The United States Supreme Court resolves the effect of disability benefit claims upon Americans with Disabilities Act complaints in Cleveland v. Policy Management Systems Corporation

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THE UNITED STATES SUPREME COURT RESOLVES THE EFFECT OF DISABILITY BENEFIT CLAIMS UPON AMERICANS WITH DISABILITIES ACT COMPLAINTS

IN

CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORPORATION

*Christine Neylon O'Brien**

I. INTRODUCTION

The federal courts of appeal have been grappling with the use of judicial estoppel in cases where an Americans with Disabilities Act ("ADA")[1] plaintiff has previously asserted a total disability in order to obtain supporting benefits, particularly under the Social Security Disability Insurance ("SSDI") program of the Social Security Administration ("SSA").[2] Should ADA claims be barred by the earlier application for or receipt of disability benefits, or should the prior claim of disability in the benefits context create a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that he/she is a "qualified individual with a disability" under the ADA?[3] The crux of the

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1. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1995).

2. *See* Christine Neylon O'Brien, *To Tell the Truth: Should Judicial Estoppel Preclude Americans with Disabilities Act Complaints?*, 73 ST. JOHN'S L. REV. 349 (1999) (discussing the disposition of this issue among the circuit courts prior to the United States Supreme Court's decision in Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597 (1999)).

3. *See* Cleveland v. Policy Management Sys. Corp., 120 F.3d 513 (5th Cir. 1997), *cert. granted*, 119 S. Ct. 39 (1998). The court granted petition for certiorari on the following questions:

debate revolves around the differing definitions of disability and the varying public policies underlying the statutory schemes. While the ADA prohibits employment discrimination against a qualified individual who is able to perform the essential functions of the job with reasonable accommodation, the SSA awards disability benefits to applicants on a broader, less factually particularized basis.[4] In fact, the SSA presumes an inability to work among classes of individuals who have listed or presumptive disabilities, and does not inquire into either the applicant's ability to perform the essential functions of his/her last job, or whether the employee requested or received reasonable accommodation, the latter being the relevant standards for pursuit of an ADA claim.[5]

Justice Easterbrook of the Court of Appeals for the Seventh Circuit recently characterized the Social Security disability applicant as "disabled in law even though not disabled in fact."[6] And while persons who fit the categorical basis for SSA disability may possibly find a job that they can do, "the federal bureaucracy deems the effort to identify *which* of these people could work sufficiently unpromising that it awards benefits to all."[7] Thus, the person who receives disability benefits on this basis, "is disabled in a legal sense only."[8] Such a person who rises above his/her disabilities to obtain employment is entitled to the

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1. Whether the application for, or receipt of, disability insurance benefits under the Social Security Act, 42 U.S.C. § 423, creates a rebuttable presumption that the applicant or recipient is judicially estopped from asserting that she is a "qualified individual with a disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

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

Cleveland, 119 S. Ct. at 39.

4. *See generally* Marney Collins Sims, Comment, *Estop It! Judicial Estoppel and Its Use in Americans with Disabilities Act Litigation*, 34 HOUS. L. REV. 843, 865-68 (1997) (arguing against use of judicial estoppel in the ADA context based upon varying criteria and policies under SSA and the ADA).

5. *See* Taylor v. Food World, Inc., 133 F.3d 1419, 1423 (11th Cir. 1998) (discussing that the SSA does not take into account the effect of reasonable accommodation when making a determination of entitlement to disability benefits and certification of total disability on benefits application is not inherently inconsistent with being a qualified individual under the ADA); *see also* 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, 1548-49 (1996) (outlining SSA listed and presumptive disability categories and the SSA five-step sequential evaluation of eligibility for benefits, a process that does not reach the issues necessary for an ADA claim).

