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INTRODUCTION

The Americans with Disabilities Act ("ADA"),[1] reviled by some and celebrated by others, marks its tenth anniversary in the year 2000. The legislation has made its mark in a variety of areas, most notably employment, public accommodations, and building design.[2] The U.S. Supreme Court has now heard a number of ADA cases[3] and is beginning to define the place of the ADA in the existing legal landscape. In a recent case, *Cleveland v. Policy Management Systems*,[4] the Court considered the relationship between the employment discrimination provisions of the ADA and benefits programs serving people with disabilities. This Note will discuss the implications of the case for the lower courts.

Title I of the Americans with Disabilities Act[5] prohibits employment discrimination against individuals with disabilities who can do a particular job with or without reasonable accommodation.[6] One of the most striking aspects of the first decade of ADA litigation is how successfully employers have defended themselves against ADA employment discrimination suits. In general, ADA plaintiffs are highly unlikely to prevail on their ADA discrimination claims. A recent study shows that plaintiffs lose about ninety-two percent of cases handled by the courts and about eighty-six percent of all cases handled by the Equal Employment Opportunity Commission ("EEOC").[7]

One of the barriers to success for ADA employment discrimination plaintiffs is the defensive use of the plaintiff's statements to disability benefits providers.[8] Often, a

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1. 42 U.S.C. §§ 12010-12213 (1994).

2. For changes effected by the ADA, see generally LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW (2d ed. 1997).

3. The Supreme Court heard its first two ADA cases in the 1997-98 Term. *See* Bragdon v. Abbott, 524 U.S. 624 (1998); Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998). In the 1998-99 Term it heard six. *See* Olmstead v. L.C., by Zimring, 527 U.S. 581 (1999); Albertsons, Inc. v. Kirkingburg, 119 S. Ct. 2162 (1999); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999); Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999); Cleveland v. Policy Management Sys. Corp., 526 U.S. 795 (1999); Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998).

4. 526 U.S. 795.

5. 42 U.S.C. §§ 12111-12117 (1994).

6. *See id.* § 12112(a).

7. *See* ABA Comm'n on Mental and Physical Disability Law, *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 MENTAL & PHYSICAL DISABILITY L. REP. 403, 403 (1998).

8. *See id.* at 405 (citing the defensive use of assertions on disability benefits forms as a major stumbling block for plaintiffs).

person bringing suit under the ADA has at some relevant time applied for disability benefits. The ADA claim, which is premised upon the assertion that the plaintiff can work, is undercut by statements in the plaintiff's disability benefits application that the plaintiff is unable to work. The difficult question facing courts is the proper effect of the representations in the disability benefits application on the plaintiff's ADA claim. Should the court consider representations made in applications for disability benefits as conclusive evidence that a plaintiff could not do her job with or without reasonable accommodation, dooming the ADA suit as a consequence?

The Supreme Court spoke to this issue in the *Cleveland* case. Prior to the Court's decision in *Cleveland*, some lower federal courts took the position that a plaintiff who represented herself as totally disabled on a benefits application would be judicially estopped from arguing under the ADA that she was able to do a particular job.[9] Other courts set up a presumption scheme whereby the disability benefits application triggered a presumption that the plaintiff would be judicially estopped from proceeding with her ADA claim.[10] Still others rejected judicial estoppel in favor of a traditional summary judgment standard, choosing to consider statements to benefits providers as one piece of evidence among many.[11]

Cleveland addressed this disagreement and provided some answers, but in general the *Cleveland* decision takes a neutral stance that allows the lower courts to continue slowly working out their approach to ADA employment discrimination claims. Courts will continue to face ADA claims in which the plaintiff has applied for and received disability benefits. The main purpose of this Note is to analyze *Cleveland*'s meaning for the lower courts and to suggest an approach for cases involving an ADA plaintiff who has also applied for disability benefits.

In Part I, I will provide a brief overview of the applicable sections of the ADA and pertinent disability benefits programs, as well as a short discussion of the case law predating *Cleveland*. Part II discusses the *Cleveland* decision. Part III takes a closer look at *Cleveland*'s impact on the judicial estoppel doctrine and asks what general principles the lower federal courts can derive from the decision. In Part IV, drawing on the *Cleveland* decision as well as other sources, I suggest a series of questions a court might ask when confronting a potential conflict between an ADA claim and statements made to disability benefits providers.

I. THE PROBLEM OF INCONSISTENT REPRESENTATIONS: STATUTORY BASIS AND PRE-*CLEVELAND* CASE LAW

The ADA makes scant mention of Social Security Disability Insurance ("SSDI"),[12] a massive federal program that provides benefits for working-age people with disabilities.[13] The ADA and SSDI are based on fundamentally different conceptions

9. *See, e.g.*, McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996).

10. *See, e.g.*, Dush v. Appleton Elec. Co., 124 F.3d 957, 963 (8th Cir. 1997).

11. *See, e.g.*, Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376, 383 (6th Cir. 1998).

12. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1031 (1998) (noting that the "interaction between the ADA and the disability benefit programs was barely addressed at the time the ADA was enacted").

13. The Social Security Administration administers two main programs that pay benefits

of the capacities of people with disabilities and can be reconciled only with difficulty.[14] However, both serve the same population, and disabled individuals may avail themselves of both. When an ADA plaintiff has also applied for and received SSDI disability benefits, courts are faced with the task of integrating the two statutes as best they can. In this Part, I will set out the relationship between the ADA and disability benefits programs, then I will discuss the various approaches the courts evolved prior to *Cleveland* to deal with ADA claims that were facially inconsistent with statements made to disability benefits providers.

A. The ADA and Disability Benefits Programs

1. The ADA[15]

The ADA was enacted in 1990 to counter the isolation, segregation, and discrimination experienced by people with disabilities in the United States.[16] The goal of the ADA is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for disabled individuals.[17] To further this end, the ADA created a cause of action for a qualified disabled person who has been discriminated against in the terms, conditions, and privileges of employment because of her disability.[18]

The public reaction to the ADA's employment discrimination provisions has been mixed. While some polls show public support for the antidiscrimination aims of the ADA,[19] many believe the statute's employment provisions cover too many people and are overly burdensome for employers.[20] Some in the business community claim that

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to people with disabilities: SSDI, which covers people who have earned protection by paying Social Security taxes, and SSI, which covers people who are 65 and older, blind, or disabled on the basis of financial need. *See* SOCIAL SECURITY ADMIN., SOCIAL SECURITY AND SUPPLEMENTAL SECURITY INCOME DISABILITY PROGRAMS: MANAGING FOR TODAY, PLANNING FOR TOMORROW (1999). This Note will focus on the SSDI program, since that program was designed for workers and was the program at issue in the *Cleveland* decision. In 1998, around 4.7 million disabled workers received disability benefits from SSDI totaling $43.5 billion. *See id.* at 9 tbl.1.

14. *See* Diller, *supra* note 12, at 1006.

15. In some of the cases discussed, plaintiffs sued under the Rehabilitation Act, *see, e.g.*, Overton v. Reilly, 977 F.2d 1190, 1191 (7th Cir. 1992), or state disability statutes, *see, e.g.*, August v. Offices Unlimited Inc., 981 F.2d 576, 578 (1st Cir. 1992). Because these statutes, like the ADA, require the plaintiff to prove she is a qualified individual with a disability, the analysis under these statutes is identical to the analysis under the ADA.

16. *See* 42 U.S.C. § 12101(a)(2) (1994).

17. *Id.* § 12101(a)(8).

18. *See id.* § 12112(a).

19. *See Poll Update Harris: 87% Favor Americans with Disabilities Act*, THE HOTLINE, May 12, 1999, *available in* WL APN-HO 38 (reporting that 87% of those polled said they favored and supported the ADA).

20. *See, e.g.*, Editorial, *Bringing Sense to the ADA*, PROVIDENCE J., July 2, 1999, at B6 ("[H]ow far can the definition of a disability be stretched before half the nation's population can sue and courts, prodded by plaintiff's lawyers, use the ADA to tell employers how to run virtually every aspect of their businesses . . . ?"); Thomas G. Hungar, Editorial, *A Clear*

the ADA actually impedes the hiring of disabled workers, because managers do not want to run the risk of a discrimination suit should the employee not work out.[21] Even some supporters of rights for the disabled worry that an overbroad definition of disability weakens the ADA's effectiveness.[22] The media frequently portray ADA plaintiffs as opportunists who avail themselves of special perks that they do not deserve.[23] Also often reported are the costs the ADA imposes on businesses.[24] In a 1998 report, the U.S. Commission on Civil Rights blamed "misleading and sometimes inaccurate news coverage" for the public's "gross misunderstanding" of the ADA.[25]

This public ambivalence, even hostility, to the ADA has an analogue in the courts, where plaintiffs lose about ninety-two percent of their ADA claims.[26] The ABA Commission on Mental and Physical Disability Law's study found that there are "myriad potential pitfalls . . . that more often than not result in automatic dismissals."[27] Journalist Marta Russell has conclued that "[i]t is clear that judges have

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Sighted View of the ADA, WALL ST. J., June 24, 1999, at A22 (approving the Supreme Court's decisions narrowing the coverage of the ADA).

21. *See* Roger Clegg, *The Costly Compassion of the ADA*, PUB. INTEREST, Summer 1999, at 100, 104 (stating that employers fear hiring a lawsuit); Anne Fisher, *Readers Weigh in on the ADA and Finding Mentors*, FORTUNE, July 5, 1999, at 192 (stating that readers say that corporations would hire more disabled people if there were no ADA).

22. *See* Bill Bolt, Editorial, *Disabled Can Turn Court Setback into an Opportunity*, PORTLAND PRESS HERALD, June 30, 1999, at 11A (arguing that an expansive definition of disability has weakened the ADA); *Federal Enforcement of ADA Falls Short, Civil Rights Commission Says in Report*, 67 U.S.L.W. 2199 (Oct. 13, 1998) [hereinafter *Federal Enforcement of ADA Falls Short*] (noting that disabled member of Civil Rights Commission believes that expanded disability definition trivializes the goals of the ADA); Robert J. Samuelson, *Americans with Disabilities Act Shows Its Weakness*, BOSTON GLOBE, July 6, 1999, at E4 ("The broader the definition of 'disabled,' the more the law becomes a tool for the already employed to raise their pay.").

23. *See generally* John Leo, *Let's Lower the Bar*, U.S. NEWS & WORLD REP., Oct. 5, 1998, at 19 (criticizing decision allowing special accommodations for learning disabled student taking bar examination); Ruth Shalit, *Defining Disability Down: Why Johnny Can't Read, Write, or Sit Still*, NEW REPUBLIC, Aug. 25, 1997, at 16 (criticizing accommodations given to students deemed learning disabled).

