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TO TELL THE TRUTH: SHOULD JUDICIAL ESTOPPEL PRECLUDE AMERICANS WITH DISABILITIES ACT COMPLAINTS?

CHRISTINE NEYLON O'BRIEN*

INTRODUCTION

In the film "Liar Liar," actor Jim Carrey plays the part of a lawyer who is largely an absentee father.[1] As the son of Carrey's character celebrates his birthday without the promised presence of his workaholic father, the child makes a wish that his father will not be able to lie for twenty-four hours.[2] An effective spell is cast, placing the lawyer in danger of losing clients, cases, and 'face' in numerous social situations where his inability to proffer little white lies results in gaffes of the highest order.[3] Hollywood produces larger than life depictions of our society, but it is no exaggeration to say that we live in a society where truth is at a premium. That is to say, truth is far from routinely expressed or even expected.

Individuals subjected to arrest are entitled to be warned that anything they say (including of course, the truth) can, and may be used against them.[4] The thinly veiled message behind the *Miranda* warnings seems to be that if you tell the truth, you may not be well served. Telling the truth may be a distant con-

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[1] LIAR LIAR (Universal City Studios, Inc. 1997).

[2] *See id.*

[3] *See id.*

[4] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that before a line of questioning ensues, a defendant must be advised of the "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed").

cern that has little to do with positive practical consequences for the truthteller. One wonders why a potential criminal is legally entitled to such sage advice at the time of arrest, and yet disabled Americans receive no comparable admonition at the time they file for disability benefits under the Federal Social Security Administration (SSA) Supplemental Security Income (SSI), and Supplemental Security Disability Income (SSDI) programs.[5] As the federal courts of appeal struggle with the issue of disability representations made at the time of application for benefits, some allow such representations to bar an otherwise valid Americans with Disabilities Act (ADA) claim.[6] Thus, at the present time, saying the wrong things, writing the wrong words, perhaps even telling the truth when filing for benefits, may result in forfeiture of the statutory right to protest employment discrimination resulting from the disability.[7] This backlash against statements made for benefits' purposes may force the disabled to choose between benefits they may need immediately and a more speculative, yet more complete remedy under the ADA.[8]

This article analyzes the use of the doctrine of judicial estoppel as a bar to an ADA claim where a plaintiff has previously asserted a total disability in order to obtain sustaining benefits.

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[5] *See* Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907, 921 (1997) (discussing the need for individuals to carefully qualify statements regarding disability on claim forms). Of course crimes carry weightier penalties than the loss of civil rights, but the notion persists that the disabled should receive some guidance through the present legal thicket.

[6] *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (1994). *See* Marney Collins Sims, Comment, *Estop It! Judicial Estoppel and Its Use in Americans with Disabilities Act Litigation*, 34 HOUS. L. REV. 843, 870 (1997) (discussing the split in federal courts and noting that judicial estoppel is unnecessary since receipt of disability benefits is only one piece of evidence for courts to take into account when facing a defendant's motion for summary judgment).

[7] *See* Andrea Christensen Luby, Note, *Estopping Enforcement of the Americans with Disabilities Act*, 13 J.L. & POL. 415, 450 (1997) (criticizing oversimplified judicial view of disability benefit claims as inconsistent with ADA claims and advocating that courts allow claimants to correct or reconcile prior disability statements in an ADA context); *see also* Christine Neylon O'Brien, *Employment Discrimination Claims Remain Valid Despite After-Acquired Evidence of Employee Wrongdoing*, 23 PEPP. L. REV. 65, 67 n.10 (1995) (stating that "important public policy is served when the law encourages parties and witnesses to tell the truth").

[8] *See* McNemar v. Disney Stores, Inc., 91 F.3d 610, 620 (3d Cir. 1996) (discussing McNemar's use of this unfair choice argument), *cert. denied*, 519 U.S. 1115 (1997).

The author argues that there are numerous reasons why estoppel should not be automatically applied to preclude such ADA complaints.[9] The definitions of disability differ from one statute to another, and the policies behind the federal statutes and programs vary as well.[10] It may be that a person is disabled for purposes of benefit eligibility and yet remains able to perform the essential functions of a job with reasonable accommodations from the employer.[11] The assessment of benefit eligibility often is a presumptive, generalized determination derived from medical documentation of accepted conditions.[12]

In contrast, the inquiry as to whether a plaintiff is qualified under the ADA is laden with individualized factual issues.[13] Whether the plaintiff is able to perform the essential functions of the job in question and whether the employer has reasonably accommodated the plaintiff are fact-based questions that require

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[9] Much of the scholarly commentary on the topic seems to run in favor of curtailing the use of estoppel. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1080–82 (1998); Maureen C. Weston, *The Road Best Traveled: Removing Judicial Roadblocks That Prevent Workers from Obtaining Both Disability Benefits and ADA Civil Rights Protection*, 26 HOFSTRA L. REV. 377, 444 (1997); Anne E. Beaumont, Note, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, 71 N.Y.U. L. REV. 1529, 1542 (1996); Elissa Kirby, Recent Decision, 70 TEMP. L. REV. 349, 349–50 (1997); Luby, *supra* note 7, at 453; Sims, *supra* note 6, at 872. *But see* Jorge M. Leon, *Two Hats, One Head: Reconciling Disability Benefits and the Americans with Disabilities Act of 1990*, 1997 ILL. L. REV. 1139 (arguing that individuals who claim total disability for benefit purposes "should be judicially estopped or prevented as a matter of law from pursuing an employment claim under the ADA").

[10] *See* Beaumont, *supra* note 9, at 1543–50 (comparing definitions); Sims, *supra* note 6, at 865–68 (noting that precluding a recipient of benefits of SSA from returning to work would be against the policy of both the SSA and the ADA);

[11] *See* Wilkinson, *supra* note 5, at 928 (recognizing the distinction between a statement on a disability application form and an inquiry into whether an applicant is "otherwise qualified" to perform a job); Luby, *supra* note 7, at 427–29 (discussing that "total disability" may not necessarily be inconsistent with "qualified individual" status). Judge Easterbrook characterizes the plaintiff with a categorical, listed impairment under SSA as "disabled in law even though not disabled in fact" if she can work with reasonable accommodation. Wilson v. Chrysler Corp., 172 F.3d 500, 512 (7th Cir. 1999) (Easterbrook, J., concurring).

[12] *See* Wilkinson, *supra* note 5, at 928–29 (describing SSA as a medical approach to determine whether disability exists); Beaumont, *supra* note 9, at 1548–50 (describing benefit classifications).

[13] *See* Beaumont, *supra* note 9, at 1559 (noting that evaluation of disability under the ADA demands an individualized approach); Sims, *supra* note 6, at 846–47 (comparing elements of an ADA claim).

particularized evidentiary development.[14] In addition, the abilities of the disabled individual may have changed since the initial representations were made and documented.[15] The facts concerning a disability may be weighted differently in the ADA context, and thus, the discrimination question should generally not be swept aside at the summary judgment stage.[16] Consequently, the doctrine of judicial estoppel should at most enjoy a measured use in the ADA context.[17]

This article suggests a better process than the use of estoppel, that is, amendment of the ADA to address the problem.[18] This is important because even though the EEOC has issued guidance on the topic and the agency's advice is essentially sound,[19] the courts are not bound to adhere to the EEOC's rec-

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[14] *See* Beaumont, *supra* note 9, at 1562 (stating that inquiry into ADA disability status requires a case-by-case examination of individual claims).

[15] *See id.* at 1573 (realizing that the phenomenon of disability is not a static one and, therefore, disabilities may improve and an individual's status may change).