6. Wilson v. Chrysler Corp., 172 F.3d 500, 512 (7th Cir. 1999) (Easterbrook, J., concurring).

7. *Id.*

8. *Id.*

protection of the ADA, despite the earlier receipt of disability benefits.[9] However, a benefit recipient who says that he/she is "disabled in fact," and also is unable to perform the work of the employer even with reasonable accommodations, would not enjoy the same ADA protection.[10] Judge Easterbrook's perspective on the intersection of the two statutes is a simple and appropriate description of the balance between the facts necessary to prove disability under SSA and those elements necessary to proceed with a complaint under the ADA. His analysis was prescient in that it complements the United States Supreme Court's practical resolution of the same issue in the *Cleveland* case just two months later.[11]

II. BACKGROUND OF THE *CLEVELAND* CASE

A. The Facts

The *Cleveland* plaintiff suffered a stroke during the course of her employment with Policy Management Systems Corporation ("PMSC").[12] The stroke resulted in aphasia, "a condition that affects concentration, memory, and language functions such as speaking, read-

9. *See id.*

10. *See id.* at 512. The *Wilson* case involved a plaintiff who suffered from paranoid schizophrenia, a disability that is a "listed impairment" under SSA, and also one that Judge Easterbrook notes may entail the type of outbursts that an employer would not reasonably be expected to accommodate. *See id.* at 513.

11. *See generally* Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597 (1999). Interestingly, the Supreme Court in *Cleveland* did not refer to the *Wilson* decision. The *Wilson* case may have been overlooked by the Court because it was decided less than two months before *Cleveland* on March 31, 1999. Alternatively, the decision may simply have been omitted because the opinion in *Cleveland* is short and to the point. *See Cleveland*, 119 S. Ct. at 1601, where the Court briefly reviews the "disagreement among the Circuits about the legal effect upon an ADA suit of the application for, or receipt of, disability benefits" where the Court refers only to the Tenth, Sixth, District of Columbia, Third, and Ninth Circuit Courts of Appeal. *Id.* Nonetheless, despite the Court's failure to cite the *Wilson* case, the concurrence in *Wilson* is a particularly useful interpretation of the balance of issues of fact and law involved in the SSA/ADA context. The United States Supreme Court in *Cleveland* used similar language of "factual statement" and "legal conclusion" in its discussion of the lack of inherent conflict between the two statutes. *See id.* at 16. And, as will be discussed, the explanation of any contradiction in the prior factual statement made to the SSA and the proffered elements of an ADA complaint must be explained under the standard of review for summary judgment referenced in *Cleveland*. *See infra* notes 49-67 and accompanying text. In *Wilson*, a like standard of review was relied upon in both Justice Cudahy's opinion, *see Wilson*, 172 F.3d at 503, 505-06, and Justice Easterbrook's concurrence, *see id.* at 512-13 (Easterbrook, J., concurring). The likeness between the language and the analysis in *Wilson* and *Cleveland* may be explained by Justice Easterbrook's reference to the Solicitor General's Brief in the *Cleveland* case in support of his analysis. *See id.* at 512.

12. *See* Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 514 (5th Cir. 1997).

ing, and spelling."[13] Ms. Cleveland, with the assistance of her daughter, applied for SSDI benefits based upon an inability to work.[14] Some three months after the stroke, and before any benefits were granted, Cleveland's condition improved, with her doctor anticipating "an eventual recovery for her of nearly 100%."[15] Plaintiff promptly returned to work and reported her resumption of employment to the SSA.[16] When the SSA denied Cleveland's application for SSDI about three months later, the agency noted Cleveland's apparent recovery in light of her return to work.[17]

Unfortunately, Cleveland had difficulty performing her work, and she requested accommodations including computer training, permission to bring work home, a position transfer, and authorization for the assistance of a (free) state rehabilitation counselor.[18] The employer, PMSC, denied Cleveland's requests for accommodation and terminated her employment approximately three months after her return to work,[19] just four days after the SSA denied her SSDI benefits application.[20] Cleveland then alleged that she developed depression and experienced more severe aphasia.[21] She subsequently applied for SSDI a second time.[22] Eight months after her request for reconsideration, she asked for a hearing before an Administrative Law Judge ("ALJ").[23] The ALJ ruled that Cleveland had been continuously disabled from the date of her stroke, granting her retroactive SSDI benefits.[24]

B. United States District Court for the Northern District of Texas

Just a week prior to the ALJ's decision, Cleveland sued PMSC for "wrongful termination in violation of the ADA and the Texas Labor Code."[25] The defendant employer's motion for partial summary judgment on the ADA claim was granted by the district court on the basis that Cleveland's "application for, and . . . receipt of, social security dis-

