The Road Best Traveled: Removing Judicial Roadblocks That Prevent Workers from Obtaining Both Disability Benefits and ADA Civil Rights Protection

Maureen C. Weston

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THE ROAD BEST TRAVELED:
REMOVING JUDICIAL ROADBLOCKS THAT
PREVENT WORKERS FROM OBTAINING
BOTH DISABILITY BENEFITS AND
ADA CIVIL RIGHTS PROTECTION

Maureen C. Weston*

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I. INTRODUCTION

For most of our nation’s history, many Americans with disabilities have dwelt in the shadows, having little presence in public life or the business world. Historically, individuals with disabilities have been isolated, segregated, and otherwise discriminated against in the areas of employment, housing, education, communications, recreation, health services, access to public services, and even in the pursuit of guaranteed constitutional rights, such as the right to vote. Traditional American disability policy has focused on society’s obligation to provide financial subsistence to those whose disabilities prevent them from working and achieving economic self-sufficiency. Accordingly, disability benefits programs operate in the federal, state, and private sector arenas and provide a basic level of financial, and sometimes health, security to individuals who are disabled and deemed unable to work.

The Americans with Disabilities Act of 1990 (“ADA”) forged a new and long overdue way of thinking about people with disabilities.
The ADA recognized that disabled individuals often want to work and can work with some accommodation, but do not do so (because they are not hired, must quit, or are terminated), in significant part, because of employer prejudice or other discrimination in the workplace. In contrast to traditional disability policy, which emphasizes maintaining the disabled, the ADA provides disabled individuals with substantive civil rights that prohibit discrimination on the basis of their disability and require employers to provide reasonable accommodations to qualified applicants and employees with disabilities, thereby enabling them to perform essential job functions.

In enacting the ADA, Congress made clear that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." The ADA was passed in part because of a concern that those "who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." Also underlying the passage of the ADA was the expectation that a law prohibiting discrimination on the basis of disability would provide the means for disabled individuals to become economically self-sufficient by working and ultimately reducing their dependence upon private and government-supported benefit programs.

An important and recurring question arising in disability discrimination cases across the country presents an apparent conflict for individuals who have applied for or received disability benefits and who also seek to assert rights under the ADA. The issue addresses whether an individual who is, or claims to be totally disabled and unable to work due to disability under the benefits eligibility standards, can still be qualified to perform the essential functions of a particular job, with or without reasonable accommodation (a necessary element for proving
unlawful discrimination under the ADA).

The following scenarios depict variations of the problem: First, Beverly, a successful sales representative, develops a degenerative spinal disease which limits her ability to walk on her own. She could, however, perform essential functions of her job, such as making sales calls, with the assistance of a motorized cart. Her employer allegedly thinks that the cart "will not look right" and fails to provide the requested accommodation. The employee stops working and receives total disability benefits. Second, Leonard, fully able to perform his job, is terminated shortly after he revealed to his employer that he is HIV-positive. Leonard thereafter applies for and receives total disability benefits. His HIV-positive status is presumed to be totally disabling under the applicable disability benefits regulations. Third, Anthony, due to his disability, has not worked since 1968 and receives total disability benefits under Social Security. In applying for a job, Anthony requests a temporary "job coach" as a reasonable accommodation. The employer refuses to interview him based, allegedly, upon his disability. Finally, Charles does not return to work after a surgical injury and seeks disability benefits claiming total inability to work. After his request for benefits is denied, Charles seeks reinstatement to his former position and is refused. Each of these individuals contend that he or she was the victim of discrimination because of his or her disability. But in subsequent disability discrimination lawsuits, the respective employers used the fact that these individuals sought or received disability benefits, upon representations of inability to work, as an attempt to bar such claims.

From one perspective, the question involves the dubious situation in which individuals appear to be "speak[ing] out of both sides of [their] mouth[s]" in asserting seemingly inconsistent positions—in effect, that they are both too disabled to work when seeking benefits, yet also otherwise qualified to perform a particular job in an ADA forum. From another vantage, the question involves a situation in which disabled individuals might be forced into the "untenable position of choosing between [the] right to seek [relatively immediate] disability benefits and

[the] right to seek redress for an alleged violation of the ADA."

