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# What Employees Say, or What Employers Do: How Post-Cleveland Decisions Continue to Obscure Discrimination

Lauren Lowe

# NOTES

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## I. INTRODUCTION

The phrase "equal justice" has dubious meaning for persons with disabilities who seek redress of employment discrimination in court. After experiencing job loss and facing relatively slim chances of reemployment, many of these individuals seek judicial recognition that their employers failed to accommodate their disabilities. Yet the

vast majority of plaintiffs who bring employment discrimination lawsuits under the Americans with Disabilities Act ("ADA") lose. In 2006, employers prevailed in 212 of the 272 cases that went to trial in federal court.[1] Some commentators point to the high win rates for employers as evidence of judicial frustration with the volume of ADA litigation.[2] Indeed, the ADA is arguably one of the most frustrating federal statutes for courts and one that has generated interpretive confusion with record speed. Many employees seek the statute's protection. In 2007, the Equal Employment Opportunity Commission ("EEOC") received over 17,000 disability discrimination complaints, yet found reasonable cause for discrimination in only five percent of them.[3]

Many ADA plaintiffs also seek the protection of another, considerably older federal statute: the Social Security Act ("SSA"). Receipt of disability benefits under the SSA makes a successful ADA claim even more difficult. ADA plaintiffs must prove that they could perform the essential functions of their jobs, with or without reasonable accommodations.[4] If a disability renders someone completely unable to do a job, there is no recourse under the ADA.[5] By contrast, a successful Social Security Disability Insurance ("SSDI") claim hinges on an applicant's inability to work.[6]

The ostensible mutual exclusivity of the statutes has proven invaluable to employers by permitting them to argue that ADA plaintiffs who receive SSDI plead the impossible: they are both able and unable to do their jobs. Capitalizing on the statutory conflict, employers' counsel often invoke judicial estoppel, a doctrine that

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1. Amy L. Allbright, *2006 Employment Decisions Under the ADA Title I–Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (2007); *see also* Amy L. Allbright, *2005 Employment Decisions Under the ADA Title I–Survey Update*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 492, 492 (2006) (finding that out of 401 ADA employment discrimination cases brought in federal court in 2005, 288 resulted in employer victories via summary judgment or motions to dismiss); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999) (analyzing 615 trial court ADA cases during the period 1992–1998 and finding that employers prevailed in 92.7%, including 38.7% on summary judgment).

2. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 451–52 (2004) (concluding that "district courts process employment discrimination cases with a neutral or even jaundiced eye toward plaintiffs," and that plaintiffs fare even worse in appellate courts).

3. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES: FY 1997-FY 2008, http://www.eeoc.gov/stats/ada-charges.html (last visited Apr. 15, 2009).

4. 42 U.S.C. § 12111(8) (2006).

5. *See id.* (defining a "qualified individual" as one who can perform the essential functions of the employment position that such individual holds or desires).

6. *Id.* § 423(d)(1)(A).

prevents a party who prevailed on an assertion in a legal proceeding from benefiting from a contradictory assertion in a subsequent legal proceeding.[7] Rarely raised compared to other preclusion doctrines like res judicata and collateral estoppel,[8] judicial estoppel has gained currency against plaintiffs who seek the protection of the ADA after being awarded disability benefits.[9] The risk that SSDI will preclude an ADA claim puts a plaintiff in the unenviable position of choosing between financial support after a job loss and redressing the allegedly unlawful employer action that caused the need for government support. For most ADA plaintiffs, however, "choice" is a misnomer; judicial estoppel is a trap for those who simply could not have imagined that a court would deem redressing discrimination and obtaining minimal financial assistance to be inconsistent and even unlawful goals.

In 1999, the Supreme Court tried to resolve the lower courts' varying applications of judicial estoppel to ADA and SSDI claims.[10] In *Cleveland v. Policy Management Systems Corp.*, the Court held that receipt of SSDI is not an automatic bar to an ADA claim.[11] Plaintiffs must, however, offer a "sufficient explanation" for the apparent inconsistency to avoid summary judgment.[12] Although hailed as a victory for ADA plaintiffs, *Cleveland* still allows employers to win summary judgment when employees receive disability benefits and fail to offer a satisfactory explanation.[13] While some plaintiffs awarded SSDI are able to proceed with ADA claims,[14] the continued invocation of judicial estoppel raises questions about the doctrine's appeal in this particular statutory context.

Judicial estoppel does possess a certain logical appeal. On the surface, the statutory conflict between the ADA and the SSA puts claimants in the contradictory position of pleading that they are both

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7. Kira A. Davis, Note, *Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law*, 89 CORNELL L. REV. 191, 192 (2003).

8. *See infra* Part II.C.

9. Lawrence B. Solum, *Caution! Estoppel Ahead:* Cleveland v. Policy Management Systems Corporation, 32 LOY. L.A. L. REV. 461, 463, 473 (1999).

10. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 800 (1999).

11. *Id.* at 807.

12. *Id.*

13. *See, e.g.*, Hidalgo v. Bloomingdale's, No. 98 Civ. 9016, 2002 U.S. Dist. LEXIS 12433, at *18 (S.D.N.Y. July 8, 2002) (holding that plaintiffs who received SSDI were not "qualified individuals" under the ADA), *aff'd*, 62 F. App'x 412 (2d Cir. 2003); Lorde v. City of Philadelphia, No. 98-5267, 2000 U.S. Dist. LEXIS 17196, at *2 (E.D. Pa. Nov. 30, 2000) (same).

14. *See, e.g.*, Adams v. TRW Auto. U.S. L.L.C., No. 3:03-1240, 2005 U.S. Dist. LEXIS 39636, at *42 (M.D. Tenn. July 22, 2005) (declining to award summary judgment to employers on ADA claims although the plaintiffs had received SSDI); Nodelman v. Gruner & Jahr USA Publ'g, No. 98 Civ. 1231, 2000 U.S. Dist. LEXIS 5398, at *22 (S.D.N.Y. Apr. 25, 2000) (same).

able and unable to work. Applying judicial estoppel allows courts to express frustration with this conflict and eliminate unmeritorious claims relatively quickly. However, as this Note demonstrates, judicial estoppel is rarely a statutorily faithful way to approach the ADA. Further, true conflicts between SSA and ADA claims are rare, provided that courts are willing to dig beneath the superficial appeal of the vintage judicial estoppel doctrine. The crucial questions, regardless of the receipt of SSDI, are whether ADA plaintiffs requested accommodations from their employers and whether employers discriminated against these employees because of their disabilities. Eager application of judicial estoppel risks overlooking these elements.

Many commentators—before and after *Cleveland*—criticized the application of judicial estoppel to the ADA and SSA.[15] While this Note addresses how receipt of disability benefits is not inconsistent with the ability to work, its purpose is not to reiterate the differences between the SSA and ADA. Rather, it examines how federal courts have analyzed this conflict since *Cleveland*, observing that courts continue to find irreconcilable conflicts between ADA and SSDI claims, often through overly formalistic or technical analyses. Because many ADA plaintiffs apply for SSDI upon losing their jobs,[16] the

15. *See* Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1048 (1998) (arguing that judicial estoppel reinforces a binary view by suggesting that the ADA protects only persons with disabilities who can work and that the SSA protects only those who cannot work); Christine Neylon O'Brien, *To Tell the Truth: Should Judicial Estoppel Preclude Americans with Disabilities Act Complaints?*, 73 ST. JOHN'S L. REV. 349, 372 (1999) (arguing that judicial estoppel should be abandoned and that receipt of disability benefits may instead be admissible evidence); Solum, *supra* note 9, at 496 (arguing that judicial estoppel is no longer a valid doctrine under liberal notice pleading standards); Jessica Barth, Note, *Disability Benefits and the ADA After* Cleveland v. Policy Management Systems, 75 IND. L.J. 1317, 1347 (2000) (arguing that *Cleveland*'s flexible approach "allows continued lower-court hostility to the ADA and perpetuates unpredictability for ADA plaintiffs"); 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, 1577 (1996) (arguing that despite the "superficial logical appeal" of judicial estoppel, it "absolves courts of the obligation to engage in thorough statutory interpretation" and "perpetuates negative stereotypes" about persons with disabilities); Marney Collins Sims, Comment, *Estop It!: Judicial Estoppel and its Use in Americans with Disabilities Act Litigation*, 34 HOUS. L. REV. 843, 870 (1997) (arguing also against the use of judicial estoppel as a per se bar to ADA claims and proposing that receipt of disability benefits be considered as evidence). *But see* 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, 672 (1998) (arguing that judicial estoppel may prevent employees from "extort[ing] damages from employers" and preserves "the integrity of [ADA] claims").

16. *See* David H. Autor & Mark G. Duggan, *The Rise in the Disability Rolls and the Decline in Unemployment*, 118 Q.J. ECON. 157, 159 (2003) (observing that because "nonemployment is a de facto precondition for disability application," most persons only seek SSDI after job loss).

conflict will continue to arise. Requiring plaintiffs to disentangle the statutory and administrative schemes communicates a message of forfeiture: by excusing themselves from the societal obligation to work, plaintiffs have forfeited their right to redress under the ADA. Further, by taking plaintiffs' statements made to the Social Security Administration outside of their administrative context, judicial estoppel diverts attention from employers' alleged discriminatory actions,[17] making it appear that the employer was "disability-blind" while the employee self-identified as a person unable to contribute to the economy.

Part II of this Note provides background on the relevant provisions of the ADA and SSA, the judicial estoppel doctrine, and *Cleveland*'s conclusion on the statutory conflict. Part III analyzes how courts have approached the conflict since *Cleveland*, observing that they often apply overly formalistic analyses to meeting *Cleveland*'s resolve-the-inconsistency standard. For example, one major loophole the Supreme Court deliberately left open, the difference between contrary factual assertions and contrary legal assertions,[18] has kept judicial estoppel alive. Part IV suggests that when harmonizing the statutes, courts should look for discrimination within the specific employment relationship rather than search for indications of accommodations within SSDI applications. Part V concludes by addressing how a more careful assessment of the interplay between the ADA and SSA better serves the adjudicatory integrity that judicial estoppel aims to protect.

## II. BACKGROUND: THE CONFLICTING STATUTORY SCHEME

### *A. The Americans with Disabilities Act*

Congress passed the ADA in 1990 to prohibit "discrimination against disabled individuals in employment and public transportation, accommodations, and services."[19] Title I, which covers employment, prohibits employers from "discriminat[ing] against a qualified

17. Diller, *supra* note 15, at 1057. Diller criticizes courts' overemphasis on the fixed status of ADA plaintiffs' medical conditions and argues that this tendency is heightened in the context of judicial estoppel: "The focus on the severity of the plaintiff's medical condition also means that the center of attention remains on the plaintiff, rather than on the conduct of the employer. The 'abnormality' still holds center stage, rather than the structure of institutions or the social response to the impairment." *Id.*

18. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 802 (1999).

19. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)).

individual with a disability because of the disability" in regard to job application and hiring procedures, terms of employment, and termination."[20] The ADA defines disability in three ways: (1) having "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) having "a record of such an impairment"; or (3) being "regarded as having such an impairment."[21] Crucial to this Note's solution is the "regarded as" definition, which protects employees from the mistaken assumptions of their employers.[22]

A prima facie case of employment discrimination under the ADA requires the plaintiff to show that she (1) meets at least one of the three above definitions of "disabled"; (2) is a "qualified individual"; and (3) suffered adverse employment action because of her disability.[23] A qualified individual is one "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires."[24] The ADA's legislative history reveals Congress's intent that the relevant moment to assess whether an individual is "qualified" is the time of an adverse employment action, such as a job termination—not the time of litigation.[25] Isolating this timeframe is essential to discerning whether receipt of SSDI is inconsistent with an ADA claim.