13. *Id.*
14. *See id.*
15. *Id.*
16. *See id.*
17. *See Cleveland*, 119 S. Ct. at 1600.
18. *See Cleveland*, 120 F.3d at 515.
19. *See Cleveland*, 119 S. Ct. at 1600.
20. *See id.*
21. *See Cleveland*, 120 F.3d at 515.
22. *See id.*
23. *See id.*
24. *See id.*
25. *See id.*

ability benefits estopped her from claiming that she [was] a 'qualified individual with a disability.'"[26] The district court dismissed her state law claim without prejudice.[27] Cleveland appealed the summary judgment, maintaining that her social security disability benefit application was not inconsistent with her ADA claim, because she could have performed the essential functions of her job if the employer had provided the requested reasonable accommodations.[28]

C. *The Court of Appeals for the Fifth Circuit*

The Court of Appeals for the Fifth Circuit reviewed the district court's grant of summary judgment de novo, and affirmed the ruling of the district court.[29] The standard for summary judgment requires that the evidence, viewed in the light most favorably to the plaintiff (the non-moving party), shows no genuine issue of material fact.[30] Circuit Judge Wiener wrote the opinion of the court, analyzing the definitions of disability under the SSA and ADA, and the law among the other circuits on the issue.[31] Judge Wiener characterized the assertion of an ADA claim after pursuit of social security disability benefits as being seemingly "logically inconsistent, at first blush."[32] Although the complexity of the problem is alluded to, the dilemma may be that the conflict between the two acts or assertions is not quite direct.[33] Additionally, due to a disagreement among the circuits, the question of whether judicial estoppel is appropriate in this context, is unclear. The Fifth Circuit in *Cleveland* interprets the Third, Sixth, Seventh, and Ninth Circuits as having invoked the doctrine, with the Ninth Circuit later finding it unnecessary to use estoppel because of the absence of a genuine issue of material fact which left the plaintiff unable to withstand a motion for summary judg-

26. *Cleveland*, 120 F.3d at 515. The district court entered a final judgment on her federal claim. *See* Lawrence B. Solum, *Caution! Estoppel Ahead*: Cleveland v. Policy Management Systems Corporation, 32 LOY. L.A. L. REV. 461, 464 (1999) (discussing same).

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

28. *See id.*

29. *See id.* at 515, 519.

30. *See id.* at 515 & n.3 (citing River Prod. Co. v. Baker Hughes Prod. Tools, Inc., 98 F.3d 857, 859 (5th Cir. 1996) (citing Fed. R. Civ. P. 56(c)); *see also infra* note 68 and accompanying text discussing the cases cited by J. Breyer in *Cleveland*, 119 S. Ct. at 1603-04, regarding the creation of a genuine issue of fact sufficient to survive summary judgment in the context of apparently contradictory statements that require explanation.

31. *See Cleveland*, 120 F.3d at 515-18.

32. *Id.* at 516.

33. *See id.*

ment.[34] The First and Eighth Circuits treated the prior representations to the SSA as binding admissions, as interpreted by the Court of Appeals for the Fifth Circuit in *Cleveland*.[35]

The Court of Appeals for the Fifth Circuit specifically "decline[d]. . . to adopt a per se rule that automatically estops an applicant for or recipient of social security disability benefits from asserting a claim of discrimination under the ADA."[36] Rather, the court recognized that there may be circumstances, albeit rarely, where the two claims may not be mutually exclusive.[37] This is so because the ADA inquiry is individualized, while the SSA permits general assumptions about ability or inability to work.[38] One may be able to work under the ADA with reasonable accommodations, and yet have an SSA disability, at least in part because the SSA does not assess ability with accommodations.[39]

In *Cleveland*, the appellate court held that in cases where an application for or receipt of social security disability benefits occurs, this "creates a *rebuttable* presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.'"[40] There may be cases where the "nature and content of the disability statement submitted," or the particular facts involved, will not "absolutely bar a plaintiff from attempting to demonstrate that despite his total disability for Social Security purposes he is a 'qualified individual with a disability'" in an ADA suit.[41] Nonetheless, Cleveland's submissions, including her sworn statement to the SSA that she was disabled, were not sufficient in the court's eyes to rebut the presumption that she should be estopped from asserting an ADA claim.[42]

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34. *See id.* & n.10 (citing Kennedy v. Applause, Inc., 90 F.3d 1477, 1481-82 & n.3 (9th Cir. 1996)).

