84] An ADA claim, however, does look at whether the employee could perform the essential functions of his or her job with reasonable accommodations.[85] Therefore, "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."[86]

Secondly, the Court believed that the highly impersonal and formal way in which SSDI claims are administered showed that the statutes are

79. *See id.* ("Cleveland continuously and unequivocally represented to the SSA that she is totally disabled and completely unable to work. As her statements are unambiguous and previously uncontroverted, she cannot now be heard to complain that she could perform the essential functions of her job.").

80. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 800 (granting certiorari to settle disagreement among circuits).

81. *See id.* at 802-03 (holding courts should not apply any type of presumption in cases like *Cleveland*).

82. *See id.* at 802 (explaining reasoning for lower court's use of estoppel, that plaintiff is making inherently contradictory statements, namely "I am too disabled to work" and "I am not too disabled to work").

83. *See id.* at 802-03 (stating "there are too many situations in which a SSDI claim and an ADA claim can comfortably exist side by side").

84. *See id.* at 803 (noting reasonable accommodation language present in ADA claims, but not necessary in SSDI determination); *see also Employment, supra* note 61, at 533 (explaining justifications used by Court); *Disability Estoppel Rule Rejected,* 14 FED. LITIGATOR 170 (1999) (discussing reasoning of Court); EEOC, *supra* note 3, at 5426-28 (urging same rationale prior to Supreme Court decision); *Selected Labor & Employment Law Updates* 2 U. PA. J. LAB. & EMPL. L. 369, 369-70 (1999) (discussing holding and rationale of Court) [hereinafter *Employment Law Updates*].

85. *See* 42 U.S.C. § 12111(9)(B) (1994) (listing possible examples of reasonable accommodations for ADA claims).

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

not necessarily inconsistent.[87] As already discussed, the five-step process of a SSDI application is very categorical and does not involve individualized assessments of a person's particular disabilities or of the individual's particular job requirements.[88] The large number of SSDI applications requires such a process, but the simplification is different than the highly fact-specific application of an ADA claim.[89]

The Court went on to stress that disability benefits can continue even after an individual has returned to work.[90] Accordingly, the payment of benefits does not always mean an individual is, or is claiming to be, totally unable to work.[91] Also, the Court noted that an individual's disability might worsen over time.[92] Therefore, a person who seeks disability benefits may make statements that do not reflect his or her condition at the time of the earlier employment decision bringing rise to the ADA claim.[93] The Court thought these were also justifications as to why statements made under a disability application do not "inherently conflict" with an ADA prima facie case.[94]

Finally, the Court reasoned that when an individual has merely applied for, but has not received any disability payment, the alleged inconsistencies are just a normal part of the legal system.[95] Rules of civil procedure allow a party to set forth several different claims in order to seek a remedy.[96] Parties are often allowed to argue in the alternative or

87. *See id.* at 804 (noting the presumptions and procedures used by SSA are further examples of how benefits applications can "comfortably exist" and are not "inherently inconsistent" with ADA claims).

88. *See* 20 C.F.R. § 404.1520 (2000) (developing five-step procedure to be used by SSA which includes list of "presumptive disabilities" that do not require factual inquiries into applicant's particular characteristics).

89. *See* EEOC, *supra* note 3, at 5424 ("Unlike the definitions under other statutory and contractual schemes, which permit generalized inquiries, the definition of 'qualified individual with a disability' under the ADA always requires an individualized inquiry into the ability of a particular person to meet the requirements of a particular position."); *Employment, supra* note 61, at 533 (discussing rationale of Court).

90. *See* 42 U.S.C. §§ 422(c), 423(e)(1) (1994) (allowing Social Security benefits to continue during "trial work" period); *Cleveland,* 526 U.S. at 805 (noting possibility of individuals receiving benefits while also being gainfully employed).

91. *See Cleveland,* 526 U.S. at 805 (stating "the SSA sometimes grants SSDI benefits to individuals, who not only can work, but are working").

92. *See id.* (noting timing is factor that can allow plaintiff to receive SSDI benefits, while also holding valid ADA claim).

93. *See id.* (noting change in condition is possible reason why statutes can coexist).

94. *See id.* (giving justifications why ADA claim can coexist with disability benefits).

95. *See id.* (stating alternative theories are normal part of American legal system).