Simply having a disability does not trigger ADA protection. A successful ADA claim requires that a person be able to perform the essential job functions despite the disability. The quid pro quo is that an employer must provide reasonable accommodations to make that performance possible.[26] Judicial estoppel stops the inquiry at the

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20. 42 U.S.C. § 12112(a).

21. *Id.* Recent ADA amendments, which went into effect on January 1, 2009, expanded the definition of disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. Although courts have had little time to interpret these amendments, they should not affect this Note's analysis because the definition of "qualified individual," which is at issue in a judicial estoppel analysis, was not changed by the amendments.

22. Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999) (observing that the "regarded as" definition of disabled applies when employers "entertain misperceptions about the individual . . . misperceptions [that] often 'result from stereotypic assumptions not truly indicative of . . . individual ability' " (internal citations omitted)); *see also* Diller, *supra* note 15, at 1020 ("The ADA is rooted on the premise that many barriers to employment . . . stem from prejudice, rather than from limitations imposed by medical conditions.").

23. 42 U.S.C. § 12112(a).

24. *Id.* § 12111(8).

25. H.R. REP. NO. 101-485 (III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 456 ("The determination of whether a person is qualified should be made at the time of the employment action . . . and should not be based on the possibility that the employee or applicant will become incapacitated and unqualified in the future.").

26. *See supra* note 5 (defining "qualified individual").

question of job qualification. By doing so, it diverts attention from the crucial question of whether the individual suffered adverse employment action because of a disability and onto the seeming affront of applying for government benefits premised on inability to work. Yet as this Note shows, this question of whether adverse action occurred *because of* an individual's disability is closely linked to whether judicial estoppel is appropriate. How an employer treats an employee may inform how the employee characterizes her medical conditions to the Social Security Administration.

### *B. The Social Security Act*

Unlike the ADA, the focus of the SSA is on the individual's inability to work at all. Since 1956, the SSA has provided long-term income support for individuals deemed too disabled to work.[27] In 2007, the Social Security Administration paid approximately 7.8 billion dollars in disability benefits to 8.1 million people, ninety percent of whom were disabled workers.[28] The SSA defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[29] To receive SSDI, the impairment must be of "such severity that [an individual] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."[30] Because SSDI eligibility requires both an inability to do one's previous job and *any* "substantial gainful work," a successful claim seemingly establishes that a person is wholly unable to work, and therefore is not a "qualified individual" under the ADA. Indeed, some courts have emphasized the SSA's economy-at-large definition of disability to justify judicial estoppel of ADA claims.[31]

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27. Diller, *supra* note 15, at 1005.

28. SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2007 (2008), http://www.ssa.gov/policy/docs/statcomps/di_asr/2007/index.html#highlights [hereinafter 2007 ANNUAL STATISTICAL REPORT].

29. 42 U.S.C. § 423(d)(1)(A).

30. *Id.* § 423(d)(2)(A).

31. *See, e.g.*, Hindman v. Greenville Hosp. Sys., 947 F. Supp. 215, 222 (D.S.C. 1996) ("Indisputably, [Plaintiff] obtained disability benefits from the SSA because she was declared 'totally disabled' . . . . In reaching this conclusion, the SSA observed that [Plaintiff] . . . labored under a considerable disability that severely impaired her ability to work, which of course precluded substantial gainful employment."); Smith v. Midland Brake, Inc., 911 F. Supp. 1351, 1359 (D. Kan. 1995) ("In light of the fact that the SSA explained to the plaintiff that to be

As some courts recognized even before *Cleveland*, the SSA, unlike the ADA, does not consider whether the applicant's employer could have provided a particular accommodation to enable job performance.[32] SSDI claims are heard in an informal administrative setting that employs a standardized, five-step procedure to make disability determinations.[33] The SSA's five questions are: (1) is the applicant working? (generally, working applicants are ineligible); (2) is the applicant's condition severe?; (3) is the condition included among the SSA's list of automatically disabling conditions?; (4) can the applicant do his or her prior work?; and (5), if not, is there any work that the applicant can do given his or her medical conditions, work experience, age, education, and skills?[34]

Beyond these statutory and administrative differences, SSDI awards may be misunderstood on a more general level as signaling a total inability to work. Professor Matthew Diller argues that SSDI awards are more accurately described as socioeconomic judgments, not objective medical determinations; they signify "that an individual is *excused* from the social obligation to work because to work would require effort or impose hardship that is greater than that which society expects people to endure."[35] As Diller contends, SSDI awards bear an implicit conclusion that social and economic forces, such as a

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'disabled' one must be not only unable to perform his usual work, but any substantial gainful work, the plaintiff cannot now [avoid judicial estoppel].."), *rev'd*, 180 F.3d 1154 (10th Cir. 1999).

32. *See, e.g.*, Aldrich v. Boeing Co., 146 F.3d 1265, 1268 (10th Cir. 1998) ("The Social Security Act . . . does not take into consideration whether an accommodation would render the individual able to perform a job."); Downs v. Hawkeye Health Servs., Inc., 148 F.3d 948, 951 (8th Cir. 1998) ("[T]he Social Security disability standard does not take into account ability to work with a reasonable accommodation."); Swanks v. Wash. Metro. Area Transit Auth., 116 F.3d 582, 583 (D.C. Cir. 1997) (noting that SSDI determinations do not consider reasonable accommodations), *aff'd after remand*, 179 F.3d 929, 932 (D.C. Cir. 1999).

33. Beaumont, *supra* note 15, at 1548, 1567; *see also* Nodelman v. Gruner & Jahr USA Publ'g, No. 98 Civ. 1231, 2000 U.S. Dist. LEXIS 5398, at *23 (S.D.N.Y. Apr. 26, 2000) (noting that the SSA's five-step analysis "inevitably leads to a superficial understanding of the applicant's disability").

34. Social Security Administration, How We Decide If You Are Disabled, http://www.ssa.gov/dibplan/dqualify5.htm (last visited Apr. 16, 2009).

35. Diller, *supra* note 15, at 1059–60 (emphasis added); *see also* David H. Autor & Mark G. Duggan, *The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding*, J. ECON. PERSP., Summer 2006, at 71, 73–74 (arguing that the SSDI screening process "hinges to a significant extent on an applicant's employability, not just personal health, causing the program to function much like a long-term unemployment insurance program for the unemployable"). Autor and Duggan contend that medical advances have dated the Social Security Act's original purpose by "blurr[ing] any sharp divide that may have once existed between those who are 'totally and permanently disabled' and those who are disabled but retain some work capacity." Autor & Duggan, *supra*, at 74.

lack of available jobs and claimants' limited skills, make employment unlikely but not impossible.[36]

Amendments to the Social Security Act reflect a transition from an incapacity model of disability to an excuse model. In 1999, Congress enacted the Ticket to Work and Work Incentives Improvement Act, a voluntary program that allows individuals receiving SSDI to access vocational support services and return to work without immediately losing their benefits.[37] Congress passed the law after finding that, despite SSDI recipients' desire for employment and the enhanced protections of the ADA, less than one-half of one percent of recipients returned to work.[38] In his signing statement, President Clinton remarked that the new legislation could harmonize the ADA and SSA by "affirm[ing] the basic principle manifested in the Americans with Disabilities Act: that all Americans should have the same opportunity to be productive citizens."[39] Senator Edward Kennedy commented that Ticket to Work strengthened the ADA by showing that "disabled does not mean unable."[40] Yet as of June 2007, the program's participation rate was approximately six percent,[41] suggesting that the ADA and SSA have not been integrated to the extent that legislators hoped.

### *C. Judicial Estoppel: The Pre-*Cleveland *Approach*

Judicial estoppel is an equitable doctrine that prevents a party who prevails on a claim in a legal or administrative proceeding from prevailing on a contradictory claim in a subsequent proceeding.[42] Courts typically apply judicial estoppel through summary judgment.[43] In 2001, the Supreme Court fleshed out the doctrine's contours in *New*

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36. Diller, *supra* note 15, at 1010.

37. Mark McWilliams, *Disability Law–The Ticket to Work and Work Incentives and Improvement Act: An "E" Ticket for Adults with Disabilities*, 79 MICH. B.J. 1680, 1682 (2000).

38. Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, 113 Stat. 1860 (codified as amended at 42 U.S.C. § 1320b-19 (2006)).

39. President's Statement on Signing the Ticket to Work and Work Incentives Improvement Act of 1999, 35 WEEKLY COMP. PRES. DOC. 2637 (Dec. 17, 1999).

40. Jennifer Heldt Powell, *Disabled Workers Welcome New Law*, BOSTON HERALD, Dec. 12, 1999, at 43.

41. *Barriers to Work for Individuals Receiving Social Security Disability Benefits: Hearing Before the S. Finance Comm.*, 110th Cong. 1 (2007) (statement of Sen. Grassley, Ranking Member, Senate Comm. on Finance), *available at* http://www.senate.gov/~finance/hearings/statements/062107cg.pdf.

42. O'Brien, *supra* note 15, at 356–57.

43. 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, 384–385 (1997).

*Hampshire v. Maine*, observing that the unanimously accepted rationale for judicial estoppel is protecting the integrity of the judicial process.[44] Unlike other forms of estoppel, the purpose of judicial estoppel is to protect courts, not litigants; therefore, the doctrine does not require that the non-estopped party detrimentally relied on the prior position.[45] The phrase courts often invoke to justify judicial estoppel is that it prevents litigants from "playing fast and loose with the courts."[46]

Lower courts have not developed a bright-line rule for when to apply judicial estoppel.[47] One district judge has stated that "judicial estoppel is a vintage doctrine whose popularity varies from court to court nearly as greatly as its contours do."[48] Nonetheless, some common elements have emerged. First, the party's subsequent position must be "clearly inconsistent" with its prior position.[49] Second, the party actually must have prevailed on the prior position; otherwise, there is no "risk of inconsistent determinations."[50] Finally, courts consider whether the party asserting the inconsistent position would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[51] One commentator argues that because this last element suggests detrimental reliance, it more appropriately falls under equitable estoppel.[52] Still, some courts appear to require an element of unfairness by declining to judicially estop a party who asserted inconsistent positions in good faith.[53]

Until *Cleveland*, lower courts differed on the applicability of judicial estoppel to the intersection of the ADA and SSA.[54] In 1992, the Seventh Circuit articulated discomfort with the doctrine in this statutory context, commenting that SSDI awards are "generalized" and do not establish conclusively that there is "no work [that a]

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44. 532 U.S. 742, 749–50 (2001).

45. Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982).

46. *E.g.*, Feder v. Elec. Data Sys. Corp, 429 F.3d 125, 136 (5th Cir. 2005); Coleman v. Cmty. Trust Bank, 426 F.3d 719, 728 (4th Cir. 2005); Wagner v. Prof'l Eng'rs in Cal. Gov't, 354 F.3d 1036, 1044 (9th Cir. 2004); Ergo Sci., Inc. v. Martin, 73 F.3d 595, 598 (5th Cir. 1996); Palcsesz v. Midland Mut. Life Ins. Co., 87 F. Supp. 2d 409, 412 (D.N.J. 2000).

47. *New Hampshire*, 532 U.S. at 750.

48. Sumner v. Michelin N. Am., Inc., 966 F. Supp. 1567, 1571 (M.D. Ala. 1997).

49. *New Hampshire*, 532 U.S. at 750.

50. *Id.* at 750–51.

51. *Id.* at 751.