35. *See Cleveland*, 120 F.3d at 516 n.10 (citing, *inter alia*, August v. Offices Unlimited, Inc., 981 F.2d 576, 584 (1st Cir. 1992)).

36. *Cleveland*, 120 F.3d at 517.

37. *See id.*

38. *See id.*

39. *See id.* at 517-18 (pointing to the trial work period allowing disabled SSA beneficiaries and the maintenance of the same SSA benefit levels during periods of such employment as another example of the differing expectations of the SSA with respect to its disabled individuals).

40. *Id.* at 518.

41. *See Cleveland*, 120 F.3d at 518. A plaintiff may rebut the presumption with "credible, admissible evidence" including the application, and/or other sworn documents or allegations relevant to the ADA claim. *See id.* Such must be sufficient to establish the elements of the ADA claim. *See id.*

42. *See id.* at 518. According to Judge Wiener, the reason for the doctrine of judicial estoppel, or preclusion against inconsistent positions is "to protect the integrity of the judicial process." *Id.* at 517. This view of the doctrine of judicial estoppel has been criticized as "abstract and in-

The court interpreted Cleveland's assertions as continuous and unequivocal representations of total disability, and noted that her complete inability to work remained uncontroverted.[43] Thus, the Court of Appeals for the Fifth Circuit upheld the district court's grant of summary judgment.[44]

D. The United States Supreme Court

Carolyn Cleveland's petition for certiorari was granted in October, 1998.[45] On May 24, 1999, she received a favorable outcome.[46] In a unanimous decision, authored by Justice Breyer, the United States Supreme Court held that claiming Social Security Disability Insurance program benefits does not "erect[] a special presumption that would significantly inhibit an SSDI recipient from simultaneously pursuing an action for disability discrimination under the Americans with Disabilities Act of 1990," where the recipient is able to perform the "essential functions" of her previous job with "reasonable accommodation" as such is defined under the ADA.[47] The Justices perceived no inherent inconsistency between the ADA and SSDI statutory schemes.[48] The Court refused to approve the standard applied by the Court of Appeals for the Fifth Circuit, that the pursuit of, or receipt of SSDI benefits creates a rebuttable presumption against a plaintiff's ADA claim of discrimination.[49] In order for a plaintiff to proceed with an ADA claim, however, she needs to explain how the representations for SSDI purposes are consistent with the ADA claim, namely, "that she could 'perform the essential functions' of her previous job, at least with 'reasonable accommodation.'"[50]

The standard applied by the United States Supreme Court in *Cleveland* was no more or less than a traditional summary judgment standard.[51] In the SSDI/ADA context, the Court held that a plaintiff

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complete. Judge Wiener's formulation does not provide a rule of law that could be applied to the facts of a particular case." Solum, *supra* note 26, at 465.

43. *See Cleveland*, 120 F.3d at 518.

44. *See id.* at 519.

45. *See* Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 39 (1998).

46. *See* Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597, 1600, 1604 (1999).

47. *See Id.* at 1599-1600.

48. *See id.* at 1600.

49. *See id.* at 1600-01 (citing *Cleveland*, 120 F.3d 513, 518 (5th Cir. 1997)).

50. *Cleveland*, 119 S. Ct. at 1600.