[16] The Equal Employment Opportunity Commission (EEOC) makes an analogy to the treatment of after-acquired evidence in employment discrimination cases. Seeing the use of judicial estoppel as another such "general equitable doctrine" as the after-acquired evidence doctrine that the Supreme Court dealt with in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), the EEOC advises that the enforcement of the ADA would suffer if individuals were barred from presenting the merits of their discrimination claims because of prior disability benefits claims. *See* EEOC Enforcement Guidance on Disability Representations, EEOC Notice No. 915.002 (Feb. 12, 1997), *reprinted in* Daily Lab. Rep. (BNA) No. 31, at E-1 (Feb. 14, 1997) [hereinafter EEOC Guidance]. *See* Christine Neylon O'Brien, *The Impact of After-Acquired Evidence in Employment Discrimination Cases after* McKennon v. Nashville Banner Publishing Co., 29 CREIGHTON L. REV. 675, 682 (1996), *reprinted in* 47 LAB. L.J. 3 (1996) (discussing the Supreme Court's holding that after-acquired evidence should not bar employer's liability for employment discrimination, but rather should be relevant to the remedy).

[17] *See* Heather Hamilton, *Judicial Estoppel, Social Security Disability Benefits and the ADA: The Circuits Diverge*, 9 DEPAUL BUS. L.J. 127, 156–57 (1996) (recommending a moderate statement-based approach to the use of judicial estoppel in this context).

[18] A second-best choice might be the use of administrative agency rulemaking that would clarify the appropriate use of estoppel in the ADA context. This option is an improvement over the use of Enforcement Guidance by the EEOC in that rulemaking carries more weight within the judicial system. *See* Nancy Montweiler, News, *Civil Rights: Advocacy Group Calls Clinton Record 'Mixed'; Professor Suggests More EEOC Rulemaking*, Daily Lab. Rep. (BNA) No. 51, at A-1 (Mar. 17, 1997) (noting that agency carries more clout in its rulemaking than as a litigant).

[19] *See* EEOC Guidance, *supra* note 16; *see also infra* notes 98–102 and accompanying text (discussing the EEOC Guidance); *cf.* News, *Disabilities Discrimination: EEOC Policy on Inconsistent Statements 'Goes Too Far,' Management Attorney Says*, Daily Lab. Rep. (BNA) No. 141, at A-12 (July 23, 1997); Kimberly Jane Houghton, Commentary, *Having Total Disability and Claiming It, Too: The EEOC's Position*

ommendations.[20] In fact, since the issuance of the EEOC Guidance, several appellate court decisions have not followed the EEOC's explicit advice on the effect of disability representations upon disability discrimination complaints.[21] Also, the United

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Against the Use of Judicial Estoppel in Americans With Disabilities Act Cases May Hurt More than It Helps, 49 ALA. L. REV. 645, 663–72 (1998) (arguing that judicial estoppel is still necessary to preserve the integrity of the judicial system in some instances and that courts don't agree with the EEOC's position).

[20] The Commission's position is discussed *infra* notes 98–102 and accompanying text.

[21] *See* Bernard Mower, News, *Disabilities: Appeals Courts Block Disability Bias Suits in Light of Prior Assertion of Inability to Work*, Daily Lab. Rep. (BNA) No. 169, at A-1, A-2 (Sept. 2, 1997) (summarizing three cases from the Fifth, Seventh, and Eighth Circuits, all decided subsequent to the issuance of the EEOC Guidance, *supra* note 16, and all barred relief on disability bias claims); *see also* Susan J. McGolrick, *Disabilities Discrimination, Fifth Circuit Bars ADA Claims of Manager With Jaw Disease Who Sought Benefits*, Daily Lab. Rep. (BNA) No. 11, at A-2 (Jan. 16, 1998) (discussing *McConathy v. Dr. Pepper/Seven Up Corp.*, 131 F.3d 558 (5th Cir. 1998), where the court concluded that an application for and receipt of social security disability benefits creates a rebuttable presumption that a plaintiff is judicially estopped from asserting that she was qualified for purposes of an ADA claim); *cf.* Moore v. Payless Shoe Source, Inc., 139 F.3d 1210, 1211 (8th Cir. 1998) (upholding summary judgment for the defendant employer in an ADA case where the plaintiff "failed to present the 'strong countervailing evidence' needed to defeat summary judgment when an ADA claimant has represented to the Social Security Administration that she is 'unable to work' " (quoting Dush v. Appleton Elec. Co., 124 F.3d 957, 963 (8th Cir. 1997))); Simon v. Safelite Glass Corp., 128 F.3d 68, 72 (2d Cir. 1997) (limiting the use of judicial estoppel in a related age discrimination case to situations where "a tribunal in a prior proceeding has accepted the claim at issue by rendering a favorable decision").

However, according to the Eleventh Circuit, a majority of federal circuits reject a blanket bar on ADA lawsuits because of prior total disability claim for benefit purposes. *See* Barbara Yuill, *Disabilities Discrimination, Eleventh Circuit Joins Sister Circuits, Finds Disability Benefits Do Not Bar ADA Suit*, Daily Lab. Rep. (BNA) No. 232, at A-9 (Dec. 3, 1997); *see also, e.g.*, Wilson v. Chrysler Corp., 172 F.3d 500, 503, 504–05, 506 (7th Cir. 1999) (finding plaintiff's "position before the [SSA] . . . inconsistent with her subsequent allegation of constructive discharge" and a basis for estopping her retaliation claim, while noting that grant of SSA benefits "is not necessarily dispositive of the issue whether an individual is qualified to work" and even where judicial estoppel operates, it is not irrebuttable); Flowers v. Komatsu Mining Sys., Inc., 165 F.3d 554, 556–57 (7th Cir. 1999) (finding social security determination of disability not relevant to ADA liability "in this case," but that it was relevant to back pay award, and also finding that the receipt of SSA "benefits d[id] not preclude a person, as a matter of law, from being a qualified person with a disability" (citing McCreary v. Libbey-Owens-Ford, Co., 132 F.3d 1159 (7th Cir. 1997) and Weigel v. Target Stores, 122 F.3d 461 (7th Cir. 1997))); Haschmann v. Time Warner Entertainment Co., 151 F.3d 591, 603 (7th Cir. 1998) (upholding district court's refusal to apply judicial estoppel based upon ADA plaintiff's application for and receipt of Social Security disability benefits since employee may still be "a qualified individual" under the ADA); Aldrich v. Boeing Co., 146 F.3d 1265, 1268–69 (10th Cir. 1998) (applying rule from *Rascon v. US West Communications, Inc.*, 143 F.3d 1324, 1330

States Supreme Court has left undisturbed a Third Circuit decision that was directly criticized in the EEOC Guidance, that of *McNemar v. Disney Stores, Inc.*[22] In light of all this, the best interests of the disabled are not being fully served absent fresh legislative action.