52. Davis, *supra* note 7, at 199 n.46.

53. *Id.* at 210.

54. *See* Beaumont, *supra* note 15, at 1555–58 (describing the various approaches courts have taken in addressing judicial estoppel and the ADA).

claimant can do."[55] Judicial estoppel of ADA claims gained attention after *McNemar v. Disney Store, Inc.*, a 1996 Third Circuit decision affirming the use of estoppel in the case of an HIV-positive ADA plaintiff who applied for SSDI after his job termination.[56] The court stressed the doctrine's purpose of protecting the judicial system, not litigants.[57] Emphasizing that Congress did not intend for individuals who are capable of working to receive SSDI, the court declared that while choosing between disability benefits and an ADA claim may be difficult, the hardship does not permit making "false representations with impunity."[58]

*McNemar* was criticized widely as an unjust application of judicial estoppel.[59] The EEOC signaled its disapproval by issuing an enforcement guidance explaining why SSDI is not inherently inconsistent with the ADA.[60] The EEOC emphasized that the SSA, unlike the ADA, "permits general assumptions about an individual's ability to work," does not closely examine the essential functions of a particular job, and does not consider reasonable accommodations.[61] Unlike the *McNemar* court, the EEOC felt that individuals should not have to choose between disability benefits and an ADA claim.[62] After *McNemar*, however, some circuits adopted a rebuttable presumption of judicial estoppel against ADA plaintiffs who received SSDI.[63] A minority of circuits rejected the doctrine altogether.[64]

### *D.* Cleveland v. Policy Management Systems Corp.

In 1999, the Supreme Court attempted to resolve the confusion in *Cleveland v. Policy Management Systems Corp.*, a case in which the

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

56. 91 F.3d 610, 619 (3d Cir. 1996). While *McNemar* has never been overruled, its ruling was severely abrogated by a three-judge panel in *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 502–03 (3d Cir. 1997).

57. *McNemar*, 91 F.3d at 616–17.

58. *Id.* at 620.

59. Barth, *supra* note 15, at 1326. Soon after the decision, a Third Circuit three-judge panel noted that while criticism of *McNemar* may have been "well-founded," it was not the panel's role to revisit a prior panel's decision. *Krouse*, 126 F.3d at 502–03.

60. Barth, *supra* note 15, at 1326.

61. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE ON THE EFFECT OF REPRESENTATIONS MADE IN APPLICATIONS FOR BENEFITS ON THE DETERMINATION OF WHETHER A PERSON IS A "QUALIFIED INDIVIDUAL WITH A DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990, intro. (1997), *available at* http://www.eeoc.gov/policy/docs/qidreps.html.

62. *Id.* at pt. III.B.

63. Barth, *supra* note 15, at 1327–28.

64. *Id.* at 1327.

Fifth Circuit had affirmed judicial estoppel of an ADA claim.[65] Briefs filed in the case demonstrate the high stakes perceived by different actors. An amicus brief submitted on behalf of the plaintiff by over forty medical, legal, and advocacy organizations argued that "failing to recognize and disaggregate the distinct policies" of the SSA and ADA "re-erects barriers for employable individuals with disabilities."[66] The employer, on the other hand, argued that while the ADA was a "worthy statute designed to eliminate discrimination against the disabled," it was for Congress, not courts, to decide whether individuals could reap a "double recovery" under the two statutes.[67]

The Supreme Court held that disability benefits do not automatically bar an ADA claim nor create a rebuttable presumption of judicial estoppel, finding that "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side."[68] The Court emphasized that the SSA does not carefully consider possible accommodations, nor are SSDI applicants required to mention accommodations in their applications.[69] Indeed, the Court observed that it would be infeasible for the Social Security Administration to consider accommodations, given the millions of disability applications it processes each year and the "workplace-specific" nature of accommodations.[70] Thus, an SSDI award is simply not conclusive evidence of an ADA plaintiff's inability to perform a particular job.[71]

The Court provided additional reasons why receipt of SSDI does not automatically trigger judicial estoppel. Many SSDI awards are based on "presumptive" disabilities: impairments the Administration categorizes as presumptively resulting in an inability to work, without an individualized inquiry into whether the applicant is actually unable to work.[72] Further, the Court recognized that the recently implemented "trial period" system, under which disabled persons could continue to receive full SSDI benefits while attempting to re-enter the work force, demonstrated Congress's recognition that

65. 526 U.S. 795, 800 (1999).

66. Brief of AIDS Policy Center for Children et al. as Amici Curiae Supporting Petitioner at 4, *Cleveland*, 526 U.S. 795 (No. 97-1008).

67. Brief of Respondents at 27–28, *Cleveland*, 526 U.S. 795 (No. 97-1008) (quoting McNemar v. Disney Store, Inc., 91 F.3d 610, 619 (3d Cir. 1996)).

68. *Cleveland*, 526 U.S. at 802–03.

69. *Id.* at 803.

70. *Id.*

71. *Id.* at 802–03.

72. *Id.* at 804.

disability is a fluid status.[73] Finally, the Court held that there is no conflict when an ADA plaintiff has applied for—but has not been awarded—disability benefits.[74] The Court observed that merely stating claims under both statutes comports with the allowance of alternative and even inconsistent pleadings.[75]

While receipt of SSDI is not fatal to an ADA claim, *Cleveland* holds that there are still situations in which the two statutes genuinely conflict, making judicial estoppel appropriate.[76] Because ADA plaintiffs must prove that they could perform the essential functions of the job with or without reasonable accommodation, a prior sworn assertion of one's inability to work may indeed "negate an essential element" of an ADA case.[77] If so, plaintiffs cannot "simply ignore the apparent contradiction"; they must provide a "sufficient explanation" for the inconsistency.[78] Plaintiffs cannot accomplish this merely by contradicting their SSDI application statements.[79] If the application pleads something akin to "total disability," 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 still perform her essential job functions, with or without reasonable accommodation.[80] Some courts, however, appear to assume the absolute truth of statements in SSDI applications rather than accept ADA plaintiffs' good faith beliefs at the time of their applications.[81]

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73. *Id.* at 805.

74. *Id.*

75. *Id.*

76. *Id.* at 805–06.

77. *Id.* at 806.

78. *Id.*

79. *See id.* at 806–07 (observing that the lower courts "have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement" and adopting a similar rule).

80. *Id.* at 807 (emphasis added).

81. *See, e.g.*, Lee v. City of Salem, 259 F.3d 667, 677 (7th Cir. 2001) (holding that an ADA plaintiff's "change of heart" or mistaken self-assessment of a medical condition was not sufficient to resolve the inconsistency of his SSDI and ADA claims); Bisker v. GGS Info. Servs., Inc., No. 1:CV-07-1465, 2008 U.S. Dist. LEXIS 73310, at *8 (M.D. Pa. Sept. 22, 2008):

> The fact that [the plaintiff] intended to explain her circumstances to an ALJ is not relevant to the test for estoppel laid out in *Cleveland*, which only asks whether a plaintiff has successfully submitted and received SSDI benefits, and if so, can explain this inconsistency. The fact that she "intended" an explanation of her circumstances would appear to bear only on the question of bad faith, a consideration in traditional judicial estoppel analysis, but not part of the analysis under *Cleveland*.

Jones v. Southcentral Employment Corp., 488 F. Supp. 2d 475, 486 (M.D. Pa. 2007) ("*Cleveland* instructs that courts must assume that Plaintiff's representations to the SSA were truthful . . . .").

Although *Cleveland* rejected that the ADA and SSA are categorically incompatible and mandated a particularized inquiry, the Court drew an opaque distinction between specific factual assertions in SSDI applications and legal conclusions. The Court noted that a representation of complete disability in an SSDI claim is often a legal rather than a factual conclusion.[82] The Court held that when an SSDI applicant makes factual statements, such as, "I can/cannot raise my arm above my head," that contradict an ADA claim, judicial estoppel remains appropriate.[83] The EEOC's amicus brief in support of the plaintiff also highlighted this distinction, arguing that receipt of SSDI should not pose a per se bar to an ADA claim, but specific factual inconsistencies between an SSDI application and an ADA claim may warrant estoppel.[84] As one commentator observed shortly after *Cleveland*, the distinction is problematic because SSDI assertions can be labeled both legal and factual.[85] *Cleveland*'s significance, therefore, may lie more in its general proclamation that the ADA and the SSA are not mutually exclusive rather than its announcement of a clear rule.[86] An employers' bulletin issued shortly after the decision enthusiastically declared that the fact-law distinction would allow employers to use SSDI awards to "nip [ADA claims] in the bud."[87] As Part III shows, courts rely on the distinction to apply judicial estoppel.

## III. JUDICIAL ESTOPPEL BY ANOTHER NAME?

Although *Cleveland* raised judicial awareness of the differences between the SSA and the ADA, it has not stopped employers from winning summary judgment when ADA plaintiffs receive SSDI. This is not due to a misreading of *Cleveland*, but rather to the decision's lack of specificity about what constitutes a successful resolution of the inconsistency.[88] Indeed, because ADA claims are context-sensitive, the Court could not provide a bright-line rule. Yet lower courts seem to

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

83. *Id.*

84. Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 27–28, *Cleveland*, 526 U.S. 795 (No. 97-1008).

85. Barth, *supra* note 15, at 1335.

86. *Id.* at 1336–37.

87. *An SSDI Claim of Total Disability Defeats an Employee's ADA Claim*, PERSONNEL MANAGER'S LEGAL LETTER, Sept. 2000, at 1.

88. Barth, *supra* note 15, at 1347; *see also* Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 947 (2003) ("My point is not that these lower courts have misread *Cleveland*. In fact, a fair argument can be made that they are being entirely faithful to that decision . . . . These cases simply hold that the plaintiff has failed to supply a sufficient explanation.").

have filled this void by focusing on technicalities more than true inconsistencies. The post-*Cleveland* parameters that lower courts have developed may even indicate increased discomfort with the ADA-SSA intersection. Under these parameters, the seeming mutual exclusivity of the statutes will continue to frustrate courts unless they focus their analyses on the specific employer-employee relationship and consider the employer actions that may have motivated the employee's assertions to the Social Security Administration.