51. *See id.* at 1603. The Court noted that there was no reason to apply a different standard in SSDI/ADA cases. Rather,

> [o]ur ordinary rules recognize that a person may not be sure in advance upon which le-

"must proffer a sufficient explanation" rather than ignore the "apparent contradiction" between statements made.[52] The plaintiff's brief in *Cleveland* explained the "discrepancy" between the SSDI statements and her ADA claim on the basis of the time period in which the statements were made, and the fact that SSDI does not consider "the effect that reasonable workplace accommodations would have on the ability to work."[53] The Court was satisfied that Cleveland should survive the employer's motion for summary judgment, and they vacated the Fifth Circuit's grant of summary judgment, remanding to give Cleveland an opportunity to prove her ADA claim.[54]

E. Analysis of the United States Supreme Court's Decision

Plaintiffs' lawyers should breathe a sigh of relief after the United States Supreme Court's decision in *Cleveland*.[55] The Court refused to use the Fifth Circuit's rebuttable presumption standard. Justice Breyer referred to it as "a special negative presumption" and one that should not be applied because "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side."[56] The key is whether "reasonable accommodation" will make it possible for the plaintiff to perform the "essential functions" of the job.[57] The Court alluded to the vast number of SSA claims, fearing that "SSA misjudgment" of fact and workplace-specific matters could "deprive a seriously

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gal theory she will succeed, and so permit parties to "set forth two or more statements of a claim or defense alternately or hypothetically," and to "state as many separate claims or defenses as the party has regardless of consistency.

Id. (citing Fed. R. Civ. P. 8 (e)(2)).

52. *See id.*

53. *Id.* at 1604.

54. *See id.* The Court left the parties "to present, or to contest, these explanations, in sworn form where appropriate." *Id.*

55. *See* Shannon P. Duffy, *U.S. Supreme Court Decision on ADA Wipes Out 3rd Circuit's* McNemar, THE LEGAL INTELLIGENCER, May 25, 1999, at 5 (noting that plaintiff's lawyers should rejoice especially in the Fifth and Third Circuits which had allowed tossing out an ADA suit on judicial estoppel grounds); *see also* Linda Greenhouse, *Justices, 9-0, Find No Inherent Conflict Between 2 Laws on Disabled Workers*, N.Y. TIMES, May 25, 1999, at A24 (noting that Beatrice Dohrn, legal director for Lambda Legal Defense Fund, a gay rights group that filed an amicus brief in the *Cleveland* case, approved of the United States Supreme Court's decision in *Cleveland* because it will assist people with H.I.V. who may be migrating in and out of the workplace, and facing discrimination because of their disability); Susan J. McGolrick, *Supreme Court Rejects Automatic Bar To ADA Claims by Social Security Applicants*, DAILY LAB. REP. (BNA) No. 100, at AA-1 (May 25, 1999) (reporting on *Cleveland* decision as advantageous to the disabled).

56. *Cleveland*, 119 S. Ct. at 1602.

57. *See id.* at 1603 (citing 42 U.S.C. § 12111(8)).

disabled person of the critical financial support the statute seeks to provide."[58] The opinion infers that the particularized factual determinations necessary for assessing the issues relevant to the plaintiff's ADA claim would be inappropriately examined in the SSA forum, in part because of limited administrative resources.[59]

That the SSA agency is not vested with power to administer the ADA is also a substantial jurisdictional basis for excluding SSA's examination of these issues.[60] The nature and severity of the disability may also have changed over time, just as in the *Cleveland* case where the plaintiff sought benefits, then resumed employment, experienced difficulty, requested accommodation, was denied accommodation and terminated, and thereafter suffered psychological as well as medical decline.[61] Cleveland's disability status upon filing a request for reconsideration of her SSA claim had changed significantly, and thus the SSA awarded her retroactive benefits.[62] The elements of her ADA complaint had formulated over the same time period, and they were very fact-specific.[63] In the United States Supreme Court's view, Cleveland should be given her day in court to develop her ADA claim.[64]

What is the level of explanation of the "apparent contradiction" between claims that will be required in order to withstand a motion for summary judgment?[65] The *Cleveland* Court put it very simply that the plaintiff must attempt "to resolve the disparity."[66] The trial court needs "an explanation of any apparent inconsistency" between the SSA "total disability" claim and the "necessary elements of an ADA claim."[67] Citing a host of federal circuit court decisions that dealt with purely factual contradictions, the Court analogized that the same "insistence upon explanation is warranted here, where the conflict involves a legal conclusion."[68] The opinion noted that "[a]n SSA representation of total disabil-

58. *Id.* at 1602 (citing Brief for United States *et al.* as Amici Curiae at 10-11 & nn.2, 13, Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597 (1999)).