I. *MCNEMAR V. DISNEY STORES, INC.*

In November 1993, the "Disney Store" (Disney) in Cherry Hill, New Jersey fired assistant manager Leonard McNemar, who was HIV-positive, for stealing two dollars from the register.[23] A year later McNemar filed a lawsuit against Disney under, inter alia, the Americans with Disabilities Act of 1990 (ADA), arguing that his dismissal was not the result of his infraction, but rather due to the rumor that he had AIDS.[24]

(10th Cir. 1998), to a plaintiff who received private disability benefits), *cert. denied*, 67 U.S.L.W. 3376 (U.S. June 1, 1999) (No. 98-859); *Rascon*, 143 F.3d at 1330 (holding that statements made for SSA benefit purposes do not automatically bar an ADA claim, but that they may be relevant to whether the plaintiff is a "qualified individual with a disability" under the ADA); Nowak v. St. Rita High Sch., 142 F.3d 999, 1004 & n.2 (7th Cir. 1998) (holding that there is no per se rule of preclusion to ADA claims to those who have asserted disability for SSA benefit purposes because of fundamental differences in definitions and finding support in the Third Circuit's decision in *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 (3d Cir. 1997), to retreat from its earlier position favoring judicial estoppel); Johnson v. Oregon, 141 F.3d 1361, 1367 (9th Cir. 1998) (concluding that an individual may be entitled to disability benefits and yet be qualified to work with reasonable accommodation); Taylor v. Food World, Inc., 133 F.3d 1419, 1425 (11th Cir. 1998) (holding that the plaintiff was not judicially estopped from bringing an ADA claim despite his assertion of a listed impairment under SSA, because he should be afforded the opportunity to establish his "qualified" individual status "with or without accommodation" under the ADA); McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 1166–67 (7th Cir. 1997) (reversing the district court's finding that plaintiff was estopped from pursuing an ADA claim because of his filing for Social Security disability benefits); Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 590 (D.C. Cir. 1997) (holding that representations on a disability benefits application are merely one piece of evidence that an ADA plaintiff is not qualified).

[22] 91 F.3d 610 (3d Cir. 1996), *cert denied*, 519 U.S. 1115 (1997). *See* EEOC Guidance, *supra* note 16, at E-7 to E-8 & n.66; *see also infra* notes 23–36 and accompanying text; Kirby, *supra* note 9, at 340–52 (discussing Third Circuit's position on judicial estoppel and comparing *McNemar* to *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996), where requirements of prior success and privity of parties were deemed unnecessary in order to apply judicial estoppel). In *Krouse*, the Third Circuit distinguished an ADA retaliation claim from an ADA discrimination case such as *McNemar*, and noted the considerable criticism evoked by *McNemar*. *See Krouse*, 126 F.3d at 502–03 & nn.3–4. In fact, Judge Becker advocated reconsideration of the "wrongly decided" *McNemar*. *Id.* at 503 n.4.

[23] *See McNemar*, 91 F.3d at 613–14.

[24] *See id.* at 616.

In order to qualify for employment-related protection under the ADA, McNemar had to first show that he was a "qualified person" under the law.[25] Specifically he had to show that he was an individual " 'with a disability who, with or without reasonable accommodation, can perform the essential functions of a job.' "[26] To claim unfair dismissal from a position because of a handicap, the law requires that one first demonstrate that the handicap was not so severe that he or she was unable to perform the job.[27]

Soon after his unemployment in 1993, and based on his HIV-positive condition, McNemar applied for disability benefits under the SSI and SSDI programs.[28] In order to be eligible for these programs, he claimed that his disability had prevented him from working since October 1993, a month before his dismissal.[29] He had, in fact, missed 68% of his scheduled workdays during that period.[30]

In *McNemar*, the federal district court ruled that since the plaintiff had stated under penalty of law in these applications that he was completely disabled since October 1993, he could not then assert that he qualified for protection under the ADA, which required that, at the time of his dismissal in November, he could perform the essential functions of his position.[31] His case was dismissed on summary judgment, but he appealed to the United States Court of Appeals for the Third Circuit.[32]

The Third Circuit upheld the lower court, and ruled that where he had made prior sworn statements inconsistent with his present position, the policy of "judicial estoppel" would be applied, preventing him from proceeding with his ADA claim.[33] The appeals court quoted the lower court with approval when it said, " 'it is the province of the legislature rather than this Court to authorize such a double recovery.' "[34] Analytically, the court concluded that McNemar could not present the prima facie case required to proceed, because he could not overcome the threshold

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[25] *Id.* at 619.
[26] *Id.* at 618 (quoting 42 U.S.C. §§ 12111(8), 12112(a) (1994)).
[27] *See id.*
[28] *See id.* at 615.
[29] *See id.*
[30] *See id.* at 613.
[31] *See id.*
[32] *See id.*
[33] *See id.* at 619–20.
[34] *Id.* at 620 (quoting lower court).

question of whether or not he was "qualified for the job."[35]

This case is only one among many recent decisions where the courts have denied an ADA plaintiff a hearing, because the plaintiffs have applied for other disability benefits after the incident of alleged discrimination.[36] The doctrine of judicial estoppel has been invoked by the courts in many cases, but as will be discussed, it is not clear that this doctrine has been properly applied, either under its historical usage or in the context of the goals and language of the ADA.

II. JUDICIAL ESTOPPEL[37]

Judicial estoppel is an equitable doctrine intended to prevent an individual from asserting one set of facts before one court, and a different set of facts before another court.[38] It is often applied to criminal defendants on appeal.[39] The doctrine has appeared in many forms and under many names,[40] but as used in modern courts it has some elements of issue preclusion, equitable estoppel, and estoppel in pais.[41] Where the parties and issue are identical in successive proceedings, and the issue was essential to the judgment in the earlier proceeding, issue preclusion deems the judgment on that issue conclusive for purposes of the second action.[42] It can also be used by one who was not a party to the first action, which is called "non-mutual" estoppel.[43] Estoppel in pais prevents a party from changing a statement or an

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[35] *Id.* at 621.

[36] *See supra* notes 21–22.

[37] Some courts use summary judgment to dispose of the claims discussed in this article. *See* Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 n.3 (9th Cir. 1996). As Anne Beaumont explained, because summary judgment achieves the same end as judicial estoppel—concluding litigation of the claim as a matter of law—these cases are included in this discussion. *See* Beaumont, *supra* note 9, at 1551 n.114.

[38] *See* Eric A. Schreiber, *The Judiciary Says, You Can't Have it Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions*, 30 LOY. L.A. L. REV. 323, 323–24 (1996); *see also* Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244, 1244 n.2 (1986) (explaining forms of estoppel).

[39] *See* State v. Washington, 419 N.W.2d 275, 277 (Wis. Ct. App. 1987) (explaining the use of judicial estoppel in a criminal trial).

[40] *See* BLACK'S LAW DICTIONARY 551–52 (6th ed. 1990).

[41] *See* Beaumont, *supra* note 9, at 1551 (noting that all of these doctrines achieve the same end).

[42] *See id.*; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

[43] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327–32 (1979).

assertion of particular facts made in a prior proceeding.[44] Equitable estoppel can be asserted by a party to a second action if in a former proceeding the parties were adverse, the party asserting estoppel relied on the opponent's assertion to its detriment, and that party would be prejudiced if the court allowed a change of position.[45]

The primary purpose of the judicial estoppel doctrine is to protect the integrity of the judicial process from the manipulation of facts.[46] Some courts require a finding of "bad faith" to invoke the doctrine.[47] Most commentators have found that courts base their use of the doctrine on either: (a) whether the claimant has "adopted" the statement by having it accepted as a fact before an earlier court (the "success" category); or (b) whether, regardless of adoption, the claimant has presented differing facts before two different tribunals (the "fast and loose" family).[48] Another variation relies solely on the offense of violating the sanctity of the oath.[49] Nevertheless, in cases where judicial estoppel has been applied, the following five elements usually appear in the analysis:

> (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 records 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 successful in maintaining the first position and must have received some benefit thereby in the first proceeding; [and] (5) the two positions must be totally inconsistent.[50]

It is in this last requirement—that the two positions be totally inconsistent—that courts seem to overlook the subtleties of fact in each case, as well as the distinctly different objectives of

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[44] *See* BLACK'S LAW DICTIONARY 551 (6th ed. 1990).