24. *See, e.g.*, Clegg, *supra* note 21, at 100 (detailing the costs and practical problems the ADA imposes on businesses); Peter Coy & Gene Koretz, *Dubious Aid for the Disabled: A Promising Law May Hurt, Not Help*, BUS. WK., Nov. 9, 1998, at 30 ("[T]he mandate for 'reasonable accommodation' of disabled employees can require costly investment in such items as special elevators."). However, not all media coverage of the ADA is negative. *See* Laura KossFeder, *Spurred by the Americans with Disabilities Act, More Firms Take on Those Ready, Willing and Able To Work*, TIME, Jan. 25, 1999, at 82 (reporting ADA success stories).

25. *Federal Enforcement of ADA Falls Short*, *supra* note 22, at 2199 (quoting U.S. CIVIL RIGHTS COMM'N, HELPING EMPLOYERS COMPLY WITH THE ADA (1998)).

26. *See* ABA Comm'n on Mental and Physical Disability Law, *supra* note 7, at 403.

27. *Id.* at 405. Two of the main problem areas cited by the study are the definition of disability and the problem of inconsistent statements. *See id.* Lisa Eichhorn has discussed the difficulties for plaintiffs posed by the statute's tricky definition of disability. *See* Lisa Eichhorn, *Major Litigation Activities Regarding Major Life Activities: The Failure of the "Disability" Definition in the Americans with Disabilities Act of 1990*, 77 N.C. L. REV. 1405

sided with businesses."[28] Professor Ruth Colker found that courts in ADA cases systematically abuse summary judgment and decline to defer to agency guidance, resulting in pro-defendant outcomes.[29]

Even to make out a prima facie case of employment discrimination under the ADA, a plaintiff must show (1) that she is a disabled person within the meaning of the ADA;[30] (2) that she is a qualified individual with a disability, meaning that with or without reasonable accommodation she is able to perform the essential functions of the job;[31] and (3) that she suffered an adverse employment decision because of her disability.[32]

The second element—establishing that she is a qualified individual with a disability—presents problems for the ADA plaintiff who has applied for disability benefits. The ADA defines a qualified individual with a disability as "an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[33] Applications for disability benefits, however, often require an assertion of inability to work.[34] Having at one time claimed that she is unable to work—a fact the employer is sure to bring before the court—the plaintiff will have a more difficult time proving she was able to perform the essential functions of her job as required to succeed on an ADA claim.

2. Disability Benefits Programs

Typically, the application for disability benefits at issue is made to the Social Security Administration ("SSA").[35] Under the SSDI program, disabled individuals meeting certain requirements are entitled to monthly insurance benefits.[36] The SSA defines disability as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a

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(1999).

28. Marta Russell, *Government Should Do More for Disabled*, SALT LAKE TRIB., Nov. 7, 1999, at AA8, *available in* 1999 WL 29633927.

29. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101 (1999).

30. A disability under the ADA is "a physical or mental impairment that substantially limits the major life activities of [an] individual . . . a record of such an impairment; or . . . being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C) (1994).

31. *See id.* § 12111(8).

32. *See id.* § 12112(a).

33. *Id.* § 12111(8).

34. *See* Wendy Wilkinson, *Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act*, 38 S. TEX. L. REV. 907, 915 (1997).

35. Some cases deal with representations made on applications for workers' compensation or in workers' compensation hearings. *See, e.g.*, Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1534 (N.D. Ala. 1995). Others deal with applications for disability benefits from the employer's insurer. *See, e.g.*, D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 3 (1st Cir. 1996).

36. *See* 42 U.S.C. § 423(a)(1) (1994).

continuous period of not less than 12 months."[37]

To make a disability determination, the SSA uses a five-step process.[38] The threshold question is whether the applicant is engaged in substantial gainful activity; if so, the applicant is not entitled to benefits.[39] If the applicant is not engaged in substantial gainful activity, the second question is whether the applicant has a severe impairment.[40] If not, benefits are denied. If the applicant's impairment is found to be severe, the third step of the process is to check whether the applicant has a listed disability, like epilepsy or amputation of both hands.[41] People with listed disabilities are automatically entitled to benefits.[42] If the applicant's impairment is not listed, the fourth question the SSA asks is whether the applicant can perform her past work; if so, benefits are denied.[43] The final step in the process is to ask whether the applicant can do work that exists in substantial numbers in the national economy.[44] If not, the applicant is entitled to benefits.

3. Relationship Between the ADA and Social Security Disability Benefits

SSDI, enacted in 1956, is considerably older than the ADA and reflects a policy of segregating people with disabilities from the work force.[45] The ADA, on the other hand, is designed to eliminate the barriers that keep people with disabilities from competing on an equal basis for jobs and pursuing economic opportunities.[46] At first glance, it might seem as if the ADA and SSDI serve two different groups, the ADA serving individuals with disabilities who can work and SSDI serving individuals with disabilities who cannot work. Such a conclusion oversimplifies the relationship between the two schemes.

As one commentator put it: "An SSA determination that an applicant is 'totally disabled' does not mean that he cannot do anything."[47] First, a person receiving SSDI benefits is permitted to attempt a trial period of work without losing benefits.[48] This provision demonstrates that the receipt of benefits and the ability to work are not

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37. *Id.* § 423(d)(1)(A).

38. *See* 20 C.F.R. 404.1520 (1999).

39. *See id.* § 404.1520(b).

40. *See id.* § 404.1520(c).

41. *See id.* § 404.1520(d).

42. *See id.*

43. *See id.* § 404.1520(e).

44. *See id.* § 404.1520(f); *see also id.* § 404.1566.

45. *See* Diller, *supra* note 12, at 1005-06.

46. *See* 42 U.S.C. § 12101(8) (1994).

47. Christene Neylon O'Brien, *To Tell the Truth: Should Judicial Estoppel Preclude Americans with Disabilities Act Complaints?*, 73 ST. JOHN'S L. REV. 349, 368 (1999).

48. *See* 42 U.S.C. § 422(c) (1994). There is a definite trend toward greater work opportunities for people receiving SSDI benefits. In late 1999, President Clinton signed H.R. 1180, the Ticket to Work and Work Incentives Improvement Act, which, among other provisions, will allow people who receive federal disability benefits greater access to rehabilitation and vocational services. *See Fact Sheet: Ticket to Work and Work Incentives Improvement Act of 1999* (last modified Dec. 1999) <http://www.ssa.gov/work/factsheet.htm>.

mutually exclusive. Second, in the inquiry into whether the applicant can do her past work, the SSA does not consider whether she could do that work if accommodations were made.[49] The ADA, of course, does take the effect of reasonable accommodations into account,[50] so a person the SSA determined could not return to her past work could still be a qualified person with a disability under the ADA if reasonable accommodations would allow her to return. Third, the SSA definition of disability focuses not on a specific job, but on whether substantial gainful work exists in the national economy for the applicant.[51] The ADA, on the other hand, asks whether or not a person could do a specific job with or without reasonable accommodation.[52] As many have noted, a person for whom no substantial gainful work existed in the national economy could still be qualified to do a particular job with a reasonable accommodation.[53] These three examples show how a person who meets the SSA's definition of disabled and is eligible for disability benefits could still be capable of working and therefore covered by the ADA. Thus, while the two schemes are far from fully integrated, they can be reconciled.[54]

*B. Pre-*Cleveland *Case Law*

The task of reconciling the two statutes was left to the courts, who had to decide what effect statements made to a disability benefits provider should have on a subsequent ADA claim. In the years before *Cleveland*, several distinct approaches to the problem of inconsistent statements developed. Many jurisdictions either adopted or experimented with a harsh solution to the problem: the application of the doctrine of judicial estoppel.

Judicial estoppel is a doctrine a court may invoke to prevent a party from asserting

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49. *See* Memorandum from Daniel L. Skoler, Associate Commissioner, Social Security Admin., to Headquarters Executive Staff et al., Social Security Admin. (June 2, 1993), *reprinted in* SOCIAL SECURITY PRACTICE GUIDE app. § 15C[9], at app. 15-399, -401 (1995) ("[H]ypothetical inquiries about whether an employer would or could make accommodations that would allow return to a prior job would not be appropriate [to an SSA disability determination].").

50. *See* 42 U.S.C. § 12111(8) (1994).

51. *See id.* § 423(d)(2)(A).

52. *See* 42 U.S.C. § 12111(8).

53. *See* AMERICANS WITH DISABILITIES ACT DIV., EQUAL EMPLOYMENT OPPORTUNITY COMM'N, PUB. NO. 915.0002, ENFORCEMENT GUIDANCE ON THE EFFECT OF REPRESENTATIONS MADE IN APPLICATIONS FOR BENEFITS ON THE DETERMINATION OF WHETHER A PERSON IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990, at 26 (1997); Memorandum from Daniel L. Skoler, *supra* note 49, app. § 15C[9], at app. 15-399, -401; *see also* Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 586 (D.C. Cir. 1997) (concluding that Social Security determination says nothing about claimant's ability to do prior job with reasonable accommodation).

54. One suggestion for reconciling the two schemes is to understand the SSA determination of disability as establishing a category of people who are excused from work but who are free to exceed this expectation by entering the work force, at which point they will be protected by the ADA. *See* Diller, *supra* note 12, at 1009.

inconsistent positions.[55] The doctrine is designed to prevent parties from making a mockery of justice by changing positions as it suits their needs.[56] It prevents a party from asserting a position in a legal proceeding that contradicts a position taken in an earlier legal proceeding.[57] Judicial estoppel is not to be confused with other estoppel doctrines, such as equitable estoppel, issue preclusion, and claim preclusion.[58] Neither state nor federal courts have uniformly adopted the doctrine of judicial estoppel,[59] and various jurisdictions disagree as to the exact requirements of the doctrine.[60] The most frequently stated reason for the application of judicial estoppel is preventing parties from "playing fast and loose" with the courts.[61] Other policy rationales for the doctrine are upholding the sanctity of the oath under which the prior assertion was made and protecting the integrity of the judicial process.[62]

The application of judicial estoppel to ADA claims further manifests judicial hostility to the ADA.[63] When it operated in the ADA context, judicial estoppel served as a complete bar to the plaintiff's presenting evidence to show that she was a qualified individual with a disability.[64] The application of the doctrine was often accompanied by harsh language for the plaintiff.[65] As one court said concerning statements it found to be inconsistent: "[p]laintiff . . . cannot speak out of both sides of her mouth with equal vigor and credibility before this court."[66] Another court concluded that, "[h]aving collected substantial benefits, based on these unambiguous and seemingly informed representations, plaintiff is estopped from now claiming that she *could* perform the essential functions of her position."[67] Many of the judges in the cases that applied judicial estoppel seemed angry that a person who was claiming to be able to work would accept disability benefits. The Second Circuit, applying judicial estoppel to an age discrimination claim, said, "to rule otherwise might leave the implication that someone who feels himself in need of further income is free to

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55. *See* Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 601 (9th Cir. 1996) ("Because [judicial estoppel] is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.").

56. *See* Talavera v. School Bd., 129 F.3d 1214, 1217 (11th Cir. 1997).

57. *See* Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244, 1244 (1986).

58. *See* Douglas W. Henkin, Comment, *Judicial Estoppel—Beating Shields into Swords and Back Again*, 139 U. PA. L. REV. 1711, 1717 (1991).