Courts increasingly face this issue whenever a plaintiff in a disability discrimination action has sought, received, or is receiving disability benefits. Many courts addressing this issue have analyzed the question, expressly or implicitly, through the common law equitable doctrine of judicial estoppel—the principle that "prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." Accordingly, should an individual who has applied for or received disability-related benefits be judicially estopped or otherwise precluded from asserting that he is otherwise qualified to perform the essential functions of a job for the purposes of asserting a claim under the ADA for disability-related discrimination?

An obvious split (or splintering) has formed among the circuit and district courts that have addressed this issue. In the federal arena, cases from the Third and Ninth Circuit Courts of Appeals reflect the most ardent use of judicial estoppel. On the other end, the Seventh, D.C.,

20. Other circuits not recognizing the use of judicial estoppel have achieved largely the same result by holding that an individual making representations of total disability in connection with benefits proceedings cannot be "otherwise qualified" for purposes of stating a prima facie claim under the ADA. See infra notes 154-58 and accompanying text.
21. See Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 605-06 (9th Cir. 1996) (applying judicial estoppel to preclude a disabled individual from asserting legal claims based on her ability to work after she had received a workers' compensation settlement for temporary total disability benefits); McNemar v. Disney Store, Inc., 91 F.3d 610, 619 (3d Cir. 1996), cert. denied, 117 S. Ct. 958 (1997) (invoking judicial estoppel and ruling that an HIV-positive employee who applied for disability benefits after his alleged unlawful termination was "'speak[ing] out of both sides of [his] mouth" in claiming he was qualified to bring a discrimination claim under the ADA (quoting Reigel, 859 F. Supp. at 970)). But see Krouse v. American Sterilizer Co., 126 F.3d 494, 502 (3d Cir. 1997) (acknowledging "considerable criticism" of the McNemar decision).
22. See Weiler v. Household Fin. Corp., 101 F.3d 519, 523-24 (7th Cir. 1996) (holding that SSA determinations concerning disability are based on different standards and therefore not dispositive as to whether a disabilities recipient may sue under the ADA); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (holding that a determination of disability by the SSA for benefits purposes does not preclude a former employee from asserting a claim for unlawful employment discrimination under the Rehabilitation Act of 1973, 29 U.S.C. § 791, 794 (1988)).
23. See Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 587 (D.C. Cir. 1997) (reversing summary judgment granted in favor of the employer and holding that the employee's recipt of disability benefits did not preclude him from asserting an ADA claim); Whibbeck v. Vital Signs, Inc., 116 F.3d 588, 589-90 (D.C. Cir. 1997) (reversing summary judgment for the employer even though the employee had received long-term disability benefits after the employer allegedly denied requests for reasonable accommodations).
and, more recently, the Eleventh Circuit Courts of Appeals have refused to apply judicial estoppel or preclude ADA claims on the basis of representations made by plaintiffs on disability benefits applications. The First, Fifth, Sixth, and Eighth Circuit Courts of Appeals have addressed the issue differently. Numerous district court cases have di-