[45] *See* Schreiber, *supra* note 38, at 331.

[46] *See* McNemar v. Disney Store, Inc., 91 F.3d 610, 617 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997); Yanez v. United States, 989 F.2d 323, 326 (9th Cir. 1993) (citing Morris v. California, 966 F.2d 448 (9th Cir. 1991)).

[47] Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 362 (3d Cir. 1996).

[48] Ashley S. Deeks, Comment, *Raising the Cost of Living: Rethinking* Erie *for Judicial Estoppel*, 64 U. CHI. L. REV. 873, 876–79 (1997).

[49] *See* Schreiber, *supra* note 38, at 325.

[50] Muellner v. Mars, Inc., 714 F. Supp. 351, 357 (N.D. Ill. 1989) (quoting Department of Trans. v. Grawe, 467 N.E.2d 467, 471 (Ill. App. Ct. 1983)).

the statutory income programs (SSI and SSDI) and the ADA.

August v. Offices Unlimited, Inc.,[51] is a useful early example of a court of appeals invoking judicial estoppel principles to prevent a disability claimant from pursuing discrimination charges against his employer.[52] After twenty years of work for Offices Unlimited, August requested and was granted a leave of absence from work on March 24, 1989 to recover from depression.[53] On May 11, August asked to return on a part-time basis and to be excused from the first few morning meetings when the side-effects of his medication were strongest. His supervisor refused, and the Director of Administration suggested he apply for company-sponsored disability benefits.[54] His leave was extended to May 22.[55] He applied for benefits the next day, stating that he had been "totally disabled" since March 24.[56] When he was unable to return to work in late May 1989, he was terminated.[57] In 1990 he filed suit against his employer under, inter alia, state law which protects the handicapped in Massachusetts from discrimination in language analogous to the terms of the ADA.[58]

The Court of Appeals for the First Circuit upheld the district court's grant of summary judgment for the employer stating that: "[u]nder any definition of the term, August's declaration that he was 'totally disabled' means that he was not able to perform the essential functions of his job at OUI, with or without reasonable accommodation, since late March 1989."[59] This conclusion was reached by referring to Black's Law Dictionary, since the record did not reveal the insurer's definition of disability.[60] There was no evidence before the court upon which it could deny summary judgment.[61] Although summary judgment views the evidence in the light most favorable to the plaintiff, it was

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[51] 981 F.2d 576 (1st Cir. 1992).

[52] *See id.* at 584; *see also infra* notes 119–28 and accompanying text (discussing the later First Circuit decision, *D'Aprile v. Fleet Servs. Corp.*, 92 F.3d 1 (1st Cir. 1996)).

[53] *See August*, 981 F.2d at 578.

[54] *See id.* at 579.

[55] *See id.*

[56] *Id.*

[57] *See id.*

[58] *See id.* at 577–78; *see also* MASS. GEN. LAWS ANN. ch. 151B, § 4(16) (West 1989).

[59] *August*, 981 F.2d at 581.

[60] *See id.* (citing BLACK'S LAW DICTIONARY 462 (6th ed. 1990)).

[61] *See id.* at 582.

August's burden under the statute to show that he was a "qualified handicapped person" who could perform the job with or without accommodation. The court held he did not meet this burden, because of his own admission of his inability to assent sufficient facts.[62]

The *August* ruling was cited in *Kennedy v. Applause, Inc.*[63] In *Kennedy*, after a leave and a return to active work, plaintiff, a salesperson with Chronic Fatigue Syndrome, was certified as disabled by her doctor who submitted a disability note to the employer.[64] The plaintiff then applied for state disability benefits (SSA), and she was fired.[65] In her deposition for the ADA claim, she maintained that she was able to perform the job, but the district court granted summary judgment for the employer based upon her doctor's testimony and her SSA benefit application, describing her as "completely disabled."[66] Interestingly, the SSA found Kennedy was *not* totally disabled, and had the ability to return to work.[67] Nevertheless, the circuit court upheld the district court's findings, including its refusal to allow plaintiff's motion for further discovery to develop more facts to support her ADA qualification and to inquire into whether she was able to perform the essential functions of her job.[68]

The court held that there was no need to determine what constituted the essential functions of her job, since it concluded she could not perform the requirements of her employment.[69] Therefore, it was irrelevant whether her employer refused to provide her with a reasonable accommodation (flexible hours) that would allow her to continue to work with the disability.[70] Despite the fact that she was working the day before she was

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[62] *See id.* at 583–84. The dissent could be read to suggest that August's supposed inability to offer evidence was, in fact, a *choice* made by the majority to interpret his words as legally inconsistent, instead of factually assessing his ability to return to work as of May 11, when he requested accommodation. *See id.* at 585–86 (Pettine, J., dissenting). Thus, the court made a ruling of law without interrogating the facts.

[63] 90 F.3d 1477, 1480 (9th Cir. 1996) (citing August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992)).

[64] *See Kennedy*, 90 F.3d at 1479–80.

[65] *See id.* at 1480.

[66] *Id.*

[67] *See id.* at 1481. Kennedy cited the SSA's determination that she was able to return to the job as evidence of a genuine issue of material fact. *See id.*

[68] *See id.* at 1481–82.

[69] *See id.* at 1482.

[70] *See id.*

fired, the court found that she was unable to present "evidence that would support her claim that she [was] a 'qualified individual with a disability' under the ADA."[71] Essentially, the court held she was unable to prove she was capable of performing the essential functions of the job, with or without accommodation, on the day she was fired, although she had done so the day before. It is this type of summary dismissal of the complex factual determinations which underlie ADA claims that makes the use of judicial estoppel based upon prior assertion of disability for benefits purposes especially problematic. In light of the purposes and policies of the ADA, outcomes such as that in *Kennedy* illustrate the need to allow plaintiffs a sufficient chance to develop facts consonant with their ADA claim.

III. ADA PURPOSES AND RATIONALE

Most of us are aware of the prevalence of prejudice toward those with disabilities that existed in the earlier part of the twentieth century. Social policy and popular perception of the disabled were shaped by Victorian attitudes of pity, and characterizations of the disabled often were not far from images born in Dickens' London. At that time, disabled individuals were institutionalized and treated as deranged or incompetent, a practice which continued well into the 1970s.[72] 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.[73] Not until 1956 did the government add those with disabilities to the Social Security programs through the creation of SSDI.[74] 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.[75]

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[71] *Id.* at 1479–80, 1482. *See supra* note 21 (discussing more recent decisions from the Seventh Circuit).

[72] *See* Beaumont, *supra* note 9, at 1536–38; *see also* JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 61, 160 (1993).

[73] *See* DIANE DRIEDGER, THE LAST CIVIL RIGHTS MOVEMENT: DISABLED PEOPLES' INTERNATIONAL 7 (1989).

[74] *See generally* FRANK S. BLOCH, FEDERAL DISABILITY LAW AND PRACTICE § 1.3 (1984).