96. *See, e.g.,* FED. R. CIV. P. 8(e)(2) (permitting party to "set forth two or more statements of a claim or defense alternatively . . . [and] state as many separate claims or defenses as the party has regardless of consistency").

hypothetically.[97] Therefore, there should be no different rule when parties are arguing for disability payments and, in the alternative, for a remedy of an ADA violation.[98]

As a result, the Court concluded that there should neither be a per se use of judicial estoppel nor should there even be a rebuttable presumption in this type of ADA case.[99] The Court did conclude, however, that the plaintiff could not simply ignore the previous statement made regarding the disability benefits.[100] Instead, the plaintiff must offer a "sufficient explanation" to resolve the contradiction.[101] Otherwise, claiming to be "totally disabled" without an explanation would negate an essential element of the plaintiff's prima facie case.[102]

According to the Court, "[t]o 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 accommodation.'"[103] Specifically, Cleveland's brief stated that the prior statements "'were made in a forum which does not consider the effect that reasonable workplace accommodations would have on the ability to work.'"[104] Also, Cleveland explained that at the time the statements were made, she was totally disabled, but that was not the case at the time of the employment decision.[105] The Court remanded the case under this standard to give the parties the opportunity to contest these two explanations of the inconsistency.[106]

B. *The Third Circuit's Interpretation*

The United States Court of Appeals for the Third Circuit recently had the opportunity to apply *Cleveland* to another ADA case in *Motley v. New*

97. *See id.* (allowing alternative pleadings).

98. *See Cleveland*, 526 U.S. at 805 (ruling ADA/SSDI alternative theories should be no different than normal civil pleadings).

99. *See id.* (refusing to adopt any sort of legal presumption in ADA cases involving plaintiffs who receive Social Security benefits).

100. *See id. at* 805-06 (explaining that in some situations benefits application statement may turn out to actually contradict ADA).

101. *See id.* at 804-06 (requiring explanation sufficient enough to explain inconsistency and survive summary judgment).

102. *See* 42 U.S.C. § 12111(8) (1994) (placing burden on plaintiff to prove he or she is qualified individual capable of performing essential function of job with or without reasonable accommodations).

103. *Cleveland*, 526 U.S. at 807.

104. *Id.*

105. *See id.* (stating truth of benefits statements at time of application, but not necessarily true prior to that at time of termination).

106. *See id.* (remanding case to determine case on merits); Cleveland v. Policy Mgmt. Sys. Corp., 195 F.3d 803, 803 (5th Cir. 1999) (remanding case to district court).

Jersey State Police.[107] The court found that the plaintiff had failed to offer a sufficient explanation for the inconsistent statements to survive summary judgment.

1. *Facts of* Motley

Motley was a New Jersey State Police Officer who was injured in 1990 when an accused drug dealer dragged him 150 feet with his car and then crashed into a pole after a drug bust had gone astray. Motley was put on limited duty due to his injuries Prior to his injuries, Motley had been promoted to Detective II in 1989.

New Jersey mandates that all its officers take an annual physical examination.[108] A poor performance in a physical examination prevents officers from being promoted.[109] After the injuries to his knees, back, neck, shoulder and eye, Motley never performed successfully at a physical examination.[110] As a result, Motley never received a promotion to Detective I. Motley filed a grievance because he was not recommended for promotion in 1991. Nothing ever came of that grievance, however, and he was not recommended for a promotion again in 1992 or 1993.

At this time, Motley tried to obtain an accidental disability pension. New Jersey grants this benefit if a police officer can get a medical board to state that the officer is "permanently and totally disabled . . . and . . . physically incapacitated for the performance of his usual duties."[111] Motley succeeded in obtaining the disability pension because a medical board stated that he was both permanently and totally disabled and unable to perform the duties of a New Jersey State Police Officer.[112] After obtaining the disability pension, Motley commenced an action under the ADA and New Jersey's equivalent state provision.[113] The district court, however, found that Motley was judicially estopped from claiming he was qualified for the job because of his previous statements made to obtain the disability pension.[114]

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107. 196 F.3d 160 (3d Cir. 1999).

108. *See id.* (noting purpose of exam is to be able to handle violent confrontations).

109. *See id.* (stating temporary disabilities were decided on case-by-case basis).

110. *See id.* (indicating plaintiff's failure of exam or refusal to participate).

111. *Id.* (quoting New Jersey statute); N.J. STAT. ANN. § 5:5a-10 (West 1986) (setting out requirements for retirement benefits to New Jersey State Police Officers injured on the job, including a medical determination that applicant is "permanently and totally disabled").