### *A. Contradiction or Resolution?*

Although "contradiction" and "resolution" are antonyms, lower courts' post-*Cleveland* analyses reveal a line that is more blurred than dichotomous. *Cleveland* held that an ADA plaintiff cannot avoid summary judgment "simply by contradicting his or her own previous sworn statement . . . without explaining the contradiction or attempting to resolve the disparity."[89] The Court cited "filing an affidavit that flatly contradicts that party's sworn deposition" as an example of an impermissible contradiction.[90] In *Lee v. City of Salem*, the Seventh Circuit fleshed out the meaning of "contradiction" by holding that the mere disavowal of a prior pleading of total disability in an SSDI application will not defeat summary judgment.[91] The court must assume the truth of the statements in the application, and plaintiffs must resolve the inconsistency by referencing the difference between the statutes.[92] They may do this by pointing out that the SSA does not consider the possibility of accommodations, or by showing that their conditions have improved since the SSDI award.[93]

*Lee* suggests that the mere recitation of the differences between the statutes satisfies *Cleveland*. Yet the plaintiff in *Lee* failed to meet this liberal standard. He testified that he was actually able to perform his job when he applied for SSDI; he applied because the fact of his job termination led him to *believe* he was disabled.[94] The court found that the implicit meaning of this explanation was that he lied to the Administration about being unable to work.[95] He made no attempt to "qualify" his prior statements, such as by arguing that his assertion of complete disability in his SSDI application meant only that he was

89. 526 U.S. at 806.
90. *Id.*
91. 259 F.3d 667, 674 (7th Cir. 2001).
92. *Id.*
93. *Id.* at 675.
94. *Id.*
95. *Id.* at 676.

unable to work *without* a reasonable accommodation.[96] He simply offered "his own change of heart" to resolve the inconsistency, rather than "any differences in the statutory criteria."[97]

Oddly, after holding that some reference to the statutory difference is required to resolve the inconsistency, the *Lee* court detected this difference within the plaintiff's pleadings despite finding against him. His SSDI application statement—that his strenuous job aggravated his back pain—"arguably left room for the notion that Lee was capable of performing the essential functions of the job" with some sort of reasonable accommodation.[98] Yet the court declined to qualify the plaintiff's prior statements for him. Though well aware of the differences between the statutes, the court placed the burden on the plaintiff to articulate the distinction, if only through some minimal reference.[99]

In *Detz v. Greiner Industries, Inc.*, the Third Circuit followed *Lee*'s approach to *Cleveland* in the context of an Age Discrimination in Employment Act ("ADEA") claim, holding that the plaintiff failed to resolve the inconsistency between his assertion of total disability in his SSDI application and his subsequent argument under the ADEA that he nonetheless could perform his job despite his age and physical condition.[100] Detz argued that he became disabled because of his job termination.[101] The court found this explanation "no more than a further contradiction of his initial assertion."[102] Like the Seventh Circuit in *Lee*, the Third Circuit observed that had Detz indicated in his application that he could have performed his prior work with some accommodation, he might have survived summary judgment.[103] Instead, he "manipulated the facts, and perhaps the system, to obtain SSDI benefits" and then tried to win damages in an age discrimination suit.[104]

A more recent district court case, however, pointed out that, unlike the ADA, the ADEA's definition of job "qualification" does not consider reasonable accommodations; it is more stringent in that it

96. *Id.*

97. *Id.* at 677.

98. *Id.* at 676.

99. *Id.*

100. 346 F.3d 109, 111 (3d Cir. 2003).

101. *Id.* at 120. The plaintiff had been assigned to light-duty work before his termination. He argued that he could have continued to perform on light-duty but that his termination rendered him "disabled" under the SSA's definition because, given his physical condition, he would be unable to obtain another job. *Id.*

102. *Id.*

103. *Id.* at 120–21.

104. *Id.* at 121.

requires that the plaintiff was meeting the employer's "legitimate expectations" at the time of the termination.[105] An employee might not have satisfied the employer's legitimate expectations while suffering from a physical disability, despite any provided accommodations.[106] Still, like *Lee*, *Detz* suggests that courts should not resolve inconsistencies by articulating the difference between the SSA and employment discrimination statutes for plaintiffs.

*Lee* and *Detz* demonstrate a tension with which courts have struggled since *Cleveland*: whether mere reference to the statutory differences between the SSA and employment discrimination statutes is an impermissible contradiction or a sufficient resolution. Shortly after *Cleveland*, the Third Circuit observed that because it will always be true that the SSA does not consider reasonable accommodations, simply pleading this difference always would preclude summary judgment if doing so amounted to successful resolution.[107] Therefore, plaintiffs must offer additional detail.[108] In *Jones v. Southcentral Employment Corp.*, a Pennsylvania district court followed this logic in judicially estopping an ADA claim.[109] The court emphasized that the plaintiff never actually requested accommodations from her employer; she did not raise the possibility of accommodations until she brought her ADA claim.[110] Speculation on "theoretical" accommodations amounts only to referencing the statutory differences, which will not stave off summary judgment.[111] The *Jones* plaintiff unsuccessfully relied on a case in which the Third Circuit read the possibility of accommodations into an ADA plaintiff's SSDI application, despite the application's silence on accommodations.[112] The *Jones* court observed that the Third Circuit had supplied this possible resolution for the plaintiff because she had explicitly requested an accommodation from

105. Montano v. Christmas by Krebs Corp., No. CIV 06-0308, 2007 U.S. Dist. LEXIS 96219, at *17 (D.N.M. Aug. 30, 2007).

106. *Id.* at *18.

107. Motley v. N.J. State Police, 196 F.3d 160, 164–65 (3d Cir. 1999).

108. *Id.* at 165.

109. No. 1:05-CV-1504, 2007 U.S. Dist. LEXIS 37579, at *27 (M.D. Pa. May 23, 2007).

110. *Id.* at *35; *see also* Bisker v. GGS Info. Servs., Inc., No. 1:CV-07-1465, 2008 U.S. Dist. LEXIS 73310, at *7 (M.D. Pa. Sept. 22, 2008) ("The plaintiff must provide a 'more substantial' explanation than differing statutory schemes to explain her inconsistencies."); Nodelman v. Gruner & Jahr USA Publ'g, No. 98 Civ. 1231, 2000 U.S. Dist. LEXIS 5398, at *25 (S.D.N.Y. Apr. 26, 2000) (finding that the plaintiff successfully resolved the inconsistency between his ADA claim and his SSDI award because he requested specific accommodations from his employer and argued that he could have performed the essential job functions had his employer provided the accommodations).

111. *Jones*, 2007 U.S. Dist. LEXIS 37579, at *36.

112. Turner v. Hershey Chocolate USA, 440 F.3d 604, 610 (3d Cir. 2006).

her employer, unlike Jones.[113] Absent a request, reading possible accommodations into an SSDI application permits reconciliation by mere reference to the statutory differences.[114]

Similarly, pleading that the SSA allows SSDI recipients to return to work and still draw benefits—a fact that the *Cleveland* Court relied on[115]—may not defeat judicial estoppel. In *Boxill v. Brooklyn College*, a district court held that a plaintiff who received SSDI could not avoid summary judgment simply by presenting a booklet on the Ticket to Work program.[116] The existence of the program did not explain how the plaintiff was qualified under both the ADA and the SSA; the "mere fact that [he] *may* have attempted to return to work [did] not necessarily support the conclusion that he [was] able to work."[117] The court explained that the purpose of Ticket to Work was to enable disabled individuals to reintegrate gradually into the workforce, without a sudden loss of benefits.[118] It was not intended to "perpetuat[e] what amounts to fraud on the SSA" by allowing plaintiffs to argue that they are able to work under a discrimination statute but are nonetheless entitled "to collect social security as some form of unemployment insurance."[119]

The concern that SSDI serves as "unemployment insurance" rather than income for those truly unable to work demonstrates judicial unease with the rhetoric and reality of Social Security. Another court echoed this concern when it rejected an ADA plaintiff's explanation that he "was justified in applying for SSDI benefits, not because he was disabled, but simply because he needed income."[120] Yet protecting the rhetoric of Social Security while overlooking the reality reinforces a dichotomized view of the SSA's and ADA's protected classes. Professor Samuel Bagenstos argues that courts' seeming frustration with ADA employment discrimination suits stems not from judges "impos[ing] their own retrograde views of the proper response to disability," but from the notion that the very purpose of the ADA is to reduce dependence on direct aid from the government.[121] Courts therefore try to restrict the statute's protection to those who truly

113. *Jones*, 2007 U.S. Dist. LEXIS 37579, at *37.

114. *Id.* at *37–38.

115. Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 805 (1999).

116. No. CV-96-561, 2003 U.S. Dist. LEXIS 11762, at *19 (E.D.N.Y. July 10, 2003).

117. *Id.* at *21 (emphasis added).

118. *Id.* at *21–22.

119. *Id.* at *22.

120. Devine v. Transp. Int'l Pool, Inc., No. 06-986, 2007 WL 3033776, at *6 n.3 (W.D. Pa. Oct. 16, 2007).

121. Bagenstos, *supra* note 88, at 924, 927.

need accommodations.[122] Matthew Diller argues that this mistakenly treats SSDI- and ADA-protected populations as mutually exclusive.[123] When plaintiffs attempt to claim protection under both statutes, courts tend to "treat the disabled individual as duplicitous and . . . 'double-dipping.' "[124] According to Diller, courts misunderstand the administrative reality of SSDI determinations. Although objective and medical in theory, SSDI determinations in reality depend on subjective assumptions about social and economic barriers to employment.[125] Therefore, SSDI awards are findings of excuse from work, not impossibility.[126]

Diller's excuse argument suggests that judicial estoppel never should apply. If SSDI awards reflect excuse rather than impossibility, not only should mere reference to the statutory differences satisfy *Cleveland*, but the intersection of the statutes never should furnish a defense for employers. If SSDI signals that some individuals face a combination of medical and socioeconomic barriers that make gainful employment unlikely, it is not contradictory to argue that one could have performed the essential job functions if only an employer had removed some of the medical barriers.[127] Pointing out that the Social Security Administration does not consider accommodations merely would highlight the agency's awareness that its determinations are contingent. It need not inquire about accommodations if it is not conclusively determining the impossibility of employment. A successful ADA suit even would vindicate the excuse concept of SSDI by punishing employers who erect employment barriers.

While Diller's excuse argument may be a more realistic conception of SSDI awards, courts understandably hesitate to issue rulings based on the notion that a statute does not mean what it says. The SSA speaks of inability, not excuse.[128] Still, *Cleveland* recognizes a permissible gap between the language and realities of the statute. The problem is whether ADA plaintiffs can convince courts that their situations fit within this gap. Pointing to the statutory differences may amount only to showing that the gap exists, which is not enough. Yet requiring plaintiffs to resolve the difference from within an SSDI application recreates the fiction that SSDI benefits and ADA claims are mutually exclusive. For example, the *Detz* court found that the

122. *Id.* at 927.
123. Diller, *supra* note 15, at 1035.
124. *Id.*
125. *Id.* at 1062–63.
126. *Id.* at 1065.
127. *Id.* at 1066.
128. 42 U.S.C. § 423(d) (2006).

plaintiff's SSDI award could not be reconciled with his ADEA claim because his SSDI application did not mention accommodations.[129] Despite *Cleveland*'s caution that SSDI applications do not require applicants to mention accommodations,[130] *Detz* suggests that failing to do so forfeits a subsequent employment discrimination claim. Other courts have recognized that looking for resolution solely within an SSDI application evades *Cleveland*'s conclusion that SSDI application statements are not the final word on the bounds of a disability. As the Seventh Circuit stated in *Lee*: "Explanations of the sort *Cleveland* requires are, in short, contextual—they resolve the seeming discrepancy . . . not by contradicting what the plaintiff told the Social Security Administration, but by demonstrating that those representations . . . leave room for the possibility" that the plaintiff was nonetheless able to perform the job at issue with the requisite accommodations.[131]

Looking for resolution primarily within SSDI applications may permit courts to cast virtually any attempt at resolution as an impermissible contradiction. Because SSDI applications include boilerplate language on inability to work,[132] arguing that one could have performed the essential functions of a job if given a reasonable accommodation almost always will contradict an SSDI application. For this reason, courts should look for resolution within the specific employer-employee relationship. When confronted with the possibility of judicial estoppel, ADA plaintiffs should assert a specific accommodation that would have enabled job performance. Although some courts may dismiss a later-proposed accommodation as speculative and concocted at the summary judgment stage, others may

129. 346 F.3d 109, 120–21 (3d Cir. 2003).

130. 526 U.S. 795, 803 (1999) ("[W]hen the SSA determines whether an individual is disabled for SSDI purposes, it does *not* take the possibility of 'reasonable accommodation' into account, nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI.").

131. 259 F.3d 667, 675 (7th Cir. 2001).