[75] *See* Frank S. Ravitch, *Balancing Fundamental Disability Policies: The Rela-*

The administration of SSA programs reflected these underlying assumptions about the disabled and their capabilities.[76] By definition, they were unable to participate in the general workforce, and thus to be eligible for the program, an applicant implicitly accepted this generalization about his or her capability.[77] The purpose of the SSA program was to distribute funds for essential support, not to rectify employment misunderstandings. Thus, there was little reason to analyze, in the application process, the actual working capacity of each applicant. It was immaterial that some disabled individuals were unemployable due to discriminatory stereotyping, since they would still need financial assistance, regardless of the final cause.[78]

In the interest of administrative efficiency and to speed distribution of funds to those in need, some disabilities became "listed impairment[s]" and "presumptive disabilities."[79] In both cases an applicant can be deemed disabled without any inquiry into his or her ability to work.[80] HIV-positiveness is a presumptive disability, as is total blindness.[81] With this historical and contextual background, it is not surprising to find that a complete application for SSI or SSDI can be made over the telephone.[82]

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tionship Between the Americans with Disabilities Act and Social Security Disability, 1 GEO. J. FIGHTING POVERTY 240, 245–46 (1994) (contrasting the goals of SSDI and ADA); *see also* EEOC Guidance, *supra* note 16, at 4.

[76] See Wilkinson, *supra* note 5, at 912–15 for an excellent elaboration of policy and philosophical grounds for statutory income programs.

[77] "Disability" under the SSA is defined as the "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." 42 U.S.C. § 423(d)(1)(A) (1994). The claimant must "not only [be] unable to do his previous work," but also be incapable of "engag[ing] in any other kind of substantial gainful work which exists in the national economy." *Id.* § 423(d)(2)(A).

[78] *See* Ravitch, *supra* note 75, at 245 (quoting the Director of the National Rehabilitation Hospital Research Center's testimony that the disability program is " 'predicated on the assumption that an individual is either disabled or not disabled, and that the conditions of individuals who are disabled are so hopeless that future prospects for work are virtually nil' ").

[79] *See generally* Ravitch, *supra* note 75, at 242 (describing the SSI and SSDI evaluation processes and the "shortcuts" through the listed impairment and presumptively disabled groupings); Beaumont, *supra* note 9, at 1548–49 (same).

[80] *See id.* at 1549.

[81] *See id.* at 1549 n.107 (listing examples of presumptive disabilities) (citing 20 C.F.R. § 934 (1996)).

[82] *See* Weston, *supra* note 9, at 396 (explaining that the application for SSI benefits may be made in writing or over the telephone). *See generally* Wilkinson,

Nearly twenty years after the inclusion of disabled persons to Social Security programs, the passage of the Rehabilitation Act of 1973 placed the word "discrimination" in the disabilities lexicon.[83] Although aimed at creating vocational rehabilitation programs and job training opportunities for the disabled, the Act also included § 504, which prohibited discrimination against the disabled by any federal agency or entity receiving federal funding under the Act.[84] Nonetheless, it took a twenty-five day sit-in demonstration to force promulgation of administration rules under § 504.[85] Influenced by the civil rights movement and the policy of de-institutionalization of the handicapped commencing in the 1960s and 1970s, a series of anti-discrimination protections for the disabled were passed by Congress, culminating in the Americans with Disabilities Act of 1990.[86]

Under its employment provisions, the ADA allows a disabled person to sue an employer for the failure to hire, or for termination from a present job, based on disability discrimination.[87] 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.[88] The tool for making this determination is the concept of "reasonable accommodation."[89] If the disabled applicant could perform the essential functions of the job with only a slight change in his employment circumstances, the employer's claim that the disabled person is not fit for the job can only be discriminatory prejudice. This handling of discriminatory motive is similar to the now-accepted presumption of discrimination allowed to survive in traditional discrimination cases under *McDonnell Douglas Corp.*

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supra note 5, at 925–28 (discussing that the SSA benefit evaluation process has no face-to-face interviews at initial steps and the probability of avoiding inquiry into one's ability to work in presumptive disability cases that meet medical criteria).

[83] *See* Ravitch, *supra* note 75, at 243.

[84] 29 U.S.C. § 794(a) (1994).

[85] *See* SHAPIRO, *supra* note 72, at 64–70 (describing this particular demonstration as well as others).

[86] *See* Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101–213 (1994)).

[87] *See* 42 U.S.C. § 12112 (1994).

[88] *See generally* Ravitch, *supra* note 75, at 243–44.

[89] 42 U.S.C. § 12111(9) (1994).

v. Green,[90] where the employer cannot rebut the prima facie case with a reasonable business justification.[91]

Whether the motive is discriminatory, then, requires a factual investigation of what the disabled plaintiff may be capable of on the job if just one or two physical, procedural, or conventional barriers are removed for that person. Could he or she do the job *then*?[92] This special inquiry is the heart of the ADA. It is this special and unique technique that the Act employs to distinguish true incapacity to work due to a handicap, from the irrational fear and exaggeration at the heart of discrimination. The legislative mandate and the goals of the ADA cannot be accomplished without it.[93]

In order to litigate under the Act, a person must meet certain requirements. Under the ADA, a qualified plaintiff is "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."[94] Thus, disabled individuals are qualified if they have: (a) the ordinary prerequisites for the job; and (b) their handicap does not prevent them from exercising the essential functions of the job.[95] This test must be an "individualized" inquiry, and it must be performed on a "case-by-case" basis.[96] It is difficult to see how this jurisdictional question of fact can be considered if a court, sua sponte,[97] raises the issue of judicial estoppel first, and then answers it as a mat-

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[90] 411 U.S. 792 (1973)

[91] *See id.* at 802 (explaining that the employer must "articulate some legitimate, nondiscriminatory reason for the employee's rejection").

[92] The dissent in *August v. Offices Unlimited, Inc.*, states this plainly: "[T]he key factual inquiry is whether . . . August could have returned to work had OUI *accommodated* his disability as [requested]." *August*, 981 F.2d 576, 585 (1st Cir. 1992) (Pettine, J., dissenting).

[93] *See* H.R. REP. NO. 101-485, pt. 3, at 39–40 (1990) (discussing the requirement that employers make reasonable accommodations), *reprinted in* 1990 U.S.C.C.A.N. 303, 320–22; EEOC Guidance, *supra* note 16, at E-14, n.25 and accompanying text.

[94] 29 C.F.R. § 1630.2(m) (1998); *accord* 42 U.S.C. § 12111(8) (1994) (defining "qualified individual with a disability"); *see also* 29 C.F.R. § 1630.3 (giving exceptions to this definition).

[95] *See* 29 C.F.R. § 1630.2(m) (1988).

[96] EEOC Guidance, *supra* note 16, at E-4.

[97] Judicial estoppel is an " 'equitable doctrine invoked by a court at its discretion.' " Yanez v. United States, 989 F.2d 323, 326 (9th Cir. 1993) (quoting Morris v. California, 966 F.2d 448, 453 (9th Cir. 1991)).

ter of law.

As we have seen, a matter of law in this context is often a battle of definitions, and the opportunity for further factual deposition or investigation may not be granted.[98] The definition of "disability" in different programs then becomes determinative. In the case of SSA applications, the term "reflects the obligation to provide benefits to people who generally are unable to work."[99] SSA does not distinguish between the "customary requirements" of the position and the "essential functions" of the position, which is precisely what the ADA is concerned with.[100] An applicant can be considered disabled by the SSA, but qualified by the ADA, for what in essence is a slightly different job—one narrowed to the essential functions of the position.[101] The SSA categorically refuses to consider whether an employer could make reasonable accommodations as part of its determination.[102] This raises an obvious question: If the SSA explicitly, purposely, and reasonably denies any association between its definitions and ADA qualifications, how could a court justifiably use the SSA definition to rule on an ADA question?