112. *See Motley,* 196 F.3d at 163 (noting continued payment of benefits to plaintiff).

113. *See* 42 U.S.C. § 12112 (1994) (stating general rule of employment under ADA); N.J. STAT. ANN. §§ 10:5-1, 4.1 (West 1986) (creating New Jersey "Law Against Discrimination" and including prohibitions of discrimination against handicapped persons in employment).

114. *See Motley,* 196 F.3d at 162 (affirming district court's decision to grant summary judgment).

2. *Analysis*

A majority of the appellate court affirmed the district court's ruling. The opinion stated that though the plaintiff was not estopped from bringing the claim, the defendant was simply not entitled to survive summary judgment.[115]

The court took the opportunity to discuss the implication of its prior holding in *McNemar*.[116] The court noted the criticism *McNemar* had received from courts and commentators because the decision was taken to stand for a per se application of judicial estoppel in ADA cases where a plaintiff had previously claimed to be totally disabled and unable to work.[117] The court indicated that such a reading of *McNemar* was incorrect; the holding was meant to follow the traditional two-part test of judicial estoppel and "each case [should] be decided on its own particular facts and circumstances."[118] Nevertheless, the opinion clarified that *Cleveland* has settled any controversy over a per se rule and has shown that judicial estoppel should not be used. The question of whether sufficient explanations exist for apparent inconsistencies shall be made on a case-by-case basis.[119]

The *Cleveland* holding has been interpreted and applied to all types of disability statutes, not just to Social Security applications.[120] In *Motley*, the *Cleveland* holding was applied to a New Jersey law that granted disability payments to police officers who were unable to perform their previous duties due to job-related injuries.[121] The court focused the majority of its analysis on the fact that *Cleveland* stands for the proposition that differences in statutory standards alone will not suffice to explain inconsistent

115. *See id.* (declining to use judicial estoppel, instead using traditional summary judgement analysis); O'Brien, *supra* note 2, at 374 (noting *Cleveland's* holding requires only sufficient explanation to survive traditional notions of summary judgment); *Employment Law Updates, supra* note 84, at 371 (describing holding of *Cleveland* as preventing use or presumptions under judicial estoppel, but requiring sufficient explanations under summary judgment standard).

116. *See Motley*, 196 F.3d at 163-64.

117. *See id.* at 163 (discussing reasons for criticism and citing *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 502 n.3 (3d Cir. 1997)). For a discussion of the criticism received by the *McNemar* decision, see *supra* notes 54-57 and accompanying text.

118. *Motley*, 196 F.3d at 163 ("We stated that the application should not be formulaic, but should follow the framework set out in our decisions, most notably in *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996).").

119. *See id.* at 164 n.4 (indicating *Cleveland* as governing standard).

120. *See* Peggy R. Mastroianni, *Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disabilities" and "Qualified"*, 615 PLI/LIT. 313, 332 (1999) ("The analysis by the Supreme Court to compare an application for SSDI benefits and a CP's claim that s/he is 'qualified' also would apply to applications for other types of disability benefits, such as Long Term Disability benefits or workers' compensation.").

121. *See* N.J. STAT. ANN. § 53:5A-10(a) (West 1994) (granting benefits to handicapped state troopers).

statements.[122] Instead, there must be an additional justification for the difference in context-related legal conclusions that appear to contradict each other.[123] The court also focused on the fact that Motley's injuries were extremely detailed and his assertion of being "totally and permanently disabled" was "not a mere blanket statement of complete disability checked on a box in order to obtain pension benefits."[124] Additionally, the court noted that a medical board examined and diagnosed Motley as being "totally and permanently incapacitated for police officer duties."[125]

The attainment of benefits is certainly evidence that an individual has not made a prima facie showing under the ADA.[126] The difference in statutory standards alone will not rebut that evidence, and Motley failed to offer any additional support to sufficiently explain the discrepancy.[127] The court also noted that *Cleveland* only applies to context-related legal conclusions and that any contradictions of purely factual assertions can be estopped.[128]

The dissent agreed with the standard used by the majority, but concluded there was enough evidence to allow the claim to continue.[129] Specifically, Motley continued to work as a detective for nearly three years after the injury.[130] The dissent also felt that too much weight was placed

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122. *See Motley*, 196 F.3d at 165 (discussing *Cleveland*). The court stated:

> Cleveland noted that her initial statements were "made in a forum that does not consider the effect that reasonable workplace accommodations would have on the ability to work." Obviously, this is true in all of these cases and, if this argument alone allowed ADA plaintiffs who had previously applied for SSDI-type benefits to survive summary judgment, summary judgment could never be granted. Because the Supreme Court indicated that summary judgment would indeed be appropriate in some cases, an ADA plaintiff must, in certain circumstances, provide some additional rational to explain the plaintiff's apparent about-face concerning the extent of the injuries.