59. *See id.* at 1711; *see also* Michael D. Moberly, *Playing "Fast and Loose" or Just Fast?: A Look at Judicial Estoppel in the Ninth Circuit*, 33 GONZ. L. REV. 171, 174 (1998).

60. For a discussion of the currently prevalent versions of the doctrine, see David S. Coale, *A New Framework for Judicial Estoppel*, 18 REV. LITIG. 1, 2-6 (1999).

61. *See* Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996); Henkin, *supra* note 58, at 1725.

62. *See* Simon v. Safelite Glass Corp., 128 F.3d 68, 71 (2d Cir. 1997); Boyers, *supra* note 57, at 1250-51.

63. *See supra* text accompanying notes 26-29.

64. *See* Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547, 555 (D. Kan. 1995).

65. *See* Jeffrey Koziar, Note, *Judicial Estoppel and the Americans with Disabilities Act: Should the Courts Defer to the EEOC?*, 50 RUTGERS L. REV. 2259, 2275 (1998) ("Some courts invoking a per se approach all but accuse the plaintiff of attempting to commit fraud.").

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

67. *Garcia-Paz*, 873 F. Supp. at 555 (emphasis in original).

misrepresent important information to the Social Security Administration."[68] One observer noted that courts applying judicial estoppel to bar ADA claims often did so even if the formal elements of judicial estoppel were not present, instead basing the application of judicial estoppel on the court's sense that the plaintiff was trying to gain an unfair advantage.[69]

The trend toward the use of judicial estoppel to block ADA claims reached its high point in a Third Circuit decision, *McNemar v. Disney Store, Inc.*[70] In *McNemar*, an employee with AIDS applied for SSDI and state disability benefits soon after he was fired from his job.[71] In those applications, he noted that he had been unable to work since a date several weeks before he was fired.[72] In affirming the district court's grant of summary judgment for the employer, the court looked mainly at statements made by the plaintiff and his doctors in support of the plaintiff's disability benefit applications.[73] In effect, the court took the plaintiff's word that he was unable to work and refused to allow him to explain those statements for the purposes of his ADA claim.[74] Judging from the opinion, the court believed the plaintiff lied on his benefits applications and took away his ADA claim as a form of punishment for that transgression.[75]

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68. Simon v. Safelite Glass Corp., 128 F.3d 68, 72 (2d Cir. 1997).

69. *See* 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, 425 (1997). For example, the court in *McNemar v. Disney Store, Inc.* was not concerned with setting out the elements of judicial estoppel and dispassionately seeing if they were fulfilled. 91 F.3d 610, 617 (3d Cir. 1997). In fact, the court stated the elements of judicial estoppel in its jurisdiction only to dismiss them. *See id.* ("[T]he application of judicial estoppel is not limited in the formulaic manner urged by Appellant . . . ."). All the court really required before applying estoppel was (1) a statement inconsistent with the party's present position and (2) evidence that one or both of those statements was in bad faith. *See id.* at 618. Since the *McNemar* court apparently derived its evidence of bad faith from the inconsistent statements themselves, the two requirements for the application of estoppel collapsed into one: a set of inconsistent statements. *See also* Cheatwood v. Roanoke Indus., 891 F. Supp. 1528, 1538 (N.D. Ala. 1995) (applying estoppel without listing any particular elements, on the theory that plaintiff was bound by his prior statement that he could not work); *Garcia-Paz*, 873 F. Supp. at 555 (applying estoppel without listing any particular elements, on the theory that the plaintiff had received substantial benefits based on her representations that she could not work). However, even before the widespread rejection of judicial estoppel, some courts were more strict in their application of the elements of the estoppel doctrine. *See* Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1141 (N.D. Ill. 1994) (denying summary judgment were genuine issue of material fact existed as to one of the elements of the estoppel doctrine).

70. 91 F.3d 610.

71. *See id.* at 615.

72. *See id.*

73. *See id.* at 618-19.

74. *See id.*

75. "The fact that the choice between obtaining federal or state disability benefits and suing under the ADA is difficult does not entitle one to make false representations with impunity . . . . Nothing grants a person the authority to flout the exalted status that the law accords statements made under oath on penalty of perjury." *Id.* at 620.

Following *McNemar*, a backlash against judicial estoppel began, a reaction to the inequity of forcing a potential ADA plaintiff into the "untenable position" of choosing between her ADA claim and disability benefits.[76] Scholarly articles criticized the application of the estoppel theory,[77] and the EEOC issued an enforcement guidance explaining why the receipt of disability benefits should not judicially estop a plaintiff's ADA claim.[78]

The impact of the enforcement guidance was soon felt. In *Swanks v. Washington Metropolitan Area Transit Authority*, the first circuit court case decided on the judicial estoppel question after the enforcement guidance appeared, the D.C. Circuit quoted from the enforcement guidance and reversed summary judgment for an employer on the grounds that the receipt of Social Security disability benefits did not

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76. Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1142 (N.D. Ill. 1994) ("Defendant's position would place plaintiff in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA.").

77. An early student note was particularly influential. *See* 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, 1559-60 (1996). Beaumont's note was cited with approval in an influential district court case, *Mohamed v. Marriott Int'l, Inc.*, 944 F. Supp. 277, 282 (S.D.N.Y. 1996), as well as in *Sumner v. Michelin N. Am., Inc.*, 966 F. Supp. 1567, 1576 (M.D. Ala. 1997). Articles criticizing the use of judicial estoppel include O'Brien, *supra* note 47, at 368 (concluding that judicial estoppel should not preclude ADA complaints); Weston, *supra* note 69, at 444 (calling judicial estoppel an unnecessarily harsh penalty); Wilkinson, *supra* note 34, at 937 (arguing that allowing judicial estoppel of ADA claims will impede the implementation of the ADA); Koziar, *supra* note 65, at 2294 (concluding that courts are wrong to use judicial estoppel as an absolute bar to ADA claims); Andrea Christensen Luby, Note, *Estopping Enforcement of the Americans with Disabilities Act*, 13 J.L. & POL. 415, 451 (1997) (stating that policy reasons should block the use of estoppel even where the plaintiff has contradicted earlier statements); Marney Collins Sims, Comment, *Estop It! Judicial Estoppel and Its Use in Americans with Disabilities Act Litigation*, 34 HOUS. L. REV. 843, 870 (1997) (finding judicial estoppel of ADA claims unnecessary and inappropriate).

On the other hand, some student pieces supported the application of judicial estoppel. *See* Heather Hamilton, Comment, *Judicial Estoppel, Social Security Disability Benefits and the ADA: The Circuits Diverge*, 9 DEPAUL BUS. L.J. 127, 156 (1996) ("Application of judicial estoppel is appropriate . . . where the individual has admitted to a total disability."); Kimberly Jane Houghton, Commentary, *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, 671 (1998) ("[J]udicial estoppel . . . is important to preserve the integrity of the judicial system."); Jeorge M. Leon, Note, *Two Hats, One Head: Reconciling Disability Benefits and the Americans with Disabilities Act of 1990*, 1997 U. ILL. L. REV. 1139, 1140 ("The receipt of benefits for total disability should judicially estop . . . one from pursuing an employment claim under the ADA.").

78. *See* AMERICANS WITH DISABILITIES ACT DIV., *supra* note 53, at i. The EEOC's enforcement guidance carefully set out the differences between the inquiry required by the ADA and the inquiry undertaken by the SSA and other disability benefit providers. The enforcement guidance concluded that because of these differences, the application for or receipt of disability benefits should never be an absolute bar to a determination that a person is a qualified individual with a disability. *See id.* at 3.

preclude ADA relief.[79] Subsequent cases repudiating judicial estoppel also relied on the enforcement guidance for its explanation of how a person considered disabled by the SSA could also be a qualified person with a disability.[80]

By going back to district court cases refusing to apply judicial estoppel[81] and reinterpreting cases that had seemed to support it,[82] the federal courts quickly reversed the judicial estoppel trend. Less than two years after the *McNemar* court claimed to be representing the majority opinion by applying judicial estoppel, the Tenth Circuit could say that in rejecting judicial estoppel in the ADA context it was joining the majority of circuits.[83]

After this general rejection of judicial estoppel, the circuits took various approaches to the problem of inconsistent statements. The Sixth and the Tenth Circuits chose to analyze the effect of disability applications or determinations on ADA claims under traditional summary judgment rules, the Sixth citing the insufficiency of a judicial estoppel theory in the ADA context. The Tenth Circuit does not recognize judicial estoppel at all.[84]

The Fifth and the Eighth Circuits replaced judicial estoppel with a rebuttable presumption that the plaintiff who applied for or received disability benefits should be judicially estopped from bringing an ADA claim.[85] Using different formulations,[86]

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79. 116 F.3d 582, 586 (D.C. Cir. 1997).

80. *See, e.g.*, Johnson v. Oregon, 141 F.3d 1361, 1367 (9th Cir. 1998); Weigel v. Target Stores, 122 F.3d 461, 466 (7th Cir. 1997).

81. Such as *Smith*, which provided the frequently-used quote that applying judicial estoppel would "place plaintiff in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA." 859 F. Supp. at 1142. Another district court case, *Mohamed v. Marriott Int'l, Inc.*, was cited for its policy argument that the use of judicial estoppel would undermine the principal purpose of the ADA: encouraging people with disabilities to support themselves by working. 944 F. Supp. 277, 284 (S.D.N.Y. 1996).

82. In *Griffith v. Wal-Mart Stores, Inc.*, the Sixth Circuit looked back at *August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992), which had been cited by *McNemar* and others to support the use of judicial estoppel, and noted that the court simply applied well-established summary judgment principles. 135 F.3d 376, 382 (6th Cir. 1998). The Eleventh Circuit, in *Talavera v. School Board*, reclassified *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996), which *McNemar* cited as a judicial estoppel case, as a case decided on its facts without articulating any rules. 129 F.3d 1214, 1220 (11th Cir. 1997). Finally, *McNemar* itself was reevaluated when the Ninth Circuit decided that *McNemar* did not support a per se estoppel rule. *See Johnson*, 141 F.3d at 1368.

83. *See* Rascon v. US West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998).

84. The Sixth Circuit noted that "[a]pplying judicial estoppel under the circumstances presented here would be inappropriate given that the truth-seeking function of the court would be supplanted by an agency administrative decision rendered without an evidentiary hearing." *Griffith*, 135 F.3d at 382. The Tenth Circuit has refused to adopt the doctrine of judicial estoppel in any context. *See Rascon*, 143 F.3d at 1330; Parkinson v. California Co., 233 F.2d 432, 437-38 (10th Cir. 1956).

85. *See* Dush v. Appleton Elec. Co., 124 F.3d 957, 963 (8th Cir. 1997); Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 517-18 (5th Cir. 1997), *vacated*, 526 U.S. 795 (1999).