25. See August v. Offices Unlimited, Inc., 981 F.2d 576, 584 (1st Cir. 1992) (holding that an individual who claimed total disability for the purpose of receiving benefits was precluded from later asserting that he was a "qualified handicapped person" under Massachusetts law). But see D'Aprile v. Fleet Servs. Corp., 92 F.3d 1, 4-5 (1st Cir. 1996) (reversing summary judgment for employer and distinguishing August because plaintiff never claimed to be totally disabled until after requests for accommodation were made).
26. See Cleveland v. Policy Management Sys. Corp., 120 F.3d 513, 518 (5th Cir. 1997) ("[The application for or the receipt of social security disability benefits 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.']"). But see Harris v. Marathon Oil Co., 948 F. Supp. 27, 29 (W.D. Tex. 1996), aff'd, 108 F.3d 332 (5th Cir. 1997) ("It is impossible for [plaintiff] to have been both totally disabled under social security law and able to perform the essential functions of his position under the ADA.").
27. See Blanton v. Inco Alloys Int'l, Inc., 108 F.3d 104, 108-09 (6th Cir. 1997) (affirming summary judgment for employer where employee previously asserted that he was unable to perform his former position, but holding that an unsuccessful position of total disability does not estop a subsequent assertion that plaintiff could perform another job); Griffith v. Wal-Mart Stores, Inc., 930 F. Supp. 1167 (E.D. Ky. 1996), rev'd, No. 96-6361, 1998 WL 29870, at *6 (6th Cir. Jan. 29, 1998) (reversing summary judgment entered on judicial estoppel grounds and following the approaches of Swanks and Weiler).
28. See Dush v. Appleton Elec. Co., 124 F.3d 957, 962 n.8 (8th Cir. 1997) (noting the estoppel issue "remains open in our Circuit"); Budd v. ADT Sec. Sys., Inc., 103 F.3d 699, 700 (8th Cir. 1996) (per curiam) (affirming the application of estoppel to preclude an ADA claimant from proving he could perform the job due to contrary representations in a disability benefits application); Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 770-71 (8th Cir. 1987) (holding that a person claiming total disability is not "otherwise qualified" to perform a job within the meaning of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794 (1982)). But see Robinson v. Neodata Servs., Inc., 94 F.3d 499, 502 n.2 (8th Cir. 1996) ("Social Security determinations ... are not synonymous with a determination of whether a plaintiff is a 'qualified person' for purposes of the ADA."). The Eighth Circuit declined to reconcile Budd, Beauford, and Robinson and "[left] for another day the question of whether and to what extent judicial estoppel, or some other form of estoppel, will operate to prohibit someone who has formerly claimed to be 'totally disabled' from making out a prima facie ADA case." Dush, 124 F.3d at 962 n.8.
29. The Second, Fourth, and Tenth Circuits have not directly addressed the question, but have respectively affirmed cases applying judicial estoppel. See Violette v. International Bus. Machs. Corp., 962 F. Supp. 446, 449 (D. Vt. 1996) ("A finding of ... a disability [for social security purposes] estops a plaintiff from claiming he is a 'qualified individual.'"), aff'd, No. 96-2784, 1997 WL 786272 (4th Cir. Dec. 23, 1997); Ricks v. Xerox Corp., 877 F. Supp. 1468, 1477 n.9 (D. Kan. 1995) (noting that a plaintiff's misrepresentation of his condition in pursuit of disability benefits is likely to result in his being estopped from claiming he is otherwise qualified), aff'd, 96 F.3d 1453 (10th Cir. 1996).
vided on the issue in a similar fashion. Adding to the mix, the Equal Employment Opportunity Commission ("EEOC") has issued enforcement guidelines applicable to its investigators in all jurisdictions taking the position that the judicial estoppel cases were wrongly decided. The EEOC, as well as the Social Security Administration ("SSA"), maintain that representations made in connection with an application for disability benefits should not be an automatic bar to an ADA claim. Despite this splintering of authority, the United States Supreme Court has declined, without comment, to review contested application of the judicial estoppel doctrine to disability discrimination claims.

The judicial estoppel defense, or argument that an individual who has made a claim of "total disability" in connection with various benefit applications is precluded from claiming to be qualified in an ADA action, is consistently invoked in ADA litigation. A number of district courts agree, holding that prior representations of total disability preclude a plaintiff from asserting that he is qualified to perform the essential functions of the position in question. Most of these rulings against