Id. (citation omitted).

123. *See id.* (discussing what constitutes "sufficient explanation" under *Cleveland*).

124. *Id.* at 167.

125. *Id.*

126. *See id.* at 165-66 (showing plaintiff must be able to prove he or she is "qualified individual" and capable of performing "the essential functions" of job); *see also* 42 U.S.C. § 12111(8) (1994).

127. *See Motley*, 196 F.3d at 166 (distinguishing Motley's case from *Cleveland* because Cleveland did not offer additional support for discrepancies).

128. *See id.* at 164 (noting *Cleveland* is limited to apparently contradictory legal conclusions, "namely, 'I am disabled for purpose of the [disability statute]'"). Pure factual assertions fall under previous case law and are prohibited under judicial estoppel. *See id.* at 167 (noting purely factual findings can be estopped); Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6-8 (2d Cir. 1999) (discussing *Cleveland* and judicial estoppel).

129. *See Motley*, 196 F.3d at 168 (agreeing that judicial estoppel no longer applies, just summary judgment).

130. *See id.* at 170 n.6 (noting evidence that Motley performed detective duties in "superior fashion").

on the medical board.[131] Most important, the dissent felt that the plaintiff was not given the opportunity to offer other explanations for the inconsistencies. The dissent would have remanded the case and allowed Motley to argue other reasons for the inconsistent statements that would be consistent with the standards set out by the court.[132] Remanding the case would have been consistent with the action taken by the Supreme Court in *Cleveland*.[133]

IV. ANALYSIS AND PRACTITIONER'S GUIDE

Commentators have noted that the different pre-*Cleveland* uses of judicial estoppel among the circuits will indicate how the varying courts will determine whether a plaintiff has offered a sufficient explanation for the inconsistent statements after *Cleveland*.[134] Courts like the Third Circuit, which previously had a strict defendant-friendly standard, will look closely at whether a plaintiff has offered a sufficient explanation for the inconsistency.[135] *Motley* clearly established that the Third Circuit requires a justification that goes beyond a mere difference in statutory standards.[136]

The first step practitioners should take in cases where an ADA plaintiff has previously claimed to be disabled is to examine the application for disability benefits.[137] The tests under *Motley* and *Cleveland* apply to several types of disability programs.[138] SSI, SSDI, workers' compensation or any type of long-term disability benefits will trigger this analysis.[139] In examin-

131. *See id.* at 171 n.8 (noting differences in statutory standards diminishes weight of medical board's finding).

132. *See id.* at 169 (believing remand case would be proper).

133. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 807 (1999) (remanding case).

134. *See* Mariani & Robertson, *supra* note 1, at 666 (noting that implication of prior cases and divergent circuit views will effect application of *Cleveland*); *see also* Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 7 (2d Cir. 1999) (adopting *Cleveland* but distinguishing case because inconsistent statement was purely factual statement); Feldman v. American Mem'l Life Ins. Co., 196 F.3d 783, 789 (7th Cir. 1999) (adopting *Cleveland* while upholding summary judgment because plaintiff failed to sufficiently explain inconsistencies); Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 955 (8th Cir. 1999) (allowing plaintiff's claim to continue); Jammer v. School Dist., No. 978663, 1999 WL 1073688 at *3 (S.D. Fla. Nov. 19, 1999) (granting summary judgment after *Cleveland* because of analysis used in *Motley*).

135. *See, e.g., Motley*, 196 F.3d at 166 (requiring more than difference in statutory standards for sufficient explanations).

136. *See id.* (applying United States Supreme Court rule); *see also* Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 311 (3d Cir. 1998) (citing *Cleveland* case in different context); Donahue v. Consolidated Rail Corp., 52 F. Supp. 2d 476, 479-80 (E.D. Pa. 1999) (refusing to dismiss plaintiff's claim because plaintiff offered sufficient explanation).

137. *See* Mastroianni, *supra* note 120, at 332 (giving practical guide to attorneys facing problem).