IV. JUDICIAL ENLIGHTENMENT

Some courts have refused to use judicial estoppel or grant summary judgment on ADA claims when presented with evidence of statutory income disability benefit applications. In *Overton v. Reilly*,[103] the court ruled that a person could have a disability for SSA purposes and still be a qualified individual with a disability.[104] Overton was hired by the Environmental Protection Agency (EPA) to do internal staff work even though the EPA was aware that he had an emotional disorder which made it difficult for him to communicate with the public.[105] After performing equivocal work in that role (he sometimes fell asleep due to medication, yet processed more than his share of paperwork), he was required by a new supervisor to do more public communication, which resulted in increasingly poor reviews, and

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[98] *See supra* notes 51–71 and accompanying text.
[99] EEOC Guidance, *supra* note 16, at E-4.
[100] *Id.* at E-5.
[101] *See id.*
[102] *See id.*
[103] 977 F.2d 1190 (7th Cir. 1992).
[104] *See id.* at 1196.
[105] *See id.* at 1191.

he was finally fired in December 1986.[106] Before he had been hired by the EPA, Overton had applied for and been granted SSA disability benefits, which were distributed to him during his employment on a nine-month trial basis.[107] The benefits were granted since Overton had a "listed disability,"[108] and these benefits then continued after his dismissal.[109] The district court granted summary judgment for the EPA because Overton had presented no evidence that he could have performed the essential functions of his job.[110]

On appeal, the Seventh Circuit re-examined whether there was a genuine issue of material fact about whether Overton was "otherwise qualified" for his position.[111] It considered first whether contact with the public was an essential function of his job, and then, even if it was, whether it could have been performed with reasonable accommodation.[112] The court simply found that these questions could not be fairly answered based on what was before it, and, therefore, the summary judgment was overturned. "At trial, these potential accommodations may turn out to be unduly burdensome on the EPA, but we cannot say that the agency has presented evidence sufficient to make the conclusion inevitable."[113] The court also cautioned that it was assessing only the threshold question of whether he was qualified for the position—not whether he was nevertheless rightfully fired, with or without discrimination.[114] Most importantly, since the benefits were granted as a "listed disability" and no inquiry was made by SSA into his ability to find a job, the agency determination "may be relevant evidence of the severity of Overton's handicap, but it can hardly be construed as a judgment that Overton could not do his job at the EPA."[115]

In another case, *Mohamed v. Marriott International, Inc.*,[116] a district court recognized that positive evaluations and lack of

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[106] *See id.* at 1191–92.

[107] *See id.* at 1192. SSA was notified of Overton's new employment, but under its regulations it could distribute the funds anyway on the "trial" basis. *Id.*

[108] *Id.* at 1196.

[109] *See id.* at 1192.

[110] *See id.* at 1193.

[111] *Id.* at 1194–96.

[112] *See id.* at 1194–95.

[113] *Id.* at 1195.

[114] *See id.* at 1195–96.

[115] *Id.* at 1196.

[116] 944 F. Supp. 277 (S.D.N.Y. 1996).

disciplinary measures were strong evidence that the terminated plaintiff was performing the essential functions of the job.[117] The court reached this conclusion in favor of the plaintiff in spite of the fact that the SSA had granted him benefits based on the listed disability of profound deafness.[118]

The same court which issued the *August* ruling later reversed direction in *D'Aprile v. Fleet Services Corp.*[119] The plaintiff, D'Aprile, who suffered from multiple sclerosis, sought to reacclimate herself to full-time work after a medical leave necessitated by earlier severe symptoms.[120] D'Aprile's doctor advised her to return to work on a part-time basis before resuming her full-time position.[121] However, one of her superiors believed such an arrangement would conflict with company policy and obstructed D'Aprile's attempts to work out a solution. Finally, after working part-time using vacation benefits, D'Aprile was forced to resume disability leave and apply for benefits as totally disabled.[122] She received the benefits under Fleet's short and long-term disability plans until January 21, 1995, when it was determined she was no longer totally disabled.[123]

In this case, the First Circuit found that since D'Aprile applied for benefits after the defendant's refusal to accommodate her, and because her disability policy defined "totally disabled" as merely anything less than full-time work, there was a genuine issue of material fact as to whether she could have continued with the reasonable accommodation of part-time work.[124] The court distinguished this case from the holding of *August* in two ways. First, August had claimed (in his post-employment disability application) that he was totally disabled *before* he re-

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[117] *See id.* at 282; *see also* Daffron v. McDonnell Douglas Corp., 874 S.W.2d 482, 488 (Mo. Ct. App. 1994) (holding that there is a genuine issue of fact as to whether the plaintiff was capable of performing his job when he performed his duty until the date of termination).

[118] *See Mohamed*, 944 F. Supp. at 282–83. The court rejected the use of judicial estoppel in an opinion that highlighted the difference in the ADA and SSA definitions, procedures, and legal standards. *See id.* at 282–84; *see also* Sims, *supra* note 6, at 854–55, 862–65 (discussing *Mohamed*).

[119] 92 F.3d 1 (1st Cir. 1996). The panel opinion was authored by District Court Judge Gertner, who sat with Circuit Judges Aldrich and Cyr, by designation. *See id.*

[120] *See id.* at 2.

[121] *See id.*

[122] *See id.* at 2–3.

[123] *See id.* at 3.

[124] *Id.* at 5.

quested an accommodation from the employer.[125] Second, the definition of disability in *D'Aprile* was never complete.[126] Like the *Overton* court, the First Circuit found that the critical issue to be resolved was "how D'Aprile would have fared had the accommodation been made,"[127] an issue fit for trial, upon which her subsequent application for benefits "sheds no light."[128]

It seems clear that some courts are able to recognize that a person's representation that he is "disabled" for disability benefit purposes does not make that person unqualified for protection under the ADA, and neither the invocation of judicial estoppel

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[125] *See id.* at 4–5. "The issue which concerned us in *August*, that a plaintiff would claim that he was entitled to a reasonable accommodation *at the same* time he claimed to be unable to work at all, is absent here." *Id.* at 4. This seems to characterize *August* as an example of true judicial estoppel in the First Circuit, and distinguishes *D'Aprile's* facts at least in part on the basis of timing.

[126] *See id.*

[127] *Id.* at 5.

[128] *Id.* at 5. This was the position taken in the dissenting opinion of *August* by Judge Pettine. *See August v. Offices Unlimited, Inc.*, 981 F.2d 576, 585–87 (1st Cir. 1992) (Pettine, J., dissenting). He also applied *August* strictly to the district court summary judgment in *D'Aprile*, causing this review. *See* D'Aprile v. Fleet Serv. Corp., No. 94-0524P, 1995 WL 854482, at *2 (D.R.I. Nov. 22, 1995), *rev'd*, 92 F.3d 1 (1st Cir. 1996). In *Blanton v. Inco Alloys International Inc.*, 123 F.3d 916 (6th Cir. 1997) (supplemental opinion) (per curiam), the Sixth Circuit also refused to adopt a broad view of judicial estoppel in a case where a plaintiff asserted that he could not perform the essential functions of his former position. The court issued its supplemental opinion in response to motions for rehearing by the defendant and the EEOC, which filed as amicus curiae. *See id.* at 917. The supplemental opinion makes clear that "[t]he panel's opinion should not be read to endorse judicial estoppel in this context." *Id.* The Sixth Circuit noted with approval the decision of the D.C. Circuit in *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582 (D.C. Cir. 1997), which held that "the receipt of disability benefits does not preclude subsequent ADA relief and rejects the doctrine of judicial estoppel, but does allow the consideration of prior sworn statements by the parties as a material factor." *Blanton*, 123 F.3d at 917. The court reiterated its prior conclusion that the plaintiff needed to show that when he sought to return to work and requested a transfer to a vacant position, the defendant failed to reasonably accommodate his request. *See id.*