86. The Fifth Circuit instituted a rebuttable presumption, *see Cleveland*, 120 F.3d at 517, the Eighth a strong countervailing evidence standard, *see Dush*, 124 F.3d at 963.

these circuits shifted the burden to the plaintiff to produce evidence showing she was a qualified individual. The burden-shifting approach implied that something more was needed than a genuine issue of material fact to survive summary judgment. Depending on how it was applied, this approach was nearly as harsh on the plaintiff as per se judicial estoppel.[87] The First and the Seventh Circuits took a similar route by requiring the plaintiff to come forward with evidence showing she was a qualified individual, but these circuits did not create any kind of special presumption for the plaintiff to overcome.[88]

The D.C. Circuit, the Ninth Circuit, and the Eleventh Circuit disavowed judicial estoppel in general while still maintaining that, given the right set of circumstances, an ADA plaintiff would be estopped from claiming to be a qualified individual with a disability.[89] The Third and the Fourth Circuits, both of which had applied judicial estoppel to ADA plaintiffs,[90] did not revisit their approach after the backlash against judicial estoppel began. The Second Circuit had never applied judicial estoppel to an ADA claim, but it had invoked the doctrine in similar circumstances in an age discrimination suit.[91]

Thus, prior to the Supreme Court's decision in *Cleveland*, all but three of the circuits agreed that the application of judicial estoppel to ADA claims on the basis of prior inconsistent representations was not appropriate in most circumstances. They did not agree, however, as to the effect the prior inconsistent representations should have on the claim. On one end of the spectrum, some courts still applied judicial estoppel and others applied presumptions nearly as harsh in effect as judicial

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87. That the burden-shifting approach encouraged a harsh application is illustrated by an Eighth Circuit case, *Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210 (8th Cir. 1998), *vacated*, 526 U.S. 1142 (1999). The court granted summary judgment for the employer on the plaintiff's ADA claim, deeming insufficiently strong to overcome the "strong countervailing evidence" standard facts such as the employer's refusal to extend accommodations it had extended to the plaintiff in the past, the denial of plaintiff's SSA disability application, and the plaintiff's statements in state workers' compensation hearing that she could work within her restrictions. *Id.* at 1212-13. Surely under a traditional summary judgment standard this evidence would have been enough to raise a genuine issue of material fact as to whether the plaintiff was a qualified individual with a disability.

88. *See* Soto-Ocasio v. Federal Express Corp., 150 F.3d 14, 19-20 (1st Cir. 1998); Weigel v. Target Stores, 122 F.3d 461, 468 (7th Cir. 1997).

89. *See* Fredenburg v. Contra Costa County Dep't of Health Servs., 172 F.3d 1176, 1179 (9th Cir. 1999) (holding judicial estoppel not appropriate in ADA cases unless plaintiff has committed a fraud on the court); Talavera v. School Bd., 129 F.3d 1214, 1220 (11th Cir. 1997) (concluding that "*per se* judicial estoppel is not warranted in this case," definitely leaving the impression that judicial estoppel might be warranted in other circumstances); Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 587 (D.C. Cir. 1997) ("For example, ADA plaintiffs who in support of claims for disability benefits tell the Social Security Administration they cannot perform the essential functions of a job even with accommodation *could well be barred* from asserting, for ADA purposes, that accommodation would have allowed them to perform that same job.") (emphasis added).

90. *See* Cathcart v. Flagstar Corp., No. 97-1977, 1998 WL 390834, at *9 (4th Cir. June 29, 1998) (applying judicial estoppel, although court found elements not met); McNemar v. Disney Store, Inc., 91 F.3d 610, 618 (3d Cir. 1996).

91. *See* Simon v. Safelite Glass Corp., 128 F.3d 68, 73 (2d Cir. 1997).

estoppel. At the other end, courts took inconsistent prior representations as one piece of relevant evidence among many. It was to clear up the disagreement among the circuits that the Supreme Court granted certiorari in *Cleveland*.[92]

II. THE *CLEVELAND* DECISION

The Supreme Court's *Cleveland* decision was a unanimous rejection of the burden-shifting presumption approach. I will discuss briefly the lower courts' decisions in the case before turning to the Supreme Court's decision.[93]

A. Facts

Carolyn Cleveland ("Cleveland") went to work for Policy Management Systems Corporation ("Policy Management") in August 1993.[94] In early 1994, Cleveland had a stroke, which inhibited her language ability, memory, and concentration.[95] Three weeks after her stroke, with her daughter's help, Cleveland applied for disability benefits, stating that she was "unable to work."[96] In a few months, Cleveland had improved enough to return to work.[97] She informed SSA that she was working, and her application was denied on that basis.[98] During the time she was working, Cleveland asked for several accommodations to help her do her job, all of which Policy Management denied.[99] Policy Management fired Cleveland for poor job performance three months after her return.[100] Cleveland subsequently asked SSA to reconsider her disability benefits application.[101] In her request, she stated that Policy Management fired her because she "could no longer do the job."[102] After her benefits application was denied again, SSA held a hearing in which Cleveland asserted that she was unable to work.[103] Her benefits application was granted and she was awarded benefits retroactive to the date of her stroke.[104] The week before the award came through, Cleveland filed an ADA employment discrimination claim against Policy

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

93. For another account of the *Cleveland* decision, including lower court decisions and positions taken by the litigants, see Richard C. Mariani & Kimberly E. Robertson, *Representations 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, 659-65 (1999).

94. *See Cleveland*, 526 U.S. at 798.

95. *See id.*

96. *Id.*; Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 514 (5th Cir. 1997), *vacated*, 526 U.S. 795 (1999).

97. *See Cleveland*, 526 U.S. at 798.

98. *See id.*

99. *See id.* at 799.

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

101. *See Cleveland*, 526 U.S. at 798.

102. *Id.* at 799.

103. *See id.*

104. *See id.*

Management for firing her without "reasonably 'accommodating her disability.'"[105]

B. Lower Courts' Decisions

The district court granted summary judgment for Policy Management on the ADA claim, reasoning that Cleveland's representations to SSA judicially estopped her from claiming to be a qualified individual with a disability under the ADA.[106] The district court's decision was based on a straightforward judicial estoppel theory.

On appeal, the Fifth Circuit declined to adopt an automatic judicial estoppel rule,[107] but its skepticism of the ADA claimant who has applied for disability benefits was clear: "It is at least theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive . . . ."[108] The Fifth Circuit instead held that the application for, or receipt of, disability benefits created a "rebuttable presumption" that an ADA plaintiff would be judicially estopped from claiming to be a qualified individual.[109] To defeat this presumption, the plaintiff would have to show "credible, admissible evidence" that despite being disabled for SSDI purposes, she was still qualified to perform the essential functions of her job, with or without reasonable accommodation.[110] In analyzing the facts of the case, the court did not consider that the plaintiff only renewed her disability application after she was refused accommodation at her job and subsequently fired,[111] choosing to focus only on the plaintiff's representations of disability to the SSA.[112] The court's concluding statement revealed a concern that the courts would be unfairly taken advantage of if both claims were allowed: "To permit Cleveland['s] . . . argument in the face of her prior, consistent, and—until now—uncontested sworn representations to the SSA would be tantamount to condoning her advancement of entirely inconsistent legal positions, a factual impossibility and a legal contradiction."[113] The Fifth Circuit's tough, "rebuttable presumption" standard reflected its doubt that it is really possible for a person to be both disabled under the SSA standards and a qualified individual with a disability under the ADA, and its underlying suspicion that ADA plaintiffs who also receive disability benefits are trying to have it both ways.

C. Supreme Court Decision

The Supreme Court granted certiorari in *Cleveland* to resolve the split in the circuits over the effect of an application for disability benefits on an ADA claim.[114]

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105. *Id.*
106. *See Cleveland*, 120 F.3d at 515.
107. *See id.* at 517.
108. *Id.*
109. *Id.* at 518.
110. *Id.*
111. *See id.* at 515.
112. *See id.* at 518.
113. *Id.*
114. *Cleveland*, 526 U.S. at 800. While *Cleveland* dealt with the SSDI program, its analysis also applies to applications for other types of disability benefits. *See* Peggy R. Mastroianni,

Justice Breyer wrote the opinion for a unanimous Court.[115] The Court reviewed the Fifth Circuit's "rebuttable presumption" standard, framing the issue as "whether the law erects a special presumption that would significantly inhibit an SSDI recipient from simultaneously pursuing an action for disability discrimination."[116] After discussing the purposes of the SSA and the ADA and the possible conflicts between the two statutes, the Court concluded that "the two claims do not inherently conflict to the point where courts should apply a special negative presumption .... [T]here are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side."[117]

Supporting this conclusion, the Court noted three examples of how an SSDI claim and an ADA claim could coexist: (1) SSA's disability determination does not take into account the employer's duty to make reasonable accommodations, so a plaintiff who could work if accommodated could still be eligible for SSDI benefits; (2) SSA uses a streamlined five-step process to determine disability, and this process can count as disabled persons who, due to individual circumstances, are able to do the essential functions of a job; and (3) under certain circumstances, SSA grants benefits to individuals who are working.[118]

The Court then turned to the effect of an SSDI claim on a plaintiff's ADA suit and found that a statement asserting an inability to work would still negate an essential element of the plaintiff's ADA claim, unless she provided a sufficient explanation for the inconsistency.[119] The Court set out the following standard:

> When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions" of her job, with or without "reasonable accommodation."[120]

Instructions for Field Offices: Analyzing ADA Charges After Supreme Court Decisions Addressing "Disabilities" and "Qualified", in 28TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 313, 332 (PLI Litig. & Admin. Practice Course Handbook Series No. HO-0050, 1999).

115. *See Cleveland*, 526 U.S. at 797.

116. *Id.* at 797.

117. *Id.* at 802-03.

118. *See id.* at 803-05.

119. *See id.* at 806. The *Cleveland* approach is very similar to the one previously taken by the Seventh Circuit. *See* McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 1165, 1167 (7th Cir. 1997) (vacating summary judgment for employer on employment discrimination claim where plaintiff provided credible evidence that he could have done his job with reasonable accommodation); Weigel v. Target Stores, 122 F.3d 461, 468 (7th Cir. 1997) (holding that when employer relies on plaintiff's assertions of total disability to argue that the plaintiff cannot be a qualified individual under the ADA, plaintiff is free to come forward with additional evidence showing she is qualified individual); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (holding SSA finding of disability not dispositive to the determination of qualified individual status under the ADA).