30. See cases cited infra notes 154-64 and accompanying text.
33. See id. at 174-79; see also Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 586 (D.C. Cir. 1997) (recognizing the SSA's opposition to the use of judicial estoppel). The juxtaposition of the EEOC guidelines and contrary case law precedent in some jurisdictions raises the complicated issue of whether the EEOC can tell its agencies to disregard case law precedent in the respective jurisdictions or whether the courts must give deference to the EEOC pronouncements. See Wayne N. Outten & Jack A. Raisner, EEOC Resolves 'Untenable Choice' for Disabled Employees, or Does It?, N.Y. L.J., Apr. 21, 1997, at 9 (asserting that the EEOC's Enforcement Guidance on Disability Representations is likely to receive deference because the ADA gives the EEOC rule and regulation-making authority and because the guidelines are so "thorough and persuasive"). But see Guilzon v. Commissioner, 985 F.2d 819, 823-24 n.11 (5th Cir. 1993) (reasoning that little deference need be given to EEOC administrative regulations when the language of the statute is clear).
34. See McNemar v. Disney Store, Inc., 91 F.3d 610, 617 (3d Cir. 1996), cert. denied, 117 S. Ct. 958 (1997). At the time the Supreme Court denied certiorari in McNemar, similar cases were pending in the D.C. and Fifth Circuits. See cases cited supra notes 23, 26. The Supreme Court will likely be asked again to resolve the conflict among the circuit courts after additional circuit rulings are handed down.
35. See cases cited infra note 152.
plaintiffs on the basis of judicial estoppel are made at the summary judgment stage. Consequently, the merits of the underlying ADA claims are usually never reached. In some cases which have gone to trial, however, fact finders have found in favor of the plaintiff on ADA claims, even when evidence of prior representations regarding disability was presented.  

This Article examines the competing substantive arguments at issue in the divided court rulings viewed against federal disability policies and explores how the apparent conflict can be resolved. Part II examines the two general avenues of support available to individuals who do not work or who have lost their jobs because of their disability—disability-related benefits and anti-discrimination laws—setting forth the substantive provisions and policy objectives of the disability benefits programs and the ADA. Part III discusses recent court decisions reflecting the split among the federal courts regarding an individual's standing to bring an ADA claim after having sought total disability benefits. Part IV analyzes the alleged conflict between the ADA and social security disability benefits programs in light of three primary considerations: (i) the propriety of the application of the doctrine of judicial estoppel, (ii) the statutory language of each Act, and (iii) the policy goals of each Act. This Article concludes that courts declining to apply judicial estoppel got it right: prior representations of total disability made in the disability benefits context should not pose an automatic bar to preclude a statutory claim of disability employment discrimination.  

Applying judicial estoppel or other implicit preclusion principles in this context disregards the fundamental, as well as definitional, differences between the ADA and other statutory and contractual disability benefits programs and threatens to undermine the overriding statutory purposes of encouraging the disabled to seek employment and eradication of discrimination.

36. See, e.g., Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1448 (N.D. Cal. 1996) (exercising discretion by not applying judicial estoppel, in part, because the jury concluded that plaintiff would be able to perform the essential functions of her position under the ADA despite representations made in support of her disability benefits applications); Harris v. Marathon Oil Co., 948 F. Supp. 27, 28-29 (W.D. Tex. 1996) (reversing a jury verdict for an ADA plaintiff on judicial estoppel grounds), aff'd, 108 F.3d 332 (5th Cir. 1997); cf. Labonte v. Hutchins & Wheeler, 678 N.E.2d 853, 858, 860 (Mass. 1997) (holding estoppel inappropriate in affirming a jury verdict in plaintiff's favor because a genuine fact issue existed as to whether plaintiff was able to perform the essential functions of his job under Massachusetts employment discrimination law, with reasonable accommodations, despite having received disability benefits).

ing disability discrimination. In barring these claims, particularly at the summary judgment stage when the issue is primarily raised, the merits of the underlying claim are never reached, and the potentially unlawful discrimination is never exposed. Moreover, the perceived problems of "'chameleonic litigants,'" can be remedied by other less drastic means.40

Despite a plaintiff's prior representation of "total disability," courts in each case should make an individualized assessment of the facts and circumstances surrounding a plaintiff's application for benefits, examine the procedural and definitional standards used in the benefits determination, and consider other evidence which indicates a plaintiff may, with or without reasonable accommodation, have been qualified for the particular job.41 Where there is at least conflicting evidence that a plaintiff may be qualified based upon this individualized inquiry, a plaintiff should be permitted to present his case to the fact finder for ultimate resolution. Denying plaintiffs their statutory rights to bring an action for disability discrimination by virtue of having pursued rights to seek disability benefits ignores significant differences in the applicable legal standards set by the ADA and benefits programs, and thus thwarts the fundamental objectives of these laws and programs.