59. *See id.*

60. *See generally* EEOC Enforcement Guidance on Disability Representations, No. 915.002 (Feb. 12, 1997), *reprinted in* DAILY LAB. L. REP. (BNA) No. 31, at E-1 to E-5 (Feb. 14, 1997) (discussing separate legislative schemes involved).

61. *See supra* notes 12-22 and accompanying text discussing facts in *Cleveland.*

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

63. *See id.*

64. *See id.* at 1602-04.

65. *See id.* at 1603-04.

66. *Id.* at 1603.

67. *Cleveland*, 119 S. Ct. at 1604.

68. *Id.* at 1603-04. The opinion includes a case from each of the United States Courts of Appeals. The decisions run the full gamut of causes of action. *See* Colantuoni v. Calcagni & Sons,

ity differs from a purely factual statement in that it often implies a context-related legal conclusion, namely 'I am disabled for purposes of the

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Inc., 44 F.3d 1, 5 (1st Cir. 1994) (involving tort injuries and breach of warranty claims surrounding injury sustained in construction accident); Rule v. Brine, Inc., 85 F.3d 1002, 1012 (2d Cir. 1996) (disputing breach of contract on patent royalties and claiming unjust enrichment where sporting goods company promised a fair royalty amount, summary judgment vacated based upon existence of genuine issue of fact); Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991) (affirming summary judgment despite plaintiff's subsequent affidavit contradicting prior deposition in case involving labor union refusal to process grievance to arbitration); Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984) (affirming summary judgment on asbestos litigation in absence of genuine issue of fact created by affidavit of defendant that contradicted earlier depositions, later affidavit attempted to avoid time bar presented by statute of repose); Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 228, 234 (5th Cir. 1984) (upholding summary judgment for defendant in maritime injury case where plaintiff's claims of illness caused by chemical exposure were barred by statute of limitations and laches despite plaintiff's later affidavit which directly contradicted, without explanation, his prior testimony); Davidson & Jones Dev. Co. v. Elmore Dev. Co., 921 F.2d 1343, 1352 (6th Cir. 1991) (vacating in part and affirming in part, grant of summary judgment on breach of contract claims surrounding mall development, court noting "'accepted precedent' that after a motion for summary judgment has been filed, thereby testing the resisting party's evidence, a factual issue may not be created by filing an affidavit contradicting earlier deposition testimony."); Slowiak v. Land O'Lakes, Inc., 987 F.2d 1293, 1297 (7th Cir. 1993) (alleging antitrust violations by defendant in distributorship case, and since plaintiff's later affidavit asserting injury contained direct contradiction of earlier deposition testimony and internal contradictions, without explanation, it is insufficient to establish "distinct and palpable injury" necessary to avoid summary judgment); Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1365-66 (8th Cir. 1983) (involving alleged wrongful termination of dealership and tortious interference with business relationship, affidavit contradicting earlier testimony insufficient to create genuine issue of material fact absent explanation of inconsistency); Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 263, 266 (9th Cir. 1991) (concluding that the district court's basis for granting summary judgment in employee pension benefit case was "inadequately developed" and noting the Ninth Circuit's rule is "that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony," but such rule requires a factual determination that contradiction was a sham attempt to create a material issue of fact to avoid summary judgment); Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986) (upholding summary judgment since probationary status of employee not a genuine issue of fact simply because plaintiff's later affidavit contradicted earlier testimony, plaintiff merely creating a sham issue in attempt to overturn grant of summary judgment); Tippens v. Celotex Corp., 805 F.2d 949, 953-55 (11th Cir. 1986) (reversing grant of summary judgment in asbestos litigation since non-party affiant's deposition and original affidavit not inherently inconsistent, thus no sham requiring summary judgment, and issue is best left to trier of fact); Pyramid Sec. Ltd. v. IB Resolution, Inc., 924 F.2d 1114, 1123-24 (D.C. Cir.) (affirming summary judgment for defendant in case involving alleged securities fraud and racketeering since insufficient pattern established for RICO claims and statute of limitations bar of common law claims; unsuccessful attempt to jettison sworn affidavit with later contradictory statement of same principal party to litigation), *cert. denied*, 502 U.S. 822 (1991); Sinskey v. Pharmacia Ophthalmics, Inc., 982 F.2d 494, 498 (Fed. Cir. 1992) (affirming summary judgment for defendant in patent infringement suit where plaintiff inventor sought to contradict earlier deposition wherein he admitted early use and sale of intraocular lenses prior to critical date, later claiming such use was for experimental purposes merely to avoid a bar on his infringement claim; no satisfactory explanation of contradictions or attempt to resolve the disparity in testimony were provided, and thus no genuine issue of fact existed), *cert. denied*, 508 U.S. 912 (1993).