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

The Court made it clear that summary judgment for the employer is still quite possible under this standard.[121] The case was remanded to be decided under the new standard.[122]

III. AN ANALYSIS OF *CLEVELAND*

By deciding that the problem of inconsistent statements should be resolved using a summary judgment-like principle rather than judicial estoppel or presumptions, the *Cleveland* Court adopted a case-by-case, context-sensitive approach. This approach is consistent with that of the Court's other major ADA cases from the 1998-99 Term.[123] In one of the three "mitigating measures" cases from that Term,[124] for example, the Court characterized the ADA disability determination as an "individualized inquiry."[125] It held that the evaluation of whether a person is disabled should be made on a case-by-case basis with reference to measures that mitigate the individual's impairment, such as eyeglasses or high blood pressure medication.[126] This holding represents a shift toward a more individualized approach. Individuals with certain conditions—like epilepsy or severe hypertension—used to be assumed to count as disabled. Now the disability determination for those individuals must be made on a case-by-case basis with reference to whether the corrected impairment substantially limits a major life activity.[127]

This rigorous case-by-case approach, which is a prime characteristic of the current Court's general methodology,[128] has a mixed impact on ADA plaintiffs. While *Cleveland* improved the odds for an ADA plaintiff who has also applied for disability benefits, the mitigating measures decisions were seen as a major setback by disability rights groups.[129] One commentator notes that the absence of bright line rules concerning the ADA gives both plaintiffs and defendants the impression that the

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121. *See id.*

122. *See id.*

123. *See* U.S. Equal Employment Opportunity Comm'n, *Press Release, EEOC Chairwoman Comments on ADA Rulings by Supreme Court During Speech to Plainitffs' Bar in New Orleans* (visited Apr. 11, 2000) <http://www.eeoc.gov/press/7-1-99.html> (stating that the recent decisions of the Supreme Court affirmed the EEOC's individualized approach to ADA claims).

124. *See* Albertsons, Inc., v. Kirkingburg, 119 S. Ct. 2162, 2169 (1999); Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146 (1999); Murphy v. UPS, Inc., 119 S. Ct. 2133, 2137 (1999).

125. *Sutton*, 119 S. Ct. at 2147.

126. *See id.* at 2143.

127. *See id.* at 2158 (Stevens, J., dissenting). *But see* Bragdon v. Abbott, 524 U.S. 624, 637 (1998) (holding that asymptomatic HIV is an impairment that substantially limits the major life activity of reproduction and thus is a disability under the ADA).

128. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT at xiii (1999) (noting that the current Supreme Court tends to decide cases on narrow grounds, avoiding broad rulings).

129. *See* Marcia Coyle, *ADA: Clarified or Ruined? Disabled Community Is Dismayed; Business Gives a Sigh of Relief*, NAT'L L.J., July 5, 1999, at A1; Robin Toner & Leslie Kaufman, *Ruling Upsets Advocates for the Disabled*, N.Y. TIMES, June 24, 1999, at A24.

application of the ADA is arbitrary and unfair.[130] This perception reduces voluntary compliance, which occurs only when actors believe that a law is fundamentally fair.[131]

While *Cleveland* itself was generally interpreted as a victory for ADA plaintiffs,[132] it created a flexible rule, so its real legacy will depend on how the lower courts apply it. However, *Cleveland* does set a general tone for how the lower courts should approach inconsistent representation cases. In this Part, I will address the question of where *Cleveland* left the doctrine of judicial estoppel, and I will analyze the real extent of the changes made by *Cleveland.*

A. Did Cleveland *End the Use of Judicial Estoppel Against ADA Plaintiffs?*

At first glance, *Cleveland* would seem to end the use of judicial estoppel against ADA plaintiffs. Its mild tone and sympathetic treatment of ADA plaintiffs contrast sharply with the suspicious, hostile attitude of the courts applying judicial estoppel.[133] Upon closer inspection, however, *Cleveland* hedges its bets. In the second paragraph of the opinion, in its only direct reference to judicial estoppel, the Court states, "pursuit, and receipt, of SSDI benefits does not *automatically* estop the recipient from pursuing an ADA claim."[134] This cautious tone is emblematic of the opinion, which carefully avoids ruling out judicial estoppel completely and actually reinvigorates the application of the doctrine in one area. In this sub-Part, I will discuss the circumstances in which judicial estoppel of an ADA plaintiff survives *Cleveland.*

In any context, the application of judicial estoppel is "fraught with the potential for causing litigants great hardship."[135] The hardship arises from the fact that the application of judicial estoppel frustrates a decision on the merits and conflicts with the truth-seeking function of the courts.[136] Moreover, commentators argue that

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130. *See* Leslie Goddard, *Searching for Balance in the ADA: Recent Developments in the Legal and Practical Issues of Reasonable Accommodation*, 35 IDAHO L. REV. 227, 229 (1999).

131. *See id.* at 231. The argument against bright line rules in some contexts, as articulated by Professor Cass Sunstein, is that narrow decisions reduce the risk of judicial error and encourage democratic solutions to problems. *See* SUNSTEIN, *supra* note 128, at 4.

132. *See* Adin C. Goldberg, *Supreme Court Sends Mixed Signals in ADA Employment Cases*, METROPOLITAN CORP. COUNS., July 1999, at 13 (concluding that *Cleveland* broadened ADA protection).

133. *See supra* text accompanying notes 63-75.

134. *Cleveland*, 526 U.S. at 797 (emphasis added). The ploy of reserving the possibility of judicial estoppel echoes the approach of the D.C. Circuit. *See* Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 586-87 (D.C. Cir. 1997) (holding that receipt of disability benefits does not bar ADA claim, but reserving possibility that specific statements could operate as a bar).

135. Henkin, *supra* note 58, at 1713. Not all commentators would agree with this statement. *See* Ashley S. Deeks, Comment, *Raising the Cost of Lying: Rethinking* Erie *for Judicial Estoppel*, 64 U. CHI. L. REV. 873, 874 (1997) (arguing that judicial estoppel advances important policy goals and that a federal court sitting in diversity should apply the most stringent version of the doctrine available); Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 GEO. WASH. L. REV. 409, 426-34 (1987) (rebutting policy arguments against the use of judicial estoppel).

136. *See* Boyers, *supra* note 57, at 1254-55 (discussing the broadest formulation of judicial

judicial estoppel is inconsistent with the spirit of Federal Rule of Civil Procedure 8(e)(2), which allows pleading of inconsistent causes of action and defenses.[137] The abolition of judicial estoppel has been recommended,[138] and the Tenth Circuit has in fact rejected it.[139] Thus, even aside from its use in the ADA context, judicial estoppel is a controversial doctrine, the elements of which are in dispute and the application of which is not universally accepted.

When courts applied judicial estoppel in the ADA employment discrimination context, the existing problems with the doctrine were magnified. It was applied less as a legal doctrine than as an almost visceral judicial reaction to what the court perceived as the plaintiff's attempt at fraud.[140] Judicial estoppel stood for the idea that the receipt of disability benefits was *fundamentally incompatible* with the ability to prove status as a "qualified individual" under the ADA.[141]

The full-strength form of judicial estoppel was essentially rejected before *Cleveland*,[142] for good reason. As many have noted, this form of judicial estoppel completely ignores the difference between the ADA's "qualified individual with a disability" and the SSA's definition of disability, and the fact that it may well be possible to be disabled for the purposes of disability benefits and still be able to do a particular job with reasonable accommodation.[143] Even before the Supreme Court's decision in *Cleveland*, the use of judicial estoppel against ADA plaintiffs had shifted to a subtler form based on presumptions, best exemplified by the Fifth Circuit's *Cleveland* decision.[144] The Supreme Court's *Cleveland* decision abolished this type of presumption, though *Cleveland* recognizes that genuinely inconsistent statements for which the plaintiff has no explanation can put an end to a plaintiff's ADA employment discrimination claim.[145]

Even though *Cleveland* substituted a summary judgment standard for a presumption scheme or the general use of judicial estoppel, *Cleveland* also

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estoppel, not more limited versions); Henkin, *supra* note 58, at 1740.

137. FED. R. CIV. P. 8(e)(2); *see* Henkin, *supra* note 58, at 1736-37; Moberly, *supra* note 59, at 199-200.

138. *See* Henkin, *supra* note 58, at 1755. Other commentators suggest limitation of the doctrine of judicial estoppel. *See* Boyers, *supra* note 57, at 1270 (suggesting across-the-board limitation of judicial estoppel to cases in which the prior position was successfully litigated on the merits or it was clear that the initial court accepted the prior position).

139. *See* Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956); *see also* Coale, *supra* note 60, at 1, 10-11 (noting that the Tenth Circuit continues to follow *Parkinson*).

140. *See supra* text accompanying notes 63-75.

141. *See* Diller, *supra* note 12, at 1035.

142. *See supra* Part I.B.

143. *See supra* note 53.

144. Cleveland v. Policy Management Sys. Corp., 120 F.3d 513 (5th Cir. 1997), *vacated*, 526 U.S. 795 (1999). The subtler form is characterized by an acknowledgment that it is possible for the two claims to be consistent, accompanied by the articulation of a very difficult standard for the plaintiff to meet to show that they are. For example, the Fifth Circuit's rebuttable presumption standard, whereby a plaintiff's statement to SSA was presumed to judicially estop her ADA claim unless she put forth credible, admissible evidence that she was a qualified individual with a disability. *See id.* at 518.

145. Cleveland v. Policy Management Sys. Corp., 526 U.S. 795, 806 (1999).

resurrected at least the potential for application of a full-strength version of judicial estoppel in one area. Specifically, the Court's new standard is explicitly limited to conflicts concerning legal conclusions; it does not cover inconsistencies concerning purely factual matters.[146] No fewer than three times in its seven-page opinion, the Court points out that it is not addressing "directly conflicting statements about purely factual matters."[147] The example the Court gives of a purely factual contradiction is "I can/cannot raise my arm above my head."[148] Legal contradictions, by comparison, concern status or legal conclusion: "I am disabled for the purposes of the Social Security Act," or "[I am] a qualified individual with a disability."[149] The Court abolishes presumptions with regard to the latter group of statements only. With regard to factual contradictions, the Court leaves the law as it found it.[150] The law as the Court found it, in at least some jurisdictions, includes the application of judicial estoppel.[151]

The distinction the Court draws between legal and factual contradictions is problematic. For example, the following pair of statements could be either a legal inconsistency or a factual one: "I am able to work" and "I am unable to work." Perhaps the legal/factual distinction represents a compromise that made the unanimous decision possible. Whatever the reason for the loophole allowing continued use of judicial estoppel, its inclusion was unfortunate. Problems with the general application of the doctrine of judicial estoppel abound.[152] Most importantly, the doctrine deprives the courts of their truth-seeking function.[153] In the ADA context, the reinvigoration of the doctrine is particularly unwelcome since nine of the twelve circuits had already explicitly rejected it.[154] And because the Court did not openly state that judicial estoppel was appropriate for factual inconsistencies, instead stating only that it left the law as it found it,[155] confusion in the lower courts over what the Court intended is inevitable. A district court choosing to apply estoppel would do so at the risk of reversal, depending on how the appellate court read *Cleveland*.[156] Furthermore, sorting legal distinctions from factual decisions is difficult, and there is bound to be a wide variation in how courts perform that task. This will lead to inconsistent decisions across the circuits and unpredictability for plaintiffs. It was also unnecessary for the Court to include the loophole allowing the application of judicial

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146. *See id.* at 802.

147. *Id.*; *see also id.* at 807.

148. *Id.* at 802.