132. SSDI applications can now be filed online. An applicant is asked, "During the last 14 months, have you been unable to work because of illnesses, injuries or conditions that have lasted or are expected to last at least 12 months or can be expected to result in death?" Social Security Online, Apply for Disability Benefits Home Page, http://www.socialsecurity.gov/applyfordisability (last visited May 22, 2009). When filling out the online application, the applicant is asked whether "there was some period in the past 14 months where you could not work because of a serious illness, injury or condition." *Id.* (click on the "Adult" application link; click on "online application for Social Security Benefits" under Step 2; check the appropriate selections on the right hand side to indicate for whom you are applying for benefits and that you have read the Privacy Act statement; the question appears on the following "Applicant Identification" page) (last visited May 22, 2009).

find that it at least goes beyond pleading the bare statutory difference between the SSA and the ADA.[133]

### *B. Legal Versus Factual Assertions*

*Cleveland* distinguished between statements of "total disability" to the Social Security Administration—which the Court deemed "context-related legal conclusion[s]"—and "purely factual" statements.[134] In her SSDI application, Carolyn Cleveland made general statements that she was "unable to work due to [her] disability" and "could no longer do the job" because of her "condition."[135] The Court held that these blanket assertions evinced Cleveland's legal conclusion that she was disabled; they were not contradictory factual statements sufficient to preclude an ADA claim.[136] When statements to the SSA factually contradict a prima facie ADA claim, *Cleveland* holds that judicial estoppel may be warranted.[137]

Lower courts have honed in on this legal-factual distinction. In *McClaren v. Morrison Management Specialists, Inc.*, an age discrimination suit, the Fifth Circuit affirmed judicial estoppel against a plaintiff who received SSDI after his termination.[138] McClaren's SSDI application stated that he "constant[ly]" experienced "pain lower back, chest pain, fatigue . . . neropathy [sic], both legs feet, dizziness, sleeplessness, diabetes, hycholesterol [sic]."[139] He also stated that his employer had provided accommodations and that he had stopped working based on his physician's advice.[140] The court underscored that

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133. *See, e.g.*, D'Ambrosia v. Pa. Chamber of Bus. & Indus., No. 1:06-CV-2182, 2008 U.S. Dist. LEXIS 77147, at *11 (M.D. Pa. Sept. 30, 2008) (holding that judicial estoppel was not warranted because the plaintiff explained that he was "never specifically asked by the Social Security Administration ('SSA') whether he could do his prior job with an accommodation; he affirmatively states that he believes himself able to work, provided an accommodation is made for a 'modified work schedule and modified training schedule' ").

134. 526 U.S. 795, 802 (1999).

135. *Id.* at 799.

136. *Id.* at 802.

137. *Id.*; *see also* Feldman v. Am. Mem'l Life Ins. Co., 196 F.3d 783, 791 (7th Cir. 1999):

> In her SSDI application, [Plaintiff] convinced the SSA of her disability with *unambiguous statements* about her total incapacity to perform any substantial gainful employment. [Plaintiff] now explains flatly that she "was able to perform the essential functions of her job, with or without reasonable accommodations and, thus, was a 'qualified individual.' " This bald statement, without more, crashes face first against her claim of total disability in her SSDI application.

(emphasis added).

138. 420 F.3d 457, 458 (5th Cir. 2005).

139. *Id.* at 464.

140. *Id.* at 460.

these statements were specific and factual, not general legal assertions that McClaren met the SSA definition of "disabled."[141]

In an unsuccessful attempt to resolve the inconsistency, McClaren argued that his employer's failure to select him for a certain position led him to choose incapacitating surgery over employment; he would have chosen a different course of treatment had he been hired.[142] The specificity of his SSDI application statements rendered this explanation insufficient; the factual descriptions precluded the possibility that he could have performed the job.[143] The explanation amounted to mere "disavowal" of his application, not resolution.[144] As *McClaren* indicates, the more specific the statements in an SSDI application, the greater the likelihood that an explanation proffered in ADA litigation will be characterized as contradiction rather than resolution.

Similarly, in *Lorde v. City of Philadelphia*, a district court relied on the legal-factual distinction to judicially estop an ADA plaintiff who argued she could perform the essential functions of her stenographer position, despite telling the Social Security Administration that she could do "no typing, no keyboarding of any type, [and] no repetitive finger movement."[145] This specific factual assertion estopped her from arguing that she could have performed the essential job functions if only her employer had accommodated her by limiting her typing to two hours per day.[146] As this Note's solution argues, the factual specificity of Lorde's statements matters only if she actually requested an accommodation for her typing difficulties. If her employer denied the accommodation of limited typing, it is not inconsistent to assert in her SSDI application that she could not type.

Despite *Cleveland*'s distinction, specific factual statements do not inevitably lead to judicial estoppel. For example, in *Smith v. Midland Brake, Inc.*, a plaintiff who developed dermatitis after years of contact with chemicals at his job successfully resolved the factual inconsistency between his SSDI application and ADA claim.[147] Although the plaintiff represented to the Administration that his "hands and fingers were unusable most of the time" and that he could have "no contact with irritants," he persuaded the district court that he nonetheless could perform his job, which required contact with

141. *Id.* at 465.

142. *Id.* at 464.

143. *Id.* at 466.

144. *Id.* at 465.

145. No. 98-5267, 2000 U.S. Dist. LEXIS 17196, at *7–8 (E.D. Pa. Nov. 30, 2000).

146. *Id.* at *8–9.

147. 98 F. Supp. 2d 1233, 1240–42 (D. Kan. 2000).

irritants.[148] His successful resolution came from the larger Social Security record, which included statements from physicians that these restrictions could have been accommodated with other kinds of work.[149] Consistent with Diller's excuse theory, and yet in contrast to the SSA's definition of "disabled," the court reasoned that the Administration concluded only that the plaintiff was unable to perform specific tasks, not that he was unable to perform any work whatsoever.[150]

While it is certainly easier to detect inconsistencies when statements are specific and factual, the legal-factual distinction creates inequities among SSDI recipients who prevailed for different reasons. As *Cleveland* recognized, many applicants receive SSDI based on the Administration's list of presumptively disabling conditions.[151] These applicants are more likely to receive SSDI through general assertions and therefore stand a better chance of resolving the seeming conflict with the ADA. Applicants without presumptively disabling conditions must make more specific assertions. Although their statements may lack any indication of possible accommodations, this does not preclude the possibility that accommodations were available.

Most importantly, the factual-legal distinction overlooks the administrative reality of SSDI proceedings and is unfair to ADA plaintiffs who applied for SSDI under the mistaken belief that their disabilities could not be accommodated. The boilerplate language of SSDI applications and the standardized nature of the intake process may convert almost any statements into "legal conclusions." This Note's solution posits that more specific statements create an irreconcilable inconsistency only when they indicate affirmatively that not even the accommodation at issue in the ADA litigation would have enabled job performance.

### *C. Timing of the Statements*

The date that SSDI applicants list as the onset date of their disabilities (the date they became unable to work) plays a role in the *Cleveland* analysis. A plaintiff may have been "qualified" to perform her job at time of an adverse employment action despite experiencing

148. *Id.*

149. *Id.* at 1240–41.

150. *Id.*

151. 526 U.S. 795, 804 (1999).

health deterioration afterwards.[152] The ADA seems to require that plaintiffs be able to perform the essential job functions at the time of the adverse employment action (such as a termination or failure to hire).[153] A determination by the Social Security Administration that disability commenced before the adverse employment action therefore creates an inconsistency.[154] Courts sometimes find inconsistency even when the disability-onset date is the same date as the adverse employment action.[155] In *McClaren*, the plaintiff lost his job on June 8, 2000.[156] He subsequently listed June 8 in his SSDI application as the date on which he became unable to work.[157] The court held that he was therefore precluded from arguing that he was a "qualified individual" on the date of his termination.[158] Similarly, a district court applied judicial estoppel to an ADA plaintiff with Hepatitis C who listed the date of his termination in his SSDI application, despite his pleading that he applied one year after his termination and only listed his termination date because he "was not sure how to determine on what date [he] became unable to work," and "[i]t seemed like a fair date to pick because it was the last day that [he] had worked."[159] Rather than deeming this explanation a satisfactory one for choosing an inevitably arbitrary pinpoint date for the onset of a work-preventing disability, the court interpreted the plaintiff's argument as a specious "after-the-fact explanation" that might make sense with a "sudden physical injury," but not with a "gradually deteriorating disease" like Hepatitis C, which the plaintiff knew he had at the time of his termination.[160]

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152. 42 U.S.C. § 12111(8) (2006); *see also Cleveland*, 526 U.S. at 805 ("[T]he nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision.").

153. 42 U.S.C. § 12111(8) (defining a "qualified individual" as "an individual [who], with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

154. *See, e.g.*, Lee v. City of Salem, 259 F.3d 667, 668–70 (7th Cir. 2001) (estopping a plaintiff whom the SSA deemed disabled six months prior to his termination); Walter v. United Tel. Co. of Pa., No. 3:2004-255, 2006 U.S. Dist. LEXIS 80923, at *21–22, *37 (W.D. Pa. Nov. 6, 2006) (estopping a plaintiff whom the SSA found disabled as of the date of his injury, which occurred five days prior to his termination).

155. *E.g.*, Johnson v. ExxonMobil Corp., 426 F.3d 887, 892 (7th Cir. 2005); Devine v. Bd. of Comm'rs, 49 F. App'x 57, 61–62 (7th Cir. 2002); Marino v. Adamar of Jersey, Inc., No. 05-4528, 2009 U.S. Dist. LEXIS 7893, at *24 (D.N.J. Feb. 4, 2009).

156. 420 F.3d 457, 460 (5th Cir. 2005).

157. *Id.* at 460 n.2.

158. *Id.* at 465 n.9.

159. *Marino*, 2009 U.S. Dist. LEXIS 7893, at *15–16.

160. *Id.* at *16, *20.

Other cases take a more practical approach to timing. In *Felix v. New York City Transit Authority*, a district court declined to judicially estop a plaintiff who told the Administration that she became unable to work even before her job termination.[161] The court emphasized that although she listed a pre-termination disability date in her SSDI application, she did not actually apply until months after her termination.[162] Her disability may have progressed and rendered her totally unable to work by that point.[163] In *Turner v. Hershey Chocolate USA*, the Third Circuit resolved the date discrepancy in a different way when an ADA plaintiff told the Social Security Administration that she became disabled two years before her termination.[164] The court held that the disability-onset date must "be read as lacking the qualifier of reasonable accommodation."[165] In other words, the court read the application to say: "I am unable to work [as of this date] *without* reasonable accommodation."[166]

As with the other parameters courts have developed to evaluate the ADA-SSA intersection, the timing analysis risks obscuring the administrative context of SSDI applications. SSDI applicants frequently list their last date of employment as the date on which their disabilities commenced.[167] This makes sense given that the onset date asks applicants when they became unable to work; many applicants presumably frame this question in terms of an adverse employment action rather than an "official" disability onset date. When courts narrowly limit ADA qualification to the precise date of adverse employment action, they emphasize technicalities and do injustice to litigants who may have applied for SSDI on the mistaken assumption that their conditions could not be accommodated in the workplace. This frustrates the purpose of the ADA. A better approach is to recognize that SSDI applicants often interpret the disability-onset date in applications as simply asking for the last date on which they worked.

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161. 154 F. Supp. 2d 640, 649, 652 (S.D.N.Y. 2001).

162. *Id.* at 652.

163. *Id.*

164. 440 F.3d 604, 607 (3d Cir. 2006).

165. *Id.* at 610.

166. *Id.* (emphasis added).