138. *See id.* at 331 (indicating analysis applies beyond Social Security benefits).

139. *See id.* (discussing other contexts in which summary judgment issue of inconsistent statements arise); *see also Motley*, 196 F.3d at 164 (applying analysis beyond SSDI benefits to disability retirement program for police officers); EEOC,

ing the disability application, practitioners should determine what the individual has actually claimed.[140] The case law is binding only when an individual has claimed a "total and permanent" inability to work.[141] If a plaintiff has not made such a significant statement, then there is no inconsistency with subsequently claiming to be a "qualified individual . . . who with or without reasonable accommodation, can perform the essential functions of the job."[142]

Once the previous statement by the plaintiff is of such a nature that there is at least an apparent conflict, then the statutory standards need to be examined.[143] Normally the standards will be different because a benefits program does not take into account whether the plaintiff "could perform the essential functions of the job with or without reasonable accommodations."[144] The difference will need to be articulated to support the notion that the two statutes and statements can coexist side by side.[145] After *Motley*, the different standards alone will not sufficiently justify the apparent inconsistencies between the statements, but it is nevertheless necessary to articulate to a court why the statutes can coexist.[146]

The next step is to look at how the application for the benefits actually occurred.[147] If the plaintiff was "merely checking the boxes" on a form, then there is probably a basis for surviving summary judgment and letting the fact finder determine the ADA claim.[148] If, however, there are

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supra note 3, 5418-24 (analyzing several types of disability programs and their similar effect on ADA claims).

140. *See* Mastroianni, *supra* note 120, at 332 ("Determine if there appears to be any discrepancies between claims made on the application and the [applicant's] contention that s/he is 'qualified.'").

141. *See Motley*, 196 F.3d at 163 (showing plaintiff had previously claimed to be "permanently and totally disabled . . . and . . . physically incapacitated for the performance of his usual duties").

142. 42 U.S.C. § 12111(8) (1994).

143. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S 802-05 (1999) (explaining how Social Security and ADA statutes differ in statutory definitions).

144. *See id.* at 802-03 (discussing difference in statutory definitions); EEOC, *supra* note 3, at 1518-24 (discussing how statutory standards of Social Security Act, workers' compensation laws and disability benefits programs differ from ADA). *Compare* 42 U.S.C. § 423(a)(1) (1994) (defining disability under Social Security Act), *with* 42 U.S.C. § 12111(8) (requiring analysis into "reasonable accommodation" in defining "qualified individual" under ADA).

145. *See Cleveland*, 526 U.S. at 802 (discussing why statutes do not "inherently conflict"); Feldman v. American Mem'l Life Ins. Co., 196 F.3d 783, 790 (7th Cir. 1999) (discussing Supreme Court's justifications for why statutes can coexist); Mastroianni, *supra* note 120, at 332 (giving practical advice).

146. *See, e.g., Motley*, 196 F.3d at 165 (noting difference in standards alone is not sufficient to explain inconsistencies).

147. *See Cleveland*, 526 U.S. at 804 (discussing generalizations of SSDI applications to insure administrative efficiency).

148. *See* Mastroianni, *supra* note 120, at 332 ("[I]n finding a [plaintiff] to be 'qualified,' greater weight should be given to a [plaintiff's] narrative description of his/her disability and ability to work on a benefits application form than information captured when a [plaintiff] checked off a box.").

very fact specific allegations made by the plaintiff, another explanation must be offered.[149] Checking boxes will likely occur if the previous statement was made on a Social Security application.[150] The "listed" disabilities (*i.e.*, AIDS) do not require any fact-specific analysis.[151] The individual automatically receives the benefit, and there is no analysis into that person's level of incapacity or actual work duties.[152] This distinction was what prevented the plaintiff in *Motley* from succeeding.[153] He made detailed descriptions of the severity of his injuries.[154] Also, he had a medical diagnosis that he was incapable of performing the duties of a police officer.[155]

A plaintiff whose ADA claim is based on an allegation that the employer denied a request for reasonable accommodation will have a strong argument to survive summary judgement.[156] A plaintiff who simply alleges a wrongful termination or an unlawful denial of promotion will have a weaker argument.[157] If the plaintiff's cause of action is based specifically

149. *See Motley*, 196 F.3d at 166 (distinguishing case because plaintiff "offered detailed descriptions of his injuries and their impact on his ability to work"). The court noted, "to the extent that Motley now wishes to contest the purely factual findings regarding his physical condition, as opposed to conclusions that he was completely disabled for purposes of working as a state police officer, Cleveland does not even apply and Motley may be precluded from asserting such a claim." *Id.* at 167; *see Cleveland*, 526 U.S. at 802-05 (barring judicial estoppel for fact-based legal conclusions, but allowing it for pure factual assertions); Mitchell v. Washington Cent. Sch. Dist., 190 F.3d 1, 6-8 (7th Cir. 1999) (stressing *Cleveland*'s rejection of judicial estoppel is not extended to purely factual assertions).