In another recent decision from the Sixth Circuit, *Griffith v. Wal-Mart Stores Inc.*, 135 F.3d 376 (6th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3027 (U.S. June 1, 1999) (No. 97-1991), a former Wal-Mart employee who suffered from a bad back was permitted to sue under the ADA despite his assertion of disability in order to obtain Social Security disability benefits. *See Id.* at 380–84. The court rejected the use of judicial estoppel because the application for and receipt of SSA benefits does not consider the plaintiff's ability to work with reasonable accommodation, which is the ADA standard. *See id.* at 383. "[P]rior statements should not be the subject of judicial estoppel or a theory of 'super admissions,' but rather should be analyzed under traditional summary judgment principles." *Id.*

nor an abbreviated summary judgment is fair or appropriate.[129] The conflicts we see in these cases are conflicts between performance-based rules under the ADA and status-based rules under SSA. It seems something of a betrayal of the intent of the ADA for the courts to apply summary judgment ("no genuine issue of material fact") to a case, based upon a status determination by another agency when the ADA demands a particularized performance ("fact") inquiry into each situation. This is particularly true since the ADA is intended to *prevent* discrimination based on status or stereotypes, such as being handicapped.

V. JUDICIAL ESTOPPEL IS INAPPROPRIATELY OR IMPROPERLY APPLIED IN DISABILITY BENEFITS/ADA CASES

Judicial estoppel, as applied in most disability benefit cases, relies on legal assumptions that are demonstrably wrong.[130] Thus, judicial estoppel should not preclude ADA complaints. First, SSA and ADA definitions of disability are not identical.[131] SSA disability determinations simply do not mean what they appear to mean, and should not be treated simplistically by courts. An SSA determination that an applicant is "totally disabled" does not mean that he cannot do anything. As one court put it, it may be determined that "a claimant is unlikely to find a job."[132] Under SSA, the claimant has the burden of showing that he or she is unable to do his or her previous work or engage in any other type of substantial gainful work which exists in the national economy.[133] This is not a scientific evaluation of an applicant's capacity to do meaningful work. The SSA evaluation does not consider whether the situation was caused or worsened by discrimination. Indeed, the SSA determination is so remote from the plain-sense meaning of the words "total disability" that the SSA allows its "totally disabled" to hold income-producing jobs

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[129] *See* EEOC Guidance, *supra* note 16, at 9.

[130] See *Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214, 1217–20 (6th Cir. 1990) for a detailed analysis of the conditions necessary for properly applied judicial estoppel.

[131] *See* Luby, *supra* note 7, at 427–37; *see also* Weigel v. Target Stores, 122 F.3d 461, 466–67 (7th Cir. 1997) (discussing the EEOC's determination that a person who is "totally disabled" under the SSA is not dispositive as to whether he or she is a "qualified individual" under the ADA).

[132] Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992).

[133] *See* 42 U.S.C. § 423(d)(1)(a), (d)(2)(a) (1994).

while collecting their full SSDI benefits.[134] Judicial estoppel is best applied to inconsistent positions.[135] It takes only a cursory examination to reveal that the definitions of terms used in the SSA determinations are easily misleading and unreliable indicators of performance, and thus should not result in a bar to the factual development of the ADA claim.

Another requirement of judicial estoppel is that the position formerly taken by one party must have been presented in a judicial or quasi-judicial forum.[136] Judicial estoppel is applied "to protect the integrity of the courts,"[137] and it is applied to protect the court's appearance of fairness. For estoppel to apply, the contradicting position that the charging party now seeks to abandon must have been offered and accepted within the judicial system, under the scrutiny of the adversarial system, and, presumably, before another judge or fact-finder.[138] The moral indignation aspect of judicial estoppel arises from the doctrine's refusal to allow the plaintiff to make a fool out of the courts or judges. Therefore, it is clearly inapplicable in situations where the charging party: has not made any statements before any tribunal (such as a telephone application); has not sought the protection or judgment of a fact finder (such as those presumptively disabled or with listed disabilities); never asserted total disability (such as those who stated they were unemployed for lack of accommodation); or was forced or advised by his or her employer (or doctor) to submit a disability application. These applicants have not harmed the judicial system, nor do they deserve to be stopped at the bottom rung of the judicial ladder when seeking to assert legitimate civil rights.

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[134] 42 U.S.C. § 422(c) (1994); *see also* Marvello v. Chemical Bank, 923 F. Supp. 487, 491–92 (S.D.N.Y. 1996) (explaining that the SSA allows recipients to work for a maximum of nine months in order to encourage them to find jobs).

[135] *See* Douglas W. Henkin, *Judicial Estoppel—Beating Shields Into Swords and Back Again*, 139 U. PA. L. REV. 1711, 1713 (1991) (noting that the jurisdictions which have adopted the doctrine of judicial estoppel are in conflict as to the basic requirements needed for it to be satisfied).

[136] *See id.* at 1715 (stating that the courts are split as to whether the party seeking the use of estoppel is required to have been a party in the first proceeding).

[137] McNemar v. Disney Stores, Inc., 91 F.3d 610, 616 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

[138] *See* Shell Oil Co. v. Trailer & Truck Repair Co., 828 F.2d 205, 209–10 (3d Cir. 1987) (noting that judicial estoppel bars the assertion of any contradictory factual position); *see also* Smith v. Travelers Ins. Co., 438 F.2d 373, 377 (6th Cir. 1971) (asserting that the scope of judicial estoppel does not include inconsistencies between judicial and non-judicial statements).

Some judicial estoppel rulings pertain to cases where the statutory income support application was completed after the terminated employee was allegedly discriminated against.[139] Since the ADA issue is the motive for the termination at the time termination occurs,[140] a disability determination made later by another agency cannot have had any influence on the employer's motive.[141] Although some courts have applied judicial estoppel in such circumstances, there appears to be no reason to fairly justify that in light of the ADA procedures and goals.[142] If this irrelevant after-acquired evidence were presented by the employer, it would amount to presenting evidence of a record of having a disability by the charging party, which itself is a discriminatory act.[143]

In many of the cases discussed herein, the courts ended the litigation with a summary judgment for the employer. Summary judgment is granted when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law."[144] The contested fact is often the degree of disability of the charging party, where the defendant employer argues that the plaintiff is too disabled to work—as demonstrated by the plaintiff's confession of "total disability"—and therefore not a "qualified" person under the ADA.[145] Because this is a matter of definition, it appears to be a matter of law suitable to summary judgment, though it has now become clear that the same words,

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[139] *See, e.g.*, Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277, 279 (S.D.N.Y. 1996); Smith v. Dovenmuehle Mortgage Inc., 859 F. Supp. 1138, 1139–40 (N.D. Ill. 1994).

[140] *See* Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, app. § 2(m) (1996).

[141] *See, e.g.*, *Mohamed*, 944 F. Supp. at 282; D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 4 (1st Cir. 1996).

[142] The Supreme Court has recognized that the goals of eliminating discrimination in the workplace and providing compensation to victims can only be achieved by private litigants seeking redress for injuries. *See* 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)).

[143] *See* 42 U.S.C. § 12102(2)(B) (1994) (defining "disability" as "a record of such an impairment"); *see also* Beaumont, *supra* note 9, at 1570 (discussing how judicial estoppel "stops the clock at the moment that a person with a disability encounters a program of statutory income supports and brands that person as incapable of working for a period that may extend far beyond the actual duration of her disability" and that the ADA expressly prohibits discriminatory use of such records).