167. *E.g.*, *id.* at 607, 610; Johnson v. ExxonMobil Corp., 426 F.3d 887, 890 (7th Cir. 2005); Devine v. Bd. of Comm'rs, 49 F. App'x 57, 61 (7th Cir. 2002); Lee v. City of Salem, 259 F.3d 667, 670 (7th Cir. 2001); Marino v. Adamar of Jersey, Inc., No. 05-4528, 2009 U.S. Dist. LEXIS 7893, at *4, *17 (D.N.J. Feb. 4, 2009); Quick v. Albert Einstein Healthcare, No. 05-4940, 2007 U.S. Dist. LEXIS 78335, at *8–9 (E.D. Pa. Oct. 23, 2007); Mendez v. Pilgrim's Pride Corp., No. 04-CV-01095, 2005 U.S. Dist. LEXIS 18988, at *9–10 (E.D. Pa. Sept. 2, 2005); Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1139–40 (N.D. Ill. 1994).

### *D. Extending* Cleveland *to Private Disability Benefits*

Finally, the hesitancy to apply judicial estoppel to private disability benefits—administered by insurance companies rather than the government—suggests that something about the receipt of public disability benefits by ADA plaintiffs is particularly troubling. Cases addressing the issue tend to treat ADA plaintiffs who received private benefits more favorably than those awarded SSDI.[168] Some courts hold that judicial estoppel simply does not apply to unsworn statements in long-term disability ("LTD") benefit applications, unlike sworn SSDI applications.[169] Courts that do apply *Cleveland* tend to focus more on the particular employment relationship. They observe that employer encouragement may have played a role in the decision to apply, particularly because private disability benefits are usually provided by the employer. If an employer concludes that an employee is unable to do a job or denies an accommodation, this may induce the employee to apply for private disability benefits.[170] When there is some indication of employer inducement, courts may hesitate to preclude ADA claims. In one case applying *Cleveland* to private benefits, the Seventh Circuit even supplied this inducement explanation for the plaintiff, rather than requiring him to proffer his own explanation.[171] The court's willingness to provide a resolution in the context of private, but not public,[172] disability benefits perhaps suggests that plaintiffs receiving public benefits must proffer a stronger explanation.

Even absent an indication of employer inducement, courts may be more forgiving of inconsistencies in LTD applications. One explanation may be the variability of LTD applications, in contrast to

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168. *E.g.*, Giles v. Gen. Elec. Co., 11 Am. Disabilities Cas. (BNA) 1242, 1248 (5th Cir. 2001); Pals v. Schepel Buick & GMC Truck, Inc., 220 F.3d 495, 498–99 (7th Cir. 2000); Millage v. City of Sioux City, 258 F. Supp. 2d 976, 995 (N.D. Iowa 2003); Mulhern v. Eastman Kodak Co., 191 F. Supp. 2d 326, 342 (W.D.N.Y. 2002); Fliss v. Movado Group, Inc., No. 98 C 3383, 2000 U.S. Dist. LEXIS 11745, at *16 (N.D. Ill. Aug. 14, 2000); Nodelman v. Gruner & Jahr USA Publ'g, No. 98 Civ. 1231, 2000 U.S. Dist. LEXIS 5398, at *24–26 (S.D.N.Y. Apr. 26, 2000).

169. Mendoza v. Micro Elecs., Inc., No. 02 C 8005, 2005 U.S. Dist. LEXIS 5561, at *22 n.11 (N.D. Ill. Feb. 8, 2005); *Fliss*, 2000 U.S. Dist. LEXIS 11745, at *16; *see also Giles*, 11 Am. Disabilities Cas. (BNA) at 1247–48 (declining to decide the issue of whether inconsistencies between unsworn statements and ADA claims warrant summary judgment).

170. *See, e.g.*, *Pals*, 220 F.3d at 498 ("One possible explanation might have been that [Plaintiff applied for LTD] two days after meeting with [his employer] and learning that he would not be welcomed back."); *Millage*, 258 F. Supp. 2d at 995 (holding that an ADA plaintiff's explanation that his employer excluded him from a position, rendering him eligible for LTD benefits, was sufficient to avoid summary judgment); *Mulhern*, 191 F. Supp. 2d at 342 (emphasizing that the plaintiff applied for LTD benefits only because his employer would not allow him to maintain his position).

171. *Pals*, 220 F.3d at 498.

172. *See supra* text accompanying notes 98–99.

the uniformity of SSDI applications. For example, a district court did not judicially estop a plaintiff who answered "no" on an LTD application in response to whether he could perform the work with a "job modification."[173] "Job modification" was not necessarily equivalent to a "reasonable accommodation" under the ADA.[174] Another court accepted a plaintiff's bare explanation that an LTD application does not consider reasonable accommodations.[175] This acceptance contrasts with the general rule that mere reference to the accommodation difference between the SSA and ADA does not satisfy *Cleveland*.[176] In sum, courts are more likely to find permissible ambiguities within private benefit applications and appear more willing to focus on the particular employment relationship. This Note's solution advocates that courts maintain this focus in assessing SSDI statements.

By being more willing to countenance facial inconsistencies in the context of private disability benefits, courts may unwittingly communicate annoyance with ADA plaintiffs who turn to public funds for income support. This frustration may support Bagenstos's argument that judicial estoppel's currency in the ADA-SSA context is grounded in the belief that the ADA should reduce dependency on SSDI.[177] Yet studies show that, despite the passage of the ADA, the SSDI rolls grew dramatically in the 1990s.[178] Some commentators argue that the ADA actually exacerbated unemployment because its reasonable accommodation requirement increased the expense of hiring persons with disabilities.[179] Although discouraging reliance on SSDI may be a way to preserve taxpayer dollars, this motivation must be tempered by the recognition that SSDI is not the final word on a person's abilities in the workplace. Overemphasizing the finality of statements in SSDI applications frustrates both the SSA and ADA.

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173. *Nodelman*, 2000 U.S. Dist. LEXIS 5398, at *25–26.

174. *Id.* at *26.

175. Abate v. Cendant Mobility Servs. Corp., No. 3-03-cv-1858, 2007 U.S. Dist. LEXIS 50623, at *18–20 (D. Conn. July 13, 2007).

176. *See supra* text accompanying notes 90–114.

177. Bagenstos, *supra* note 88, at 927.

178. Nanette Goodman & Timothy Waidmann, *Social Security Disability Insurance and the Recent Decline in the Employment Rate of People with Disabilities*, *in* THE DECLINE IN EMPLOYMENT OF PEOPLE WITH DISABILITIES: A POLICY PUZZLE 339, 339 (David C. Stapleton & Richard V. Burkhauser eds., 2003) [hereinafter A POLICY PUZZLE]. The SSDI rolls increased by sixty-seven percent from 1990 to 2000. *Id.*

179. Thomas DeLeire, *The Americans with Disabilities Act and the Employment of People with Disabilities*, *in* A POLICY PUZZLE, *supra* note 178, at 259, 273.

## IV. FOCUSING ON THE PARTICULAR EMPLOYMENT RELATIONSHIP

Despite *Cleveland*'s instruction that courts give plaintiffs the opportunity to resolve any discrepancy between their SSA and ADA claims, courts often continue to assume that facial inconsistencies under these different statutes, and the different adjudicative contexts that accompany them, are bad-faith attempts at double recovery.[180] While this conclusion flows naturally from judicial estoppel's purpose of preserving legal integrity, it obscures the ADA's focus on specific employer-employee relationships. The ADA protects not only against discrimination based on actual medical conditions, but also against employers' mistaken beliefs about the health of their employees under the "regarded as" definition of disabled.[181] For this reason, courts should confine their *Cleveland* analyses to the specific employer-employee relationship at issue and consider the events and beliefs that informed plaintiffs' SSDI application statements. The relevant questions are whether ADA plaintiffs notified their employers of the need for an accommodation and whether employers denied the accommodation and treated these plaintiffs as unable to work. Further, courts should give special consideration to the standardized nature of an SSDI claim. This solution would mitigate discomfort with the surface inconsistencies of the SSA and ADA by acknowledging that the differences between SSDI and ADA adjudications do not present the risk of testimonial offense that judicial estoppel aims to avoid.

*Cleveland* rested on the key difference between the ADA and SSA: the SSA does not consider whether a claimant could have performed a particular job with reasonable accommodations.[182] Indeed, as *Cleveland* noted, SSDI applicants are not required to mention possible accommodations in their applications.[183] Therefore, the dual inquiry of whether there is an inconsistency between an SSDI application and an ADA claim and whether the plaintiff offers a sufficient resolution should focus on whether the employer had actual or constructive knowledge that the plaintiff needed an

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180. *E.g.*, Lee v. City of Salem, 259 F.3d 667, 676 (7th Cir. 2001) ("[T]he unavoidable implication of [Plaintiff's] testimony is that what he told the Social Security Administration . . . was *un*true."); Motley v. N.J. State Police, 196 F.3d 160, 166 (3d Cir. 1999) ("It is difficult to get around the conclusion that, in at least one of the fora, [Plaintiff] was not completely honest."); Musarra v. Vineyards Dev. Corp., 343 F. Supp. 2d 1116, 1122 (M.D. Fla. 2004) ("It is clear that plaintiff is attempting to perpetrate a sham.").

181. 42 U.S.C. § 12102(3) (2006).

182. 526 U.S. 795, 803 (1999).

183. *Id.*

accommodation. The ADA takes a relationship-specific approach to accommodations by requiring employers and employees to engage in an "interactive process" regarding possible job modifications.[184] As the *Cleveland* Court recognized, "the matter of 'reasonable accommodation' may turn on highly disputed workplace-specific matters."[185] Interpretive guidance on the ADA affirms the context-sensitive nature of accommodation: "No specific form of accommodation is guaranteed for all individuals with a particular disability. Rather, an accommodation must be tailored to match the needs of the disabled individual with the needs of the job's essential functions."[186] Because the ADA holds employers liable for failing to accommodate "*known* physical or mental limitations" of employees,[187] the initial burden is usually on the employee to request an accommodation.[188]

The key issues in ADA litigation, regardless of the presence of SSDI benefits, should be whether the plaintiff requested an accommodation and the employer's reaction to this request. If the employee never triggered the interactive process, an ADA claim may fail even without judicial estoppel. If the employee did request an accommodation, courts should examine the SSDI application statements and consider estoppel only if the statements affirmatively and specifically indicate that not even the requested accommodation would have permitted performance of the essential job functions. This solution preserves the employer's defense under the ADA that the requested accommodation would pose an undue hardship.[189]

*Cleveland* indicates that the relevant place to look for whether an employee can perform the job with reasonable accommodations is within the employment relationship, not an SSDI application.[190] Yet by estopping plaintiffs whose applications do not mention

184. 29 C.F.R. § 1630.2(o)(3) (2008).

185. 526 U.S. at 803.

186. 29 C.F.R. § 1630 app.

187. 42 U.S.C. § 12112(b)(5)(A) (2006) (emphasis added).

188. *See* Reed v. LePage Bakeries, Inc., 244 F.3d 254, 261 (1st Cir. 2001) ("Because an employee's disability and concomitant need for accommodation are often not known to the employer until the employee requests an accommodation, the ADA's reasonable accommodation requirement usually does not apply unless 'triggered by a request' from the employee.").

189. 42 U.S.C. § 12112(b)(5)(B); *see also* Payne v. Fairfax County, No. 1:05cv1446, 2006 U.S. Dist. LEXIS 79725, at *21, *28–29 (E.D. Va. Nov. 1, 2006) (finding that although the plaintiff's receipt of SSDI did not bar his ADA claim, his requested accommodation of intermittent, unplanned absences was unreasonable). The *Payne* court noted that under Fourth Circuit precedent, mere reference to the statutory difference between the SSA and ADA was a sufficient resolution under *Cleveland*. 2006 U.S. Dist. LEXIS 79725, at *20.