149. *Id.*

150. *See id.*

151. *See supra* text accompanying notes 90-91. After the *Cleveland* decision, the Second Circuit in fact applied judicial estoppel in an ADA case where it found the plaintiff's statements to be factually contradictory. *See* Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999).

152. *See supra* text accompanying notes 135-39.

153. *See* Boyers, *supra* note 57, at 1254-55; Henkin, *supra* note 58, at 1730-31.

154. *See supra* text accompanying notes 84-89.

155. *See Cleveland*, 526 U.S. at 802.

156. *See, e.g.*, Norris v. Sysco Corp., 191 F.3d 1043, 1049 (9th Cir. 1999) (interpreting *Cleveland* to have rejected the use of judicial estoppel altogether), *cert. denied*, 120 S. Ct. 1221 (2000).

estoppel to factual inconsistencies, since after *Cleveland* it is still possible for a judge to dispose of truly inconsistent claims, whether factual or legal, at summary judgment.[157] For all these reasons, the Court's preservation of existing law with regard to factual inconsistencies was counterproductive and introduces unnecessary confusion.

B. What Did Cleveland *Actually Accomplish?*

Aside from potentially reintroducing judicial estoppel into the analysis of ADA claims, did *Cleveland* really bring about much change for ADA plaintiffs? Before the Supreme Court decided *Cleveland*, the Fifth Circuit determined that an ADA plaintiff would have to explain any inconsistencies between her ADA claim and her claims for disability benefits.[158] After the Supreme Court's decision reversing the Fifth Circuit, ADA plaintiffs still must explain such inconsistencies.[159] Before and after the decision, most of the questions about conflicts between the two claims arise and are resolved at the summary judgment stage.[160] And it is still quite possible for a plaintiff to lose on summary judgment because of inconsistent statements.[161] The sentiment that *Cleveland* may be moot was captured in a quote from the oral arguments: "[W]hat difference does it make to have the presumption as opposed to following the normal rules. . . . Under the normal rules of summary judgment, the applicant in fact is going to have to come up with some kind of an explanation for the statements that the applicant made."[162]

Cleveland does matter, principally because of the tone it sets. There is a significant difference between the Fifth Circuit's grudging acknowledgment that "under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive,"[163] and the Supreme Court's recognition that the two claims are "often consistent,"[164] and can "comfortably exist side by side."[165] The Court

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157. *Cleveland*, 526 U.S. at 805-06.

158. *See supra* Part II.B.

159. *See supra* Part II.C.

160. Professor Ruth Colker found that "[t]he overwhelming trend under the ADA has been for judges to decide most of the normative, factual issues themselves and rarely send cases to the jury." Colker, *supra* note 29, at 119. For pre-*Cleveland* cases on the inconsistent statements issue decided at summary judgment, see, for example, *Dush v. Appleton Electric Co.*, 124 F.3d 957 (8th Cir. 1997), and *Soto-Ocasio v. Federal Express Corp.*, 150 F.3d 14 (1st Cir. 1998). For post-*Cleveland* cases on the inconsistent statements issue decided at summary judgment, see, for example, *Vera v. Williams Hospitality Group, Inc.*, 73 F. Supp. 2d 161 (D.P.R. 1999), and *Motley v. New Jersey State Police*, 196 F.3d 160 (3d Cir. 1999).

161. *See, e.g.*, *Motley*, 196 F.3d at 162 (affirming summary judgment for employer because plaintiff failed to reconcile inconsistent positions).

162. Oral Argument of Stephen G. Morrison on Behalf of the Respondents at 19, *Cleveland* (No. 97-1008).

163. Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 517 (1997), *vacated*, 526 U.S. 795 (1999).

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

165. *Id.* at 803.

carefully points out that no "special negative presumption" is warranted.[166] The tone of an opinion affects how courts apply it in the future.[167] *Cleveland*'s reasonable tone should moderate the harsh anti-plaintiff rhetoric that prevailed before the Supreme Court spoke.[168]

Still, the *Cleveland* decision does not assure that an ADA plaintiff will successfully clear the summary judgment barrier. The decision displays an "insistence [on] explanation," as the Court puts it.[169] While the *Cleveland* Court's tone is mild, the plaintiff still absolutely must offer a sufficient explanation for the alleged inconsistency to get past summary judgment.[170] In this, *Cleveland* illustrates one of the prime characteristics of ADA litigation: the difficulty of constructing a case that will survive summary judgment.[171] In one defense lawyer's assessment: "*Cleveland* . . . while not as favorable to employers [as the mitigating measures cases] is not nearly as bad as it could have been. . . . [T]he issue [of inconsistent positions] is alive in most litigation, and will present obvious and juicy fodder for cross-examination of the plaintiff at trial."[172]

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166. *Id.* at 802.

167. For example, after introducing a "strong countervailing evidence" standard (similar to the Fifth Circuit's "rebuttable presumption" standard) in *Dush v. Appleton Electric Co.*, 124 F.3d 957, 963 (8th Cir. 1997), the Eighth Circuit decided *Moore v. Payless Shoe Source Inc.*, 139 F.3d 1210 (8th Cir. 1998), *vacated*, 526 U.S. 1142 (1999), a very harsh application of the standard in which the court granted summary judgment for the employer on the plaintiff's ADA claim. *See also* Downs v. Hawkeye Health Servs., Inc., 148 F.3d 948, 952 (8th Cir. 1998) (finding ADA plaintiff's evidence failed "strong countervailing evidence" standard).

168. For examples of harsh rhetoric, see *supra* text accompanying notes 65-75. Some post-*Cleveland* cases finding that the plaintiff satisfactorily explained any apparent inconsistency include *Norris v. Sysco Corp.*, 191 F.3d 1043, 1049 (9th Cir. 1999) (affirming district court's denial of summary judgment to the employer on issue of inconsistent statements), *cert. denied*, 120 S. Ct. 1221 (2000); *Bonano v. Reagan Equipment Co., Inc.*, No. Civ.A. 99-1028, 1999 WL 1072547 (E.D. La. Nov. 23, 1999) (accepting plaintiff's explanation that with reasonable accommodations he could have worked for defendant but was still disabled for the purposes of SSDI); and *Vera v. Williams Hospitality Group, Inc.*, 73 F. Supp. 2d 161, 170-71 (D.P.R. 1999) (allowing plaintiff to survive summary judgment based on his explanation for inconsistency). *But see* Motley v. New Jersey State Police, 196 F.3d 160, 167 (3d Cir. 1999) (finding plaintiff's explanation for inconsistency inadequate to survive summary judgment); Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999) (applying judicial estoppel based on factual inconsistency to defeat plaintiff's ADA claim).

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

170. *See id.*

171. *See supra* text accompanying notes 26-29. Other commentators point out that while the law makes it difficult for plaintiffs to win ADA suits, they are still difficult, expensive, and time consuming to defend because of the law's complexity. *See* Clegg, *supra* note 21, at 100, 103-04. As one columnist put it, "while [the ADA] was intended to help the physically challenged get access to jobs, [it] has apparently created more work for lawyers than for anyone else." Fisher, *supra* note 21, at 192.

172. Robert T. Zielinski, *The Pendulum Swings: 1999 in Review—A Defense Lawyer's Perspective*, *in* 28TH ANNUAL INSTITUTE ON EMPLOYMENT LAW, *supra* note 114, at 193, 199.

IV. A SUGGESTED APPROACH

Cleveland offers a flexible standard. The impact of the new standard will be measured largely by the lower courts' definition of a sufficient explanation for an inconsistency.[173] The *Cleveland* decision allows the jury to resolve the merits of the plaintiff's ADA claim where the plaintiff has tendered an acceptable explanation for legally (as opposed to factually) inconsistent stances.[174]

A recent article argues that trial courts tend to overuse summary judgment in ADA cases by substituting their own judgment on factual questions for the judgment of the jury.[175] This trend is noted as part of a larger pattern of pro-defendant outcomes in ADA litigation.[176] Because employment discrimination plaintiffs are more successful when their claims are resolved by juries than by judges,[177] the circumstances under which ADA employment discrimination claims get past summary judgment are important. In a recent case in which the jury awarded the plaintiff damages on her ADA claim despite evidence of an inconsistent position in a disability benefits application, the reviewing court hypothesized that the award "partly reflects the jury's understanding about the problems and dilemmas faced by injured workers as they confront myriads of forms, demands, concepts, and needs."[178] While it allows at least some questions to get to the jury, the *Cleveland* decision leaves two vital questions in the hands of the judge: whether the statements are factually inconsistent (in which case summary judgment can be entered for the employer)[179] and whether the explanation is insufficient (in which case, again, summary judgment can be entered for the employer).[180]

This Part contains a framework for courts deciding which inconsistent representation cases should survive summary judgment. The following questions

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173. A recent article notes that "*Cleveland* provides little specific guidance as to what may constitute a sufficient explanation." Mariani & Robertson, *supra* note 93, at 677.

174. *See Cleveland*, 526 U.S. at 807.

175. *See* Colker, *supra* note 29, at 101.

176. *See id.* A study published in 1998 found that employers prevailed in 92% of the final case decisions of ADA employment discrimination claims. *See* ABA Comm'n on Mental and Physical Disability Law, *supra* note 7, at 403.

177. *See* Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1591 tbl.2 (1989) (finding a 19.2% success rate for employment discrimination bench trials and a 42.6% success rate for employment discrimination jury trials). Professor Michael Selmi reports that the low success rate for employment discrimination plaintiffs in bench trials continued into the 1990s. *See* Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 41 (1996).

178. Norris v. Sysco Corp., 191 F.3d 1043, 1049 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1221 (2000).

179. *See, e.g.*, Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999) (affirming use of judicial estoppel where plaintiff had made factual statements in disability benefits application that contradicted position taken in ADA claim).

180. *See, e.g.*, Jammer v. School Dist., No. 978663CIVHURLEYLYNCH, 1999 WL 1073688, at *4 (S.D. Fla. Nov. 19, 1999) (finding plaintiff had not put forward a sufficient explanation for inconsistent positions and thus could not survive summary judgment).

reflect relevant distinctions that have emerged in the pre-*Cleveland* case law, *Cleveland* itself, and cases that have been decided since *Cleveland* was handed down.

When faced with a disability benefits application potentially damaging to an ADA plaintiff, I suggest the court ask the following four questions: (1) Did the plaintiff actually receive disability benefits? (2) Is the contradiction factual or legal? (3) Has the plaintiff put forth an explanation for the inconsistent statements? (4) Is the explanation sufficient for the plaintiff to survive summary judgment?

This series of questions will sort plaintiffs into four distinct categories: plaintiffs who need not provide an explanation at all; plaintiffs who need not be given an opportunity to explain; plaintiffs who have provided a sufficient explanation and will survive summary judgment; and plaintiffs who have provided an insufficient explanation and will lose on summary judgment.

A. Question 1: Did the Plaintiff Receive Disability Benefits?

The first question is an easy yes-or-no threshold question that should relieve a number of plaintiffs from the obligation of having to provide an explanation for inconsistent statements at all.