II. AVENUES OF HELP TO THE DISABLED: BENEFITS AND LAWS PROHIBITING DISCRIMINATION AND REQUIRING REASONABLE ACCOMMODATION

The financial impact of having a disability or becoming disabled can be devastating.43 Individuals with disabilities face staggering levels

40. See infra Part IV.D.
41. See generally EEOC Guidance, supra note 32, at 166-67, 74, 178.
42. The problem should be a concern for everyone, not just disabled individuals, for we all face the possibility that we might one day become disabled through an accident or illness. See Shapiro, supra note 8, at 7. "[D]isability . . . is the one minority that anyone can join at any time, as a result of a sudden automobile accident, a fall down a flight of stairs, cancer, or disease. Fewer than 15 percent of disabled Americans were born with their disabilities." Id.; see also Social Sec. Admin., Pub. No. 05-10029, Disability 3 (1995) (noting studies which show that one in four young workers will become temporarily or permanently disabled at some point in their lifetime).
43. For example, the following table demonstrates the loss of income from a stated age until 65 as a result of becoming disabled:
of unemployment and poverty.\textsuperscript{4} In fact, "[n]ot working is perhaps the truest definition of [what] it means to be disabled."\textsuperscript{45} Attaining financial security is a pervasive challenge for individuals with disabilities, some of whom are too disabled to earn an income. Other disabled individuals have the ability and desire to work,\textsuperscript{46} but either cannot find a job or constantly face the possibility of losing their current job because of disability discrimination.\textsuperscript{47} As a result, a "majority of those individuals with disabilities not working and out of the labor force must depend on insurance payments or government benefits for support."\textsuperscript{48}

<table>
<thead>
<tr>
<th>ANNUAL SALARY</th>
<th>$75,000</th>
<th>$100,000</th>
<th>$150,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age 35</td>
<td>$2,250,000</td>
<td>3,000,000</td>
<td>4,500,000</td>
</tr>
<tr>
<td>Age 40</td>
<td>$1,875,000</td>
<td>2,500,000</td>
<td>3,750,000</td>
</tr>
<tr>
<td>Age 45</td>
<td>$1,500,000</td>
<td>2,000,000</td>
<td>3,000,000</td>
</tr>
<tr>
<td>Age 50</td>
<td>$1,125,000</td>
<td>1,500,000</td>
<td>2,250,000</td>
</tr>
<tr>
<td>Age 55</td>
<td>$750,000</td>
<td>1,000,000</td>
<td>1,500,000</td>
</tr>
</tbody>
</table>


44. A 1996 General Accounting Office Study found that 22% of all disabled people between the ages of 16 and 64 live at or below the poverty line, and an additional 12% maintain incomes no greater than 150% of the poverty line. The study also found that 15% of the working-age disabled population receive public assistance, whereas only 2% of the working-age nondisabled population receive such assistance. See U.S. GEN. ACCOUNTING OFFICE, \textit{People with Disabilities: Federal Programs Could Work Together More Efficiently to Promote Employment} 10 (1996).

45. ICD SURVEY, supra note 9, at 47.

46. This really is a key assumption underlying the ADA—that having a disability does not necessarily render a person unable to work, particularly when reasonable accommodations are made. This policy assumption arguably runs counter to the concept in the social security context where being “disabled” means unable to work. See Wendy Wilkinson, \textit{Judicially Crafted Barriers to Bringing Suit Under the Americans with Disabilities Act}, 38 S. TEX. L. REV. 907, 913 (1997) (stating that these disability laws and programs “stem from different philosophical views of disability”); see also ADA LEGISLATIVE HISTORY, supra note 8, at 307 (“Sixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job.”); ICD SURVEY, supra note 9, at 52 (reporting that 62% of working age disabled persons are not employed and of that percent, 66% want to work). The ICD Survey observes:

\textit{It is in the area of work, even more than social life and activities, that disability excludes people most from mainstream American life. For most Americans, striving to reach one’s abilities amounts to working to achieve career and financial goals. Our society expects people to work, and the preeminent criterion by which a person is judged and measured is the job that he or she does.}

ICD SURVEY, supra note 9, at 47.