190. 526 U.S. at 803.

accommodations, courts punish them for omitting something that the SSA does not require. For example, in *Mitchell v. Washingtonville Central School District*, the Second Circuit affirmed summary judgment against an ADA plaintiff who applied for SSDI shortly before his termination from his custodial job.[191] The plaintiff, who had a prosthetic leg, told the Social Security Administration that the amputation prevented him from working because he could not stand for long periods.[192] The court held that this specific factual assertion precluded him from arguing he could perform the essential job functions of a custodian, which require long periods of standing.[193] The plaintiff responded that one month before his termination, he obtained a new prosthesis that allowed him to stand longer.[194] He also contended that the school could have accommodated his disability by giving him more sedentary work.[195] The court rejected these arguments, finding that his SSDI assertion that he was unable to stand for long periods contradicted his ADA claim that he nonetheless could stand for a significant part of the day.[196]

*Mitchell* misses the point of *Cleveland* by suggesting that the SSDI application is the proper forum in which to raise the prospect of accommodations. The key question is whether Mitchell requested accommodations from his employer. If he did and was denied, he understandably may have believed that he could not succeed in the workplace. Viewed in this light, his SSDI assertion that his disability prevented him from standing is reasonable: he may have believed he had no option but to stand all day. His employer would still have a range of defenses under the ADA itself, including that Mitchell never requested an accommodation, that sedentary work would not have enabled him to perform the essential functions of the position, or that the accommodation was unreasonable.[197] Indeed, the court held that Mitchell's SSDI application only estopped him from arguing that he could stand for long periods; he was free to argue that he could sit.[198] Because extended standing was an essential job function, however, his SSDI application defeated the ADA claim.[199] Interestingly, the same result could have been reached without judicial estoppel. Aside from

191. 190 F.3d 1, 3–4 (2d Cir. 1999).
192. *Id.*
193. *Id.* at 7.
194. *Id.*
195. *Id.* at 5.
196. *Id.* at 7.
197. 42 U.S.C. § 12111(8)–(9) (2006).
198. *Mitchell*, 190 F.3d at 8.
199. *Id.*

providing additional and quick grounds for affirmance, estoppel may have appealed to the court as a means of communicating frustration with the statutes. Yet statutory conflict is not a novelty in litigation, which begs the question of judicial estoppel's traction when plaintiffs seek redress for disability discrimination.

Under this Note's solution, Mitchell's SSDI application would truly conflict with his ADA claim only if it affirmatively indicated that not even his requested accommodation would have enabled him to do the job. If he told the Administration that he could not stand *or sit* for long periods, this would contradict his later claim that sedentary work would have been a reasonable accommodation. In fact, the plaintiff told the Administration that he could no longer work because he did not think he could find a sedentary job.[200] That the Administration agreed with his assessment supports Diller's argument that SSDI awards reflect excuse from work, not impossibility. Mitchell likely applied for SSDI due to a failed relationship with a particular employer. His beliefs and those of his employer inform not only whether such a failed relationship violates the ADA, but also whether his SSDI assertions present the sort of egregious contradiction that judicial estoppel punishes.

A more recent ADA case underscores the relevance of denied accommodations to SSDI application statements. In *Bisker v. GGS Information Services, Inc.*, a Pennsylvania district court judicially estopped a woman with multiple sclerosis who lost her job after having to take medical leave during a deterioration in her condition.[201] She made an accommodation request to her employer that she be permitted to work from home, a modification that her physician supported but that her employer denied because being present at the worksite was an essential function of her job as a parts lister.[202] Unemployed and in need of income, the plaintiff applied for SSDI a few months after her termination. She specifically mentioned in her application that her employer had denied her accommodation request.[203] Although the Administration denied her initial application, she was awarded SSDI after she appealed, although her appeal did

200. *Id.* at 4.

201. No. 1:CV-07-1465, 2008 U.S. Dist. LEXIS 73310, at *1–2 (M.D. Pa. Sept. 22, 2008).

202. *Id.* at *3.

203. *Id.* at *4; *see also* Carstetter v. Adams County Transit Auth., No. 1:06-CV-1993, 2008 U.S. Dist. LEXIS 51874, at *16 (M.D. Pa. July 8, 2008) (finding that an ADA plaintiff successfully reconciled his ADA claim with his receipt of SSDI benefits because in his SSDI application he provided a "lengthy description of his physical abilities," which could lead a jury to conclude that he was found disabled because he was "unable to perform strenuous job functions without accommodation in the form of occasional rest periods").

not go to a hearing.[204] In an attempt to reconcile the Administration's finding that she could not work with her subsequent ADA claim, she argued that had her SSDI claim gone to a hearing, she would have told the administrative law judge ("ALJ") more about her circumstances.[205] The court rejected this explanation, emphasizing that a *Cleveland* analysis hinges on the ultimate success of an SSDI claim, not the possibility of explanations at an administrative hearing or on whether SSDI application statements were made in bad faith.[206]

It is not difficult to imagine the sort of individualized circumstances Bisker may have communicated to an ALJ had her SSDI appeal gone to a hearing. She may have mentioned that her employer denied her request to work from home, which led her to believe that she could not be accommodated in the workplace, and therefore her best course of action was to apply for government support. Additionally, she may have argued that her multiple sclerosis, a degenerative disease, had worsened by the time of her SSDI application a few months after her job termination. Unfortunately, she did not offer these explanations to the court. Perhaps she would have avoided summary judgment had she been more specific in her pleadings regarding the "circumstances" she would have communicated to an ALJ. Still, it would not have been a stretch for the court to draw these inferences in favor of Bisker at the summary judgment stage.

*Bisker* is a perfect example of why judicial estoppel is rarely an appropriate way to dispose of ADA claims and why it often does injustice to the context-sensitive inquiry that both the ADA and *Cleveland* require. The court may have found it telling that Bisker mentioned her employer's denial of her requested accommodations in her SSDI application, even though SSDI applicants are not required to list possible accommodations. Because receipt of SSDI turns on an ostensible finding of "complete" inability to work, mentioning possible accommodations is not in an applicant's best interest. That Bisker discussed the possibility of working from home in her application, and that the Social Security Administration still found her disabled, may have carried significant weight with the district court in finding that she was not qualified to perform her essential job functions under the ADA. Under this proposed solution, if Bisker had stated in her SSDI application that not even an accommodation of telecommuting would

204. *Bisker*, 2008 U.S. Dist. LEXIS 73310, at *4.

205. *Id.* at *8.

206. *Id.*

permit her to work, she might have created a true inconsistency with an ADA claim under *Cleveland*.

However, the denial of Bisker's request is of paramount importance; Bisker likely believed that she could not succeed in the workplace because she was unlikely to find an employer who would accommodate her multiple sclerosis by allowing her to work from home. Faced with the prospect of indeterminate unemployment and mounting bills, Bisker understandably applied for income support. It may be true that her condition had progressed to a point that she would be unable to obtain the requisite accommodations at any job that fit her experience and skill level and therefore was not a "qualified individual" under the ADA. Judicial estoppel is not necessary to reach this conclusion. The ADA itself offers a defense for employers: that the employee's proposed accommodation was unreasonable by imposing an undue burden or thwarting the performance of essential job functions.[207] By taking the "shortcut" of judicial estoppel, courts avoid the undesirable prospect of retrospectively dictating to employers how to restructure their business practices,[208] but at a cost of enshrining employees' perhaps mistaken beliefs about their rights under the ADA and ignoring the possible unlawfulness of employers' actions.

The necessity of carefully examining the employment relationship at issue is echoed by *Turner v. Hershey Chocolate USA*, in which the Third Circuit read an ADA plaintiff's SSDI application as lacking the qualifier of reasonable accommodations.[209] Her statements to the Social Security Administration passed muster when read as "I

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207. 42 U.S.C. § 12111(10)(A) (2006) ("The term 'undue hardship' means an action requiring significant difficulty or expense . . . ."). Factors to be considered include the nature and cost of the employee's proposed accommodation, the financial resources of the facility, the number of persons employed at the facility, and the impact of the proposed accommodation on the facility's resources and operations. *Id.* § 12111(10)(B).

208. *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."); *see also* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 21 (1996):

> The ADA . . . demands a distinctive sort of judicial evaluation. . . . [It] calls for a far more individualized process of fitting individuals to jobs than the antidiscrimination and affirmative action principles of Title VII. While it is certainly possible that this case-by-case approach to enforcement could deteriorate into purely ad hoc judicial decisionmaking, precedent counteracts this tendency . . . . Accommodations imposed, or approved, in prior cases simplify the process of later negotiations over accommodations for other employers and employees. With the accumulation of decisions, the adequacy of any particular accommodation will become better known to the parties and more easily evaluated by a court.

209. 440 F.3d 604, 610 (3d Cir. 2006).

am unable to work *without* reasonable accommodation."[210] By reading in this lacking qualifier, the Third Circuit underscored the relationship-specific inquiry that a careful application of *Cleveland* requires. Turner had requested an accommodation that she be exempt from a rotation schedule in the Hershey plant; her SSDI application did not mention this request.[211] Under this solution, if her application affirmatively indicated that not even a rotation exemption would permit her to work, this would present an inconsistency under the first prong of the *Cleveland* analysis.

Even if an SSDI application statement meets this narrow definition of an inconsistency, an ADA claim may survive if the employer denied the requested accommodation, as in *Bisker*. If an employer concludes that the requested accommodation would not enable the employee to perform the essential job functions, the employee may internalize the denial as an inability to work for the purposes of SSDI. Denials of accommodations, lawful or unlawful, may often explain ADA plaintiffs' good faith *belief* in the truth of their statements to the Social Security Administration—a belief *Cleveland* permits lower courts to consider.[212] Whether the employer lawfully denied the accommodation as unreasonable is a separate issue that arises under the ADA, not the SSA.

By focusing on the particular employment relationship more than the SSDI application, this solution narrows the relevance and lessens the unfairness of the resolution-contradiction and factual-legal distinctions that post-*Cleveland* cases have developed. These tenuous distinctions create inequities among SSDI applicants who may have believed that they could not succeed in the workplace because of their employers' actions.[213] Overemphasizing these distinctions diverts focus from the employer's beliefs and actions. Under this solution, the factual specificity of SSDI statements matters only if it indicates that not even the accommodation at issue in the ADA litigation would have enabled job performance.

Some courts have acknowledged that an SSDI application may be motivated by an employer's failure to provide accommodations, or by an employee's lack of knowledge that accommodations may be available. In *Turner*, the Third Circuit emphasized that the plaintiff told the Social Security Administration she no longer could fulfill her

210. *Id.* (emphasis added).

211. *Id.* at 607, 609.

212. 526 U.S. 795, 807 (1999).

213. *See* discussion *supra* Part III.B.

"regular" job description due to her condition.[214] This statement did not create an inconsistency; that she no longer could perform her *regular* job description demonstrated "precisely why she [was] requesting an accommodation."[215] The Seventh Circuit, however, rejected similar reasoning in *Lee v. City of Salem*. The plaintiff argued that he applied for SSDI because it had been "hammered into his head" that his condition left him unable to work.[216] The court responded that although *Cleveland* allows ADA plaintiffs to rely on their "good faith belief" in their assertions to the Administration, allowing them to resolve inconsistencies with such explanations would permit "hopping from forum to forum, making contradictory assertions under oath."[217] In a more recent case, a district court similarly opined that *Cleveland* does not allow ADA plaintiffs to rest on good faith by arguing that they applied for public support under the belief that they had no choice because of their employers' denial of accommodations.[218] This creates the danger of allowing ADA plaintiffs to explain their "*false* statement[s] in an earlier application for SSDI benefits."[219] Yet, at this Note shows, these statements may not have been false but rather grounded in SSDI applicants' good faith beliefs. By binding these plaintiffs to their prior beliefs and precluding an inquiry into the alleged unlawfulness of employers' actions and beliefs, courts risk denigrating the ADA's purpose of redressing discrimination.