Social Security Act.'"[69]

The Court expects that the summary judgment process will eliminate the plaintiffs who are not "telling the truth."[70] It seems that the Justices discovered no reason to create a special process or standard just for these SSA/ADA cases. If the legislature does not dictate a special process, then allowing existing law to handle the problem makes good common sense. This also accords with the wishes of the relevant agencies, the EEOC and SSA.[71]

In reality, the Court of Appeals for the Fifth Circuit stood alone with its advice that pursuit of or receipt of disability benefits creates a special rebuttable presumption that the disabled person is not a "qualified individual with a disability" under the ADA.[72] The United States Court of Appeals for the Third Circuit had allowed the doctrine of judicial estoppel to bar an ADA claim in *McNemar v. Disney Stores, Inc.*,[73] but the subsequent considerable criticism of *McNemar*[74] led Judge Becker of the Third Circuit to advocate reconsideration of the "wrongly decided" *McNemar* in *Krouse v. American Sterilizer Co.*[75] Still, the *Krouse* court stated that *McNemar* remained the law in the Third Circuit.[76] Also, the United States Court of Appeals for the First Circuit had invoked judicial estoppel against an ADA plaintiff in a 1992 decision,

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69. *Cleveland*, 119 S. Ct. at 1601.

70. Duffy, *supra* note 55, at 5 (quoting Alan Epstein, attorney who represented plaintiff in McNemar v. Disney Stores, Inc., 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997) concerning the United States Supreme Court's decision in *Cleveland*: "The bottom line is that the court is saying that plaintiffs who are not telling the truth can be culled out by the normal processes of summary judgment.").

71. *See* Brief for the United States and The Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner at 29, Cleveland v. Policy Management Sys. Corp., 119 S. Ct. 1597 (1999) (No. 97-1008) (advocating reversal of the United States Court of Appeal's decision in the *Cleveland* case and preservation of the integrity of the judicial process, citing Johnson v. Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998), "without resort to preclusion doctrines that undermine the objectives of the ADA and the Social Security Act.").

72. *See Cleveland*, 120 F.3d at 519.

73. 91 F.3d 610, 617 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

74. *See* Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 587 (D.C. Cir. 1997); Tranker v. Figgie Int'l, Inc., 585 N.W.2d 337, 339 (Mich. Ct. App. 1998); Dush v. Appleton Elec. Co., 124 F.3d 957, 961-62 (8th Cir. 1997); Krouse v. American Sterilizer Co., 126 F.3d 494, 502-03 (3d Cir. 1997); Talavera v. School Bd., 129 F.3d 1214, 1217-20 (11th Cir. 1997).

75. 126 F.3d 494, 502-03 & nn.3-4 (3d Cir. 1997) (stating at note 4 that it is the opinion of Judge Becker that the authorities cited in note 3 persuade her that *McNemar* was wrongly decided). The EEOC Guidance, *supra* note 60, is referenced for the same point. *See Krouse*, at 502 n.3. The *Krouse* court did not permit an estoppel effect since the prior representations of the plaintiff were not "*unconditional* assertions as to disability and inability to work" as they were in *McNemar*. *See id.* at 502-03 & n.5.

76. *See id.* at 503.