If the plaintiff did not receive disability benefits, but only applied for them and was rejected or withdrew, *Cleveland* explicitly states that courts should disregard any allegedly inconsistent statements made in the application,[181] the rationale being that our legal system normally tolerates the pleading of inconsistent claims or defenses.[182] In a case decided since *Cleveland*, a district court in fact denied summary judgment for the employer on the grounds that SSA had denied the plaintiff's claim.[183]

Before *Cleveland*, courts occasionally entered summary judgment for employers based on inconsistent statements in unsuccessful disability benefits applications.[184] However, a threshold requirement of having received disability benefits is consistent with the "prior success" requirement common to many jurisdictions' versions of the doctrine of judicial estoppel.[185] It was also recommended by critics of the pre-*Cleveland* approach to inconsistent statements.[186]

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181. *Cleveland*, 526 U.S. at 805 ("[I]f an individual has merely applied for, but has not been awarded, SSDI benefits, any inconsistency in the theory of the claims is of the sort normally tolerated by our legal system.").

182. *See id.*

183. *See* Matz v. Sisters of Providence, No. CIV. 98-1598-JO, 1999 WL 1201682, at *4 (D. Or. Dec. 8, 1999).

184. *See* Kennedy v. Applause, Inc., 90 F.3d 1477, 1481-82 (9th Cir. 1996) (granting summary judgment for employer despite denial of plaintiff's application for disability benefits).

185. *See* Boyers, *supra* note 57, at 1255-58 (advocating prior success requirement for application of judicial estoppel).

186. *See* Weston, *supra* note 69, at 428-30.

B. Question 2: Is the Contradiction Factual or Legal?

The standard set out in *Cleveland* does not apply to factual inconsistencies, which courts are to approach as they would have before the *Cleveland* decision.[187] While I believe that for practical and policy reasons factual contradictions should be handled under the *Cleveland* standard for legal contradictions,[188] the law indicates that courts should separate the two. To adhere to the spirit of the *Cleveland* decision, however, courts should interpret "factual inconsistency" as a narrow category, and count as factual inconsistencies only statements about purely factual matters, such as whether one is able to raise one's arm above one's head.[189] In the first post-*Cleveland* case to make use of the factual/legal distinction, the Second Circuit classified the plaintiff's statements to various benefits providers that he could not stand or walk for more than five minutes at a time as factually inconsistent with his ADA claim that he could do his job as a school custodian, including walking for a substantial portion of the day.[190] More difficult-to-categorize inconsistencies—such as "I am unable to work"/"I am able to work"—should be placed in the "legal inconsistency" rubric. The inconsistency most often encountered in the cases—"I am totally disabled"/"I am not too disabled to work"—is *Cleveland*'s prime example of a legal inconsistency.[191]

Assuming a purely factual contradiction, *Cleveland* left each circuit's law as it found it. That means that the Second, Third, and Fourth Circuits may apply judicial estoppel,[192] and the Fifth and Eighth may presume that judicial estoppel should apply, absent a strong showing from the plaintiff that it should not.[193] The First and Seventh Circuits applied the *Cleveland* standard before *Cleveland* did,[194] and the Sixth and

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187. *Cleveland*, 526 U.S. at 802. Presumably, *Cleveland* doesn't require courts to allow the plaintiff to explain if the inconsistency is purely factual because the only possible explanation is that one of the representations is false. Of course, timing could provide a sufficient explanation for a purely factual apparent inconsistency. However, since *Cleveland* does not apply to factual inconsistencies at all, it does not apply to factual inconsistencies that could be explained by the fact that they referred to different times.

188. *See supra* text accompanying notes 152-57.

189. This is the example of a purely factual matter given in *Cleveland*. *Cleveland*, 526 U.S. at 802.

190. *See* Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 7 (2d Cir. 1999).

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

192. Before *Cleveland*, the Second Circuit had not had the opportunity to speak directly to the issue of whether it would apply judicial estoppel to an ADA claim, but in *Simon v. Safelite Glass Corp.*, it accepted a judicial estoppel theory in an age discrimination suit. 128 F.3d 68, 73-74 (2d Cir. 1997). After *Cleveland*, in *Mitchell*, the Second Circuit applied judicial estoppel to a factual inconsistency, with the result of barring an ADA claim. *Mitchell*, 190 F.3d at 6-7. For the law in the Third Circuit, see the classic judicial estoppel case *McNemar v. Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996). The Fourth Circuit applied judicial estoppel to an ADA claim in *Cathcart v. Flagstar Corp.*, No. 97-1977, 1998 WL 390834, *8 (4th Cir. June 29, 1998), although in that case it found the elements were not met.

193. *See* Dush v. Appleton Elec. Co., 124 F.3d 957, 961-63 (8th Cir. 1997); Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 518 (5th Cir. 1997), *vacated*, 526 U.S. 795 (1999).

194. *See* Soto-Ocasio v. Federal Express Corp., 150 F.3d 14, 20 (1st Cir. 1998); Weigel v.

Tenth resolved questions of inconsistent representations using ordinary summary judgment principles,[195] so all four should approach factual inconsistencies under a *Cleveland*-like summary judgment standard. The approach of the Ninth, Eleventh, and D.C. Circuits prefigured the *Cleveland* loophole in that all rejected the application of judicial estoppel on the facts of the case before them without finding that judicial estoppel could never apply.[196] These three circuits might well choose to apply judicial estoppel to factual inconsistencies.

C. Question 3: Has the Plaintiff Put Forth an Explanation for the Inconsistent Statements?

The third question is another simple yes-or-no question. According to *Cleveland*, the plaintiff absolutely must have an explanation for the inconsistency.[197] If there is no explanation, summary judgment for the employer is appropriate.[198]

A recent case raises the question of how to handle cases in which the facts were developed before *Cleveland* announced that plaintiffs should have the opportunity to explain inconsistencies. In *Motley v. New Jersey State Police*, the Third Circuit decided that the plaintiff had not met his *Cleveland* burden based on the record, which had been developed before *Cleveland*.[199] The dissenting judge argued strenuously that *Cleveland* demanded that the case be remanded to give the plaintiff an opportunity to explain the inconsistency, rather than the court deciding for itself from the record that the plaintiff could not explain the inconsistency.[200] Because pre-

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Target Stores, 122 F.3d 461, 468 (7th Cir. 1997).

195. *See* Rascon v. US West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998); Griffith v. Wal-Mart Stores, 135 F.3d 376, 382 (6th Cir. 1998).

196. *See* Fredenburg v. Contra Costa County Dep't of Health Servs., 172 F.3d 1176, 1179 (9th Cir. 1999) (holding that a summary judgment approach would suffice for most cases but that judicial estoppel could be applied if a party's position amounted to a knowing misrepresentation or a fraud on the court); Talavera v. School Bd., 129 F.3d 1214, 1220 (11th Cir. 1997) (concluding that "per se judicial estoppel is not warranted in this case"); Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 587 (D.C. Cir. 1997) (reserving possibility of barring ADA claims in other circumstances).

197. *Cleveland*, 526 U.S. at 806 ("[W]e hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.").

198. *See* Feldman v. American Mem'l Life Ins. Co., No. 98-1831, 1999 WL 1018083, at *8 (7th Cir. Nov. 9, 1999) (affirming grant of summary judgment to employer where plaintiff failed to explain how claim of total disability could be reconciled with claim to be able to do her job); *Weigel*, 122 F.3d at 469 (affirming grant of summary judgment for the employer where plaintiff failed to provide additional evidence of her ability to perform her essential duties with or without accommodation); Jammer v. School Dist., No. 978663CIVHURLEYLYNCH, 1999 WL 1073688, at *4 (S.D. Fla. Nov. 19, 1999) (granting summary judgment for employer where plaintiff failed to come forward with an explanation to counter representations in disability applications).

199. No. 97-5715, 1999 WL 985135, at * 6 (3d Cir. Nov. 1, 1999).

200. *See id.* at *7 (Rendell, J., dissenting) ("[A]fter *Cleveland*, we should remand in cases such as this to provide all plaintiffs in Mr. Motley's position with the opportunity to explain away the inconsistency . . . rather than reaching our own conclusions from the record.").

Cleveland case law did not make it clear that a plaintiff would even have the opportunity to explain an inconsistency, it is more fair to the plaintiff and more consistent with *Cleveland* for a reviewing court to remand to allow the plaintiff to provide an explanation.

D. Question 4: Is the Explanation Sufficient for the Plaintiff To Survive Summary Judgment?

The heart of the *Cleveland* inquiry is determining whether the plaintiff's explanation suffices to overcome a motion for summary judgment. The *Cleveland* standard for defeating summary judgment states that the "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.'"[201]

The one clearly insufficient explanation for an apparent inconsistency is the plaintiff's disavowal of the earlier representation.[202] The *Cleveland* standard requires the court to assume that the earlier representation either was true or that the plaintiff had a good faith belief that it was true.[203]

In a recent case, the plaintiff stated on a disability benefits application that he was disabled as of the day he was fired from his job and that "[n]obody in their right mind would even think of hiring me."[204] Later, he filed a malpractice claim against the attorney who represented him in his unsuccessful attempt to be reinstated to his job.[205] In making the claim that he would have been successful in seeking reinstatement but for the attorney's malpractice, the plaintiff alleged that he was able to work as of the day he was fired.[206] The plaintiff gave no further explanation for the contradiction between his two statements (that he could and could not work the day he was fired). The court held that the plaintiff's simply contradicting his earlier sworn testimony did

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

202. A comment from one of the Justices at oral argument:

> I thought I heard the SG and everybody saying, yeah, we agree to that; one thing an applicant cannot do is go in and say, wait, I am disabled, Social Security Administration, and then later in the next suit they can't come in and say, oh, no, no, no, what I said before was false. Everybody says they can't say that.

Transcript of Oral Argument, *Cleveland* (No. 97-1008), *available in* 1999 WL 115176, at *24 (Feb. 24, 1999).

203. *See Cleveland*, 526 U.S. at 807. Whether one of the plaintiff's assertions was in bad faith or was a knowing misrepresentation is sometimes discussed in the cases. *See, e.g.*, Fredenburg v. Contra Costa County Dep't of Health Servs., 172 F.3d 1176, 1179 (9th Cir. 1999). However, looking for bad faith is not a separate step in the analysis because the concept of "bad faith" simply represents the court's conclusion that there is not a sufficient explanation for the inconsistency.

204. Furrow v. Corwin, No. C4-98-2126, 1999 WL 391599, at *3 (Minn. Ct. App. June 15, 1999).

205. *See id.* at *2.

206. *See id.*

not constitute a sufficient explanation under *Cleveland*.[207] In sum, offering the explanation that the earlier statement was false is the equivalent of not offering an explanation at all, and summary judgment should be entered for the employer.[208]

Potentially sufficient explanations fall into two main categories. The first contains explanations based on the plaintiff's not having claimed total disability at the time of the employment decision. To support this, the plaintiff can point either to the fact that the benefits application refers to a time other than the time of the employment decision or to the fact that the specific representations made do not indicate total disability. If the plaintiff has in fact asserted total disability at the time of the employment decision, her explanation will necessarily have to focus on the difference in the meanings of the term "disabled" under SSDI and the ADA. However, just because an explanation falls into one of these potentially sufficient categories does not mean that the plaintiff will survive summary judgment.