Finally, a careful application of *Cleveland* should incorporate the administrative realities of SSDI applications. Because the Social Security Administration processes roughly four million disability claims per year[220] through a standardized process, the disability-onset date given in an application should not be narrowly construed to preclude job qualification. Listing the final date of employment as the date on which one became unable to work may reflect an employer's unlawful denial of accommodations. Applicants' health conditions may have deteriorated since their last day of work, yet they understandably list a termination date when applying for benefits predicated on lack of employment. *Cleveland* recognized that

214. 440 F.3d at 609.

215. *Id.*

216. Lee v. City of Salem, 259 F.3d 667, 668 (7th Cir. 2001).

217. *Id.* at 677.

218. Butler v. Vill. of Round Lake Police Dep't, No. 06 C 3366, 2008 U.S. Dist. LEXIS 80077, at *12 (N.D. Ill. Oct. 8, 2008).

219. *Id.* (emphasis added).

220. *Social Security Disability Determination Process Improvements: Hearing Before H. Subcomm. on Ways and Means*, 109th Cong. (2005) (statement of Andrew Marioni, President, National Council of Disability Determination Directors).

conditions change: "[A] statement about that disability at the time of an [SSDI] application . . . may not reflect an individual's capacities at the time of the relevant employment decision."[221] In *EEOC v. Stowe-Pharr Mills, Inc.*, the Fourth Circuit addressed how the administrative context of SSDI claims affects the dates that applicants provide.[222] Although the plaintiff applied for SSDI four months after her termination, she listed a pre-termination disability date on the advice of the Administration intake officer.[223] The court found that the advice of the intake officer and the boilerplate language of the application sufficiently resolved the contradiction.[224] Other courts, however, strictly bind plaintiffs to job qualification as of the date listed in SSDI applications.[225] Allowing plaintiffs to explain the beliefs and context underlying the date is more aligned with the standardized nature of the SSDI process and the relationship-specific nature of the ADA.

Another administrative reality of SSDI is that the Administration denies the majority of initial applications.[226] Accordingly, many claimants appeal.[227] In judicially estopping ADA claims, some courts underscore plaintiffs' repeated averments of inability to work during the appeal process.[228] Courts may give extra

221. 526 U.S. 795, 805 (1999).

222. 216 F.3d 373, 376, 379 (4th Cir. 2000).

223. *Id.* at 376.

224. *Id.* at 379.

225. *See* cases cited *supra* notes 154–55.

226. 2007 ANNUAL STATISTICAL REPORT, *supra* note 28, at 135 chart 11, http://www.ssa.gov/policy/docs/statcomps/di_asr/2007/sect04.pdf.

227. SOC. SEC. ADMIN., OFFICE OF RETIREMENT AND DISABILITY POLICY, ANNUAL STATISTICAL SUPPLEMENT, 2007, at 2.68 tbl. 2.F9 (2008), http://www.ssa.gov/policy/docs/statcomps/supplement/2007/2f8-2f11.pdf.

228. *See, e.g.*, D'Ambrosia v. Pa. Chamber of Bus. & Indus., No. 1:06-CV-2182, 2008 U.S. Dist. LEXIS 77147, at *12 (M.D. Pa. Sept. 30, 2008) ("Plaintiff did not reiterate his claim of total disability to the SSA in multiple attempts to receive benefits. Rather, Plaintiff applied once over the phone . . . ."); Bisker v. GGS Info. Servs., Inc., No. 1:CV-07-1465, 2008 U.S. Dist. LEXIS 73310, at *6 (M.D. Pa. Sept. 22, 2008) ("In her appeal, the Plaintiff asserted again that she was 'unable to work,' and she requested an opportunity to explain 'how [her] impairments prevent [her] from working.' "); Shafnisky v. Bell Atl., Inc., No. 01-3044, 2002 U.S. Dist. LEXIS 21829, at *15 (E.D. Pa. Nov. 6, 2002) ("Plaintiff did not merely make a blanket statement or simply check a box on a form. She claimed to be totally disabled repeatedly to various parties throughout the pertinent period."); Lorde v. City of Philadelphia, No. 98-5267, 2000 U.S. Dist. LEXIS 17196, at *7–8 (E.D. Pa. Nov. 30, 2000) (emphasizing that the plaintiff repeatedly asserted that she was unable to work during her SSDI appeal); Ward v. Washington Mills, 92 F. Supp. 2d 168, 173–74 (W.D.N.Y. 2000) (emphasizing plaintiff's repeated assertions to the SSA); *see also* Detz v. Greiner Indus., Inc., 346 F.3d 109, 119 (3d Cir. 2003) (granting summary judgment to an employer on an ADEA claim and stressing that plaintiff "repeated his original statements regarding his disability and his inability to work"); Depauw v. Ingersoll-Rand, No. 06-cv-1161, 2007 U.S. Dist. LEXIS 75249, at *20 (C.D. Ill. Oct. 9, 2007) (granting summary judgment to an employer on an

weight to an appeal record that includes physicians' statements that the plaintiff cannot work.[229] Yet emphasizing repeated assertions still risks overlooking the employer's discriminatory beliefs and actions. If an employer leads an employee to believe that he or she cannot be accommodated in the workplace, it makes sense to repeat this belief to the Social Security Administration. Further, physicians may be unaware of possible accommodations. The disability-onset date problem also arises in SSDI appeals. If an applicant's condition has worsened during the appeal, the Administration may reverse its denial and award SSDI retroactive to the initial date listed on the application.[230] Again, courts should not be quick to label the eligibility date as the date on which a plaintiff became "officially" disqualified under the ADA.

Critics may argue that this solution eviscerates *Cleveland*'s recognition that there are situations in which SSDI awards and ADA claims genuinely conflict. Exceptional application of judicial estoppel seems to allow employment discrimination plaintiffs to win damages based on sworn contrary assertions. However, a true conflict between SSDI benefits and an ADA claim is exceptional. Post-*Cleveland* analyses tend to focus on semantic differences between the statutes and the instinctive offense of "double recovery," rather than the possibility of unlawful discrimination within a particular employment relationship. More importantly, judicial estoppel should be an exceptional remedy. It should deter true offense to judicial factfinding rather than punish plaintiffs' confusion amidst statutory conflicts, administrative bureaucracy, and the challenge of supporting themselves when employers deny support. Applying for a minimal level of government support following a job loss and later filing an uncertain (and likely doomed) ADA claim is simply not the egregious "double dipping" that some courts and employers' counsel often assert.

## V. CONCLUSION

If courts focus their *Cleveland* analyses on the employer-employee relationship at issue and whether the employee requested

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ADEA claim and noting that plaintiff "affirmatively pursued his [SSDI] claim by seeking review before an Administrative Law Judge").

229. *See, e.g.*, Voisin v. Georgia Gulf Corp., 245 F. Supp. 2d 853, 860 (M.D. La. 2002) (emphasizing that the plaintiff's physician told the SSA that the plaintiff was "[u]nable to work on a day-to-day sustained basis in full-time employment at any/all levels of exertion").

230. *See, e.g.*, Felix v. New York City Transit Auth., 154 F. Supp. 2d 640, 652 (S.D.N.Y. 2001) ("It is conceivable that [Plaintiff's] condition continued to progressively deteriorate so that she was a 'qualified individual' as of [her termination date] but became totally disabled thereafter.").

accommodations, plaintiffs receiving SSDI rarely should be judicially estopped. It will be atypical for SSDI applications to indicate affirmatively that not even the requested accommodation would have enabled job performance. Even when such affirmative assertions are present, a plausible resolution is that the requested accommodation was denied, leading the plaintiff to seek disability benefits. Allowing ADA claims to proceed under such circumstances does not convert SSDI to "unemployment insurance"; it assures that the ADA is a viable means of redress and deterrence.

If judicial estoppel is to be a rare remedy, one might ask why it is even necessary given the availability of other defenses to employers in ADA suits and the overwhelming success of those defenses.[231] Why is highlighting the confusing interaction between the ADA and the SSA appealing? If prior inconsistent statements are not a rarity in litigation,[232] why such an extreme remedy for these particular statements? For employers, the statutory intersection permits quick disposal of an ADA claim. For courts, discussing the conflict perhaps communicates frustration with Congress's failure to reconcile the statutes.[233] Recent amendments to the ADA broadening the definition of "disabled" may increase courts' temptation to apply judicial estoppel as a shortcut around the expanded statute and the concomitant increase in ADA claims.[234] Although the amendments broadened the definition of "disabled," they did not alter the definition of "qualified individual"; therefore the requirement that one be able to perform the job with or without accommodations remains vital to an ADA claim.[235] Still, the categorical differences between the SSA and ADA may be largely semantic and theoretical.[236] The Ticket to Work program, albeit a small part of the SSA, demonstrates an effort to harmonize the two statutes; it shows that "disabled" under the SSA may be a temporary status, contingent upon an employee's willingness to work

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231. *See* sources cited *supra* note 1 and accompanying text (indicating that employers prevailed in 212 of 272 federal cases).

232. Norris v. Sysco Corp., 191 F.3d 1043, 1049 (9th Cir. 1999) ("[P]roof that a party . . . has made prior inconsistent statements is not a rare event in our courts. Juries are regularly called upon to consider evidence of that sort . . . .").

233. *See* Paul Armstrong, *Toward a Unified and Reciprocal Disability System*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 157, 188–89 (2005); Diller, *supra* note 15, at 1080–81 (calling for unified disability laws).

234. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

235. *See Practitioners Should be Wary of Unusual EEOC Decisions*, FEDERAL EEO ADVISOR, Feb. 1, 2009 (arguing that because of the ADA amendments, the "focus of [ADA litigation] will shift away from the definition of disability and toward whether employers complied with their obligations").

236. Diller, *supra* note 15, at 1009.

and an employer's willingness to make accommodations. The program's low participation rate[237] will not improve unless SSDI recipients can rely on the ADA as a means to redress employment barriers.

A more harmful message communicated by judicial estoppel is that by removing themselves from the workplace and receiving SSDI, ADA plaintiffs forfeit their right to redress the discriminatory actions of their employers. Strictly binding ADA plaintiffs to fixed descriptions of conditions in SSDI applications obscures the beliefs and actions that motivated the statements. SSDI recipients may not view their benefits as reflecting a permanent and complete inability to work, but rather as the government's recognition that gainful employment depends on the willing attitudes of employers. As the Ninth Circuit observed, finding that the ADA and SSA can exist in harmony may reflect the factfinder's "understanding about the problems and dilemmas faced by injured workers as they confront myriads of forms, demands, concepts, and needs."[238] By confining their inquiry to the particular employer-employee relationship, courts will signal that the diverse needs, beliefs, and actions experienced by disabled individuals cannot be given fair hearing in an administrative proceeding that focuses on a person and a condition. Supportive employment requires a judicial forum, a forum willing to focus on a person and the employer who may have influenced that person's beliefs about his or her capabilities.

*Lauren Lowe*[*]

237. *See supra* note 41 and accompanying text (indicating a six percent rate).

238. Norris v. Sysco Corp., 191 F.3d 1043, 1049 (9th Cir. 1999).

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