150. *See* 20 C.F.R. § 404.1520 (1999) (describing how Social Security Administration shall determine validity of benefits applications).

151. *See* 20 C.F.R. pt. 404, subpt. P, app. 1, § 14.00(D) (1999) (listing HIV infection as example of "listed" disability).

152. *See* 20 C.F.R. § 404.1520(e) (allowing automatic granting of SSDI benefits if applicant has "listed" disability).

153. *See Motley*, 196 F.3d at 160 (discussing plaintiff's clear claims that he had "extremely painful recurring headaches and intense back pain . . . and could not stand on [his left knee] without pain").

154. *See id.* (discussing plaintiff's failure to explain earlier statements of disability).

155. *See id.* at 163 ("The medical board concurred [with Motley's assertion] and found Motley was totally and permanently incapacitated for State Police Officer duties.").

156. *See* 42 U.S.C. § 12111(9) (1994) (giving examples of reasonable accommodations); Mastroianni, *supra* note 120, at 333 (discussing guide to issue). If the plaintiff were forced to leave his or her job because of the employer's failure to make one of these reasonable accommodations, then his or her application for benefits is consistent with the subsequent ADA claim. *See id.* at 333 (giving "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations" as examples of reasonable accommodations); *see also* Pyrcz v. Branford College, No. 981365, 1999 WL 706882, at *3 (Mass. Super. Ct. July 26, 1999) (distinguishing case from *Cleveland* because plaintiff had not alleged failure to reasonably accommodate).

157. *See Motley*, 526 U.S. 795, 802-04 (finding plaintiff failed to offer sufficient explanation to defeat summary judgment).

on the employer's refusal to accommodate him or her, then his or her subsequent application for disability payments is understandable.[158] The individual was incapable of work, but only because of the employer's ADA violation.[159]

Finally, practitioners should determine if the plaintiff's condition has worsened over time.[160] For example, the two claims can be reconciled if the employment decision that gave rise to the ADA claim occurred at one time, and then later the employee's condition worsened to the point where, at that subsequent time, he or she needed disability benefits.[161] The ADA plaintiff is seeking a remedy for a time when he did not feel he was disabled enough to necessitate benefits.[162]

V. CONCLUSION

The United States Supreme Court has settled the issue of which test courts should use to determine whether an ADA claim is barred by a prior admission of disability.[163] The United States Court of Appeals for the Third Circuit has applied this test rather strictly in accordance with its history of judicially estopping such claims.[164] Practitioners dealing with inconsistent statements should look to the examples given by the court regarding what constitutes a sufficient explanation in order to survive summary judgment.[165]

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158. *See* Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795 (1999) (explaining why ADA claim can be consistent with SSDI application for disability).

159. *See* D'Aprile v. Fleet Serv. Corp., 92 F.3d 1, 3 (1st Cir. 1996) (giving example of individual having to quit job because of employer's refusal to reasonably accommodate her disability).

160. *See* Mastroianni, *supra* note 120, at 333 ("[A] statement about the [plaintiff's] disability on a benefits application might not reflect his/her ability to perform the essential functions, with or without reasonable accommodation, at the time of the Respondent's employment decision.").

161. *See Cleveland*, 526 U.S. at 807 (discussing plaintiff's contention that SSDI statements were true at time they were made); *Motley*, 196 F.3d at 165 (distinguishing case from *Cleveland* where plaintiff's additional explanation was that her condition had worsened over time).

162. *See Cleveland*, 526 U.S. 807 (stating plaintiff's claim that at time of employment decision giving rise to ADA cause of action she was capable of working, though she was not at time of her subsequent SSDI application).

163. *See id.* ("To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or 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.'").

164. *See Motley*, 196 F.3d at 165 (requiring more explanation than mere difference in statutory standards).

165. *See id.* at 165, 167 (noting change in condition and blanket statements may be sufficient explanations).