August v. Offices Unlimited, Inc.,[77] but a later decision pulled back from that position.[78] Despite these cases, the United States Supreme Court followed the clear weight of authority in its *Cleveland* decision. Without citing much of the existing precedent, or any of the scholarly commentary on the topic, Justice Breyer, with the full weight of the Court, disposed of the issue in the simplest way possible. By reversing the Court of Appeals for the Fifth Circuit, he overruled the most onerous decision, and left the existing rules intact.

III. CONCLUSION

The only individuals who should be upset with the outcome in *Cleveland* are defense counsel,[79] who had an easy way out, a bargaining chip for settlement negotiations if the litigation was pending within the jurisdiction of the United States Courts of Appeal for the Third or Fifth Circuit. The *McNemar* decision created a lot of uncertainty, and the decision of the Court of Appeals for the Fifth Circuit in *Cleveland* added to the fear that disabled individuals would be opting for 'short money' if they sought disability benefits because thereafter they might never get a full remedy for workplace discrimination under the ADA. Despite an outpouring of commentary and a myriad of decisions that said prior pursuit of disability benefits should not automatically preclude the presentation of the necessary elements of an ADA case, there was a pervasive sense that disabled plaintiffs would be disadvantaged by pursuing sustaining benefits under legitimate governmental programs, particularly within the Third and Fifth Circuits.

Employers would perhaps feel free to discriminate against this subclass of the disabled, those who had sought assistance, and/or obtained benefits. The prodding force of the penalties behind the anti-discrimination legislation would be lost against employers in these cases. Why should employers make the effort to reasonably accommo-

77. 981 F.2d 576, 581-84 (1st Cir. 1992) (holding that since the plaintiff did not renounce his prior declaration that he was "totally disabled," he could not establish that he was a "qualified handicapped person").

78. *See* D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 3-5 (1st Cir. 1996) (finding a genuine issue of material fact as to whether plaintiff could have continued to work with reasonable accommodation by the employer).

79. *See generally* David C. Popple, *Suits Easier for Disabled Workers*, TEXAS LAWYER, May 31, 1999, at 17 (discussing how the United States Supreme Court made it easier for disabled workers to sue employers despite application for or receipt of disability benefits, and referencing lawyer for defendant Policy Management Systems, David Kittner, who thought the "5th Circuit's approach was his preferred approach because it offered a reasonable middle ground").

date qualified disabled individuals if these disabled individuals may be prevented from pursuing ADA claims? This outcome was clearly not consonant with the policies and purposes of the ADA, a statute that made qualified disabled individuals a protected class.[80] If a person meets the standards for protection under the ADA, why should the use of another federal program preclude pursuit of an ADA claim? The statutes are separate, and the standards are separate. The benefits and the remedies are also quite different.

The United States Supreme Court affirmed the distinction between the SSA's programs and the ADA's scheme to protect disabled individuals from unwarranted workplace discrimination. For disabled individuals, the facts should speak for themselves in the usual civil litigation process. A disabled individual who is able to perform the essential functions of the job with reasonable accommodation is a qualified individual in a protected class. If he/she pursues or receives disability benefits, these facts are relevant but will not preclude pursuit of an ADA claim.[81] The benefit pursuer or recipient is a member of a subclass that needs to explain any contradictions or inconsistent statements in order to proceed under the ADA. After *Cleveland*, this subclass, along with the whole class, is protected again.

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80. *See generally* Hyman Lovitz & Sidney L. Gold, *Supreme Court: Application for SSDI Benefits Does Not Bar ADA Claim*, THE LEGAL INTELLIGENCER, June 2, 1999, at 7 (stating that the United States Supreme Court's reversal of *McNemar* and *Cleveland* "was necessary to avert reformulation of the ADA as a theoretical tool, rather than an actual one for redressing the systematic discrimination which employees with disabilities continue to confront").

81. The receipt of disability benefits would also be relevant to any remedy awarded an ADA plaintiff. *See generally* Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 554-55 (10th Cir. 1999) (discussing appropriate adjustments to remedy in employment discrimination cases where after-acquired evidence is introduced), *cert. denied*, No. 98-1829, 1999 U.S. LEXIS 4948 (Oct. 4, 1999); McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358 (1995) (discussing importance of private pursuit of employment discrimination claims in effectuating the policies and purposes of the ADEA).