[144] FED. R. CIV. P. 56(c).

[145] Wilkinson, *supra* note 5, at 931–33.

used by different agencies, have vastly different meanings. Therefore, these definitions have little bearing on the central question of an ADA claim, which asks whether the claimant *in fact* was able to perform the essential functions of the job. Summary judgment is seldom appropriate unless the court has given ample regard to the factual performance of the claimant, both before and after the dismissal.[146]

General policy considerations also weigh against the broad use of estoppel. Equitable doctrines should not be a complete bar to an anti-discrimination suit.[147] "The objectives of [anti-discrimination statutes] are furthered when even a single employee establishes that an employer has discriminated against him or her."[148] The legislative history and findings associated with the passage of the ADA are also evidence of Congress's intent that the ADA be a powerful tool to redress discrimination,[149] even though the legislation is silent on the issue of "double recovery."[150] On the other hand, 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 for some measure of double-dipping under that statutory scheme. Another policy problem is the obvious fact that judicial estoppel is enforced differently in different circuits, so that the exact same case could have different outcomes in different parts of the country.

CONCLUSION AND RECOMMENDATIONS

Judicial estoppel allows a court to unilaterally terminate a

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[146] The EEOC Guidance finds summary judgment as "inappropriate" as judicial estoppel based largely on the variations among definitions by different agencies. EEOC Guidance, *supra* note 16, at E-10.

[147] *See generally McKennon*, 513 U.S. at 358–60 (recognizing that the national interests served by anti-discrimination suits are effectuated by declining to allow later wrongdoers to present an absolute bar to earlier discrimination).

[148] *Id.* at 358.

[149] *See* Sims, *supra* note 6, at 866 (discussing legislative history of the ADA and the goal of legislators to protect victims of discrimination); *see also* H.R. REP. No. 101-485, pt. 3, at 32–33 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314–15.

[150] McNemar v. Disney Store, Inc., 91 F.3d 610, 620 (3d Cir. 1996) (recognizing the district court's concern that the legislature should authorize a "double recovery," not the courts), *cert. denied*, 519 U.S. 1115 (1997); *see also* Blanton v. Inco Alloys Int'l, Inc., 123 F.3d 916, 917 n.1 (6th Cir. 1997) (noting that a double recovery may be avoided by reducing a backpay award) (citing Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582 (D.C. Cir. 1997)).

claim before it is fully articulated and before it is subject to the truth-seeking function of a trial or motion for summary judgment. Rather than curtly dismissing the case, the courts could treat representations made to another agency about one's disability as admissible evidence presented by the defendant employer, and then use evidentiary examination to elicit the relevance and weight of these representations as they bear on the core ADA issue of ability to perform with (or without) reasonable accommodation. The benefit application can be one factor in the overall assessment of the plaintiff's prima facie case. Alternatively, "total disability" could be treated as a "rebuttable presumption" where the plaintiff has claimed it in disability applications.[151] Finally, legislative relief is another possibility. A

[151] Sims, *supra* note 6, at 866; Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 518 (5th Cir. 1997), *vacated and remanded*, 119 S. Ct. 1597 (1999). The use of a rebuttable presumption is not truly desirable in this context because it provides an advantage to the defendant at the summary judgment stage rather than allowing the plaintiff a fair chance to develop the issues surrounding the alleged discrimination. The assertion of other statutory rights should not result in an automatic preclusion of ADA claims.

In *Cleveland*, the Fifth Circuit granted summary judgment to the defendant in light of the plaintiff's sworn statements that she was disabled for Social Security benefit purposes. The court found no genuine issue of material fact rebutting the presumption that the plaintiff was judicially esptopped from asserting that she was thereafter a "qualified individual with a disability" under the ADA. The petition for certiorari in the *Cleveland* case was granted to answer the following questions:

1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 428 (1994), creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the American with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (1994).

2. If it does not create such a presumption, what weight, if any, should be given to the application for, or receipt of disability insurance benefits when a person asserts she is a "qualified individual with a disability" under the ADA. *Id.*

The Court of Appeals for the Fifth Circuit recently followed its *Cleveland* "rebuttable presumption" rule in *Pena v. Houston Lighting & Power Co.*, 154 F.3d 267 (5th Cir. 1998), a case involving an employee who represented that he was totally disabled on applications for long-term disability (LTD) benefits and mortgage disability benefits. *See id.* at 268. As part of Pena's application for LTD, he was required to fill out a disability report for the Social Security Administration wherein he claimed that his condition " 'hamper[ed] all job duties.' " *Id.* (alteration in original). The court noted that the language of disability under the LTD was very similar to the ADA definition and thus it would be difficult for Pena to rebut the presumption. *See id.* at 269.

Even if the definition of total disability in a long-term disability plan mirrors that in the ADA such as in *Pena*, issues such as the varying severity of the disability at the time of the alleged discrimination, as opposed to at the time of application for disability benefits, as well as whether plaintiff requested but was denied reasonable

simple declaration that determinations issued by statutory income support programs are not relevant to the determination of whether a plaintiff is a "qualified person" under the Act would go a long way toward removing this issue from ADA litigation. Rather, a plaintiff's assertion of disability for benefit purposes should be just one piece of evidence weighed at the summary judgment stage. Where the plaintiff thereafter succeeds in proving discrimination under the ADA, the award may be reduced to prevent an unfair double recovery.

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accommodation in order to perform the essential functions of her job, may warrant an opportunity for plaintiff to present these facts, and other facts relevant to the purported ADA violations, on a level playing field, rather than one tipped in favor of the defendant. In the Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Cleveland v. Policy Management Systems Corp., (No. 97-1008), the Social Security Administration, Equal Employment Opportunity Commission, and the United States Solicitor General supported a "case-by-case assessment of the specific abilities of the person, the specific requirements of the position that the person holds or desires, and the manner in which the person may be able or enabled to meet those requirements." Amicus Brief at 2 (citing EEOC Guidance, *supra* note 16). The Amicus Brief further noted that SSA forms "do not suggest that a claimant may qualify the statements attesting to his disability and inability to work if he were provided reasonable accommodation." *Id.* at 4. Perhaps the SSA should amend its forms to permit the applicant to qualify for SSA benefits without jeopardizing his or her potential future ADA claims. (Private long-term disability benefit applications present a separate issue, and one where the affiliation with the employer may be likely to encourage disability definitions that closely resemble those in the ADA, as existed in *Pena*). In the meantime, neither the law nor equitable principles support the use of a rebuttable presumption in cases where an ADA plaintiff has asserted disability for benefit purposes.

ADDENDUM

As this article goes to press, the United States Supreme Court issued a unanimous decision in *Cleveland v. Policy Management Systems Corp.*[152] Justice Stephen Breyer, writing for the Court, clarified that claiming SSDI program benefits does not automatically estop a disabled person from pursuing an ADA complaint.[153] Nor does it create a rebuttable presumption against a plaintiff's ADA claim, the standard set by the Court of Appeals for the Fifth Circuit.[154] The Court perceived no inherent conflict between the two federal statutory schemes.[155] A plaintiff must, however, explain any "apparent contradiction" between the representations made for benefit purposes and the necessary elements of the ADA claim, establishing "that she could 'perform the essential functions' of her previous job at least with 'reasonable accommodation,' " in order to survive the traditional summary judgment process.[156]

[152] 119 S. Ct. 1597 (1999), *vacating and remanding* 120 F.3d 513 (5th Cir. 1997).
[153] *See id.* at 1600.
[154] *See id.* at 1602.
[155] *See id.*
[156] *Id.* at 1600, 1603.