1. No Total Disability at Time of Employment Decision

If the plaintiff claims that she was not totally disabled at the time of the employment decision, her explanation will center either on timing or on the content of her representations to the disability benefit provider.

a. Timing

The most acceptable and convincing explanation that a plaintiff can put forth is that the benefits application does not refer to the time of the employment decision. As *Cleveland* noted, "the nature of an individual's disability may change over time."[209] Perhaps the plaintiff did not apply for benefits until well after the employment decision, when the plaintiff's condition had worsened.[210] Or perhaps the plaintiff's condition improved after the benefits application.[211] As one court remarked, "[t]he healing process is often both manifest and marvelous."[212] However, if a plaintiff has asserted in the benefits application that she was "totally disabled" at the time of the

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207. *See id.* at *3.

208. This outcome would be less certain if the plaintiff admitted that her earlier statement was false, but argued that she had not understood the question or had received incorrect advice on answering from a lawyer or an SSA employee.

209. *Cleveland*, 526 U.S. at 805; *see also* D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 4 (1st Cir. 1996) (denying summary judgment for employer where plaintiff never claimed to have been totally disabled at the time she requested the accommodation from her employer).

210. *See* Vera v. Williams Hospitality Group, Inc., 73 F. Supp. 2d 161, 170-71 (D.P.R. 1999) (involving a two-year gap between employment decision and filing for SSDI).

211. The *Cleveland* plaintiff, for example, filed for benefits soon after her stroke, when her recovery was uncertain. *See Cleveland*, 526 U.S. at 798. When she was able to return to work, she told SSA and her application was denied. *See id.* It was only when she was fired (allegedly after being refused reasonable accommodations) that she renewed her application and was awarded benefits retroactively. *See id.* at 798-99.

212. Norris v. Sysco Corp., 191 F.3d 1043, 1049 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1221 (2000).

employment decision,[213] to survive summary judgment she will have to provide an explanation based on something other than timing, such as a failure to provide reasonable accommodations.[214]

b. Content of Representations

A plaintiff's explanation may concern the content of the representations made to the benefit provider. For example, if the plaintiff merely checked a box marked "totally disabled" as part of the application process, the plaintiff may argue that this format did not give her the opportunity to explain the subtleties of her situation. Benefits could be awarded under such an abbreviated process if the plaintiff is one of those people whom SSA presumes disabled because they have a listed disability.[215] In most cases, however, the disability determination is fairly personalized and involves a hearing, in which case claiming that the SSA forms did not allow for full explanation is not likely to satisfy the court.[216]

A plaintiff might also base her explanation on the specific representations made. She may not have unequivocally asserted a total disability in her benefits application; perhaps she only stated that she could work but accommodations were denied her. In *Griffith v. Wal-Mart Stores, Inc.*, the plaintiff stated he was unable to work because no employer would hire him, not because he was physically incapable.[217] The limited nature of the plaintiff's admission influenced the court's decision not to grant summary judgment to the employer.[218] In *Donahue v. Consolidated Rail Corp.*, the court found that the plaintiff had met his *Cleveland* burden of reconciling his inconsistent statements where he never represented to his benefits provider that he could not work, but only that he could not work at his former job (his ADA claim being that his employer should have transferred him to another position as a reasonable accommodation).[219] In *Matz v. Sisters of Providence in Oregon*, the court found that a plaintiff's assertion to SSA that she could work only part time was

213. This was the situation in the *McNemar* case; McNemar represented on his disability benefits application that he was totally disabled five weeks before he was fired for taking money from a cash register. McNemar v. Disney Store, Inc., 91 F.3d 610, 615 (3d Cir. 1996).

214. *See* Rascon v. US West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998) ("There is nothing inconsistent in Mr. Rascon applying for disability benefits after having his reasonable accommodation denied.").

215. *See supra* text accompanying notes 41-42; *see also* O'Brien, *supra* note 47, at 361 (noting that a complete application for federal disability benefits can be made over the telephone).

216. For example, an explanation based on the limitations of the SSA's forms would not work in a case like *Mitchell v. Washingtonville Central School District*, 190 F.3d 1 (2d Cir. 1999), where the plaintiff made statements regarding his inability to work in front of several administrative tribunals. *Id.* at 7.

217. 135 F.3d 376 (6th Cir. 1998).

218. *See id.* at 384. Physicans' statements in disability benefits applications, as well as the plaintiff's own assertions, can operate in this way. *See, e.g.*, *Rascon*, 143 F.3d at 1332 (finding no error in conclusion that plaintiff was a qualified individual where doctor testified plaintiff could have returned to work had he not been terminated).

219. 52 F. Supp. 2d 476, 480 (E.D. Pa. 1999).

consistent with her ADA claim that she could do the essential functions of her job with the accommodation of a part-time schedule.[220]

It will be very difficult for a plaintiff to survive summary judgment, however, where the plaintiff has asserted a total disability in her own words, accompanied by specific descriptions of her physical limitations.[221] This is especially true where the plaintiff has made the representations repeatedly.[222] If this is the case, the plaintiff will need to provide an explanation based on the difference in definitions of disability.

2. Differences in the Definition of Disability

If the plaintiff concedes that she represented herself as totally disabled at the time of the employment decision, she can still explain the apparent inconsistency by the fact that disability is defined differently for the purposes of receiving benefits and qualifying for the protection of the ADA. This difference makes it possible to be "disabled" or "unable to work" for SSDI purposes and simultaneously be a qualified person with a disability under the ADA (meaning a person who can perform the essential functions of her job, with or without reasonable accommodation).[223] The central difference in the two definitions is that the SSA does not consider the employer's duty to make reasonable accommodations when determining whether an individual is able to work, while the ADA does.[224]

A plaintiff will have to do more than simply point to this difference in the definitions to survive summary judgment. As the Third Circuit noted in *Motley v. New Jersey State Police*, "simply averring that the statutory schemes differ is not enough to survive summary judgment in light of *Cleveland*. An ADA plaintiff must offer a more substantial explanation to explain the divergent positions taken, or else summary judgment could never be granted."[225] In *Vera v. Williams Hospitality Group*, for example, the plaintiff survived summary judgment by pointing out the

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220. No. CIV. 98-1598-JO, 1999 WL 1201682, at *4 (D. Or. Dec. 8, 1999).

221. *See* Feldman v. American Mem'l Life Ins. Co., No. 98-1831, 1999 WL 1018083, at *7-8 (7th Cir. Nov. 9, 1999) (affirming grant of summary judgment to employer where plaintiff described herself as completely and totally disabled and described her physical condition in detail, but failed to explain how these statements were consistent with her ADA claim); Motley v. New Jersey State Police, No. 97-5715, 1999 WL 985135, at *6 (3d Cir. Nov. 1, 1999) (affirming grant of summary judgment to employer where plaintiff gave detailed descriptions of his incapacity to work but was not able to reconcile these statements with his ADA claim); Jammer v. School Dist., No. 978663CIVHURLEYLYNCH, 1999 WL 1073688, at 4* (S.D. Fla. Nov. 19, 1999) (granting summary judgment to employer where plaintiff claimed to be permanently disabled, plaintiff's doctors said there was no accommodation that could allow him to work, and plaintiff did not explain the inconsistency between these statements and his ADA claim).

222. *See, e.g.*, Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 967-69 (E.D.N.C. 1994) (discussing how plaintiff's "numerous" statements convinced the court that plaintiff perceived herself to be totally disabled).

223. *See supra* text accompanying notes 50-53.

224. *See* AMERICANS WITH DISABILITIES ACT DIV., *supra* note 53, at 160-61.

225. 1999 WL 985135, at *5.

difference in the definitions *and* providing evidence that he could have done his job with accommodation.[226]

However, it is probably not enough for a plaintiff simply to state that her former employer could have accommodated her disability.[227] The Eighth Circuit would require the plaintiff to put forward evidence that the plaintiff advised her employer during employment of what accommodations were needed, as well as evidence that these accommodations would have sufficed to allow her to do the job.[228] Using a somewhat less stringent standard, a Louisiana district court recently held that a plaintiff had met the *Cleveland* burden by asserting that he could have done his job had his employer made reasonable accommodations, such as giving him assignments within his work restrictions and excusing him from work for medical appointments.[229] As these decisions show, what constitutes a sufficient explanation will vary from jurisdiction to jurisdiction, but plaintiffs are most likely to succeed where they can provide substantial evidence showing that their employers could have accommodated their disabilities.

CONCLUSION

After *Cleveland*, an ADA plaintiff who has received disability benefits should survive summary judgment on her ADA claim if she provides an explanation for a legal inconsistency based on timing, content of representations, or her employer's failure to accommodate. However, *Cleveland* represents a limited victory for ADA plaintiffs for two main reasons: it leaves courts free to apply judicial estoppel to factual inconsistencies, and it leaves the highly discretionary determination of what explanations will meet the *Cleveland* standard in the hands of the lower courts, many of which have been hostile to ADA claims in the past.

On many levels, *Cleveland* reflects larger trends in ADA jurisprudence. One such trend is the difficultly of constructing a prima facie ADA claim. *Cleveland* eases the plaintiff's burden somewhat by removing unfavorable presumptions, but prior inconsistent statements can still be used as powerful evidence against the plaintiff's claim that she is a qualified person with a disability. *Cleveland* also tacitly approves the widespread practice of courts deciding ADA claims at the summary judgment stage by leaving a great deal of discretion with the trial court to decide whether a plaintiff has offered an explanation sufficient to allow the claim to survive summary judgment. Third, *Cleveland* illustrates the Supreme Court's dedication to an individualized approach under the ADA. Rather than creating a bright-line rule, *Cleveland* sets out a highly individualized, context-sensitive test for evaluating conflicts between a plaintiff's statements to disability benefits providers and the

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226. 73 F. Supp. 2d 161, 171-71 (D.P.R. 1999).

227. *See e.g.*, Moore v. Payless Shoe Source, Inc., 187 F.3d 845, 848 (8th Cir. 1999) (finding that plaintiff's affidavit concerning reasonable accommodations her employer could have offered did not create a genuine issue of material fact), *cert. denied*, 68 U.S.L.W. 3366 (Dec. 6, 1999) (No. 99-6454).

228. *See id.*

229. *See* Bonano v. Reagan Equip. Co., No. Civ.A. 99-1028, 1999 WL 1072547, at *3-4 (E.D. La. Nov. 23, 1999).

statements in the plaintiff's ADA claim. By taking this approach, *Cleveland* allows continued lower-court hostility to the ADA and perpetuates unpredictability for ADA plaintiffs. Whether the Court's aloof approach will also allow the lower courts slowly to evolve a principled, effective methodology for dealing with the problem of inconsistent statements remains to be seen.