47. See ADA LEGISLATIVE HISTORY, supra note 8, at 306.

Government programs at both the state and federal level attempt to provide individuals with disabilities with a basic level of financial security and, more recently, civil rights protection. While this aid comes under the umbrella of many different laws and programs, support for individuals with disabilities comes in two general forms: disability benefits and anti-discrimination laws.

A. The Avenue of Subsistence: Disability-Related Benefits

The United States does not have a single comprehensive system for providing disability-related benefits. Instead, disability benefit and compensation programs exist at the federal and state government levels and in the private sector. The major programs under these categories, are federal disability benefits, workers’ compensation laws, and private disability insurance plans, respectively. For each of these programs a claimant must establish that he is disabled within the meaning of the particular program in order to receive benefits. Particularly with respect to claims for total, temporary, or permanent disability compensation, claimants typically represent that they are totally disabled and unable to perform their prior job. An administrative agency or private entity generally determines eligibility. Each program operates under different standards, eligibility criteria, and procedures. Often, these differences relate to the policy objectives of the particular program.

One survey reports that approximately 36% of all disabled persons under age 65 “receive some sort of income support from either insurance payments or government benefits. The rest of those not working and not in the labor force (40%), most of whom are women, say that they receive no benefits from either insurance company or government programs.” ICD SURVEY, supra note 9, at 91.

49. In addition to tort law, these programs include the following: group short-term disability insurance; long-term disability insurance; state workers’ compensation benefits; social security disability benefits; qualified retirement plan disability benefits; individual “permanent” disability benefits; disability overhead insurance; disability buy-sell insurance; disability waiver of premium benefits on life insurance; and living benefits on life insurance policies. See Rief, supra note 43, at 1155.

50. The variations among the different disability benefits programs present difficulty not only in concisely analyzing the programs, but also in using receipt of one as grounds to preclude a right under another statutory scheme. See Kenneth S. Abraham & Lance Liebman, Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury, 93 COLUM. L. REV. 75, 75 (1993) (arguing that the relationship among the many different public and private compensation programs is incoherent and that the “cross-purposes” of the programs sometimes leaves individuals over-compensated while leaving others completely without compensation).
1. State Benefits—Workers' Compensation

The most traditional disability benefits programs provide for compensation to employees injured in the course of their employment. At the state level, employees who have become temporarily or permanently disabled as a result of a work-related injury or illness may seek compensation through the state workers' compensation programs. Typical workers' compensation laws operate on the principle that an employee injured on the job is automatically entitled to certain benefits without regard to fault. These laws generally provide a system to compensate eligible employees in a prompt and fair manner for loss of earning capacity and for medical care due to work-related injury and illness. Recovery is usually available for work-related disabilities which are temporary or permanent in duration, and partial or total in severity. These classifications, combined with an employee's average wages, provide the basis for compensation computation.

51. See Berkowitz, supra note 4, at 15-40 (discussing the historical development of workers' compensation programs which guarantee some income support, but not employment, to workers injured in the course of employment); 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law §§ 5.00-30 (1997) (discussing the historical development of worker compensation law and noting that New York was the first state to enact a workers' compensation law in 1910 and by 1920 all but eight states had adopted worker compensation statutes, with Hawaii, the last state coming under the system, in 1963); Abraham & Liebman, supra note 50, at 79 (noting that all fifty states have adopted some form of workers' compensation programs).


53. See 1 Larson & Larson, supra note 51, § 1.10.

54. See generally 1 id. § 2.20. Larson notes that the underlying philosophy of workers' compensation laws stems from a societal recognition of the need to provide, in a dignified, efficient, and certain form, financial and medical benefits to workers injured as a result of their employment duties. However, these compensation systems do not restore claimants to their preinjury earning status; rather, compensation scales may not exceed the minimum necessary to keep the injured out of destitution. See 1 id. §§ 2.10, .50.

55. See 4 id. § 57.12(a) (noting that workers' compensation statutes ordinarily classify disabilities into four categories: temporary partial, temporary total, permanent partial, and permanent total). For purposes of workers' compensation statutes, a permanent disability is one that will last "the rest of [the] claimant's life" or for an indefinite duration as distinguished from a temporary disability from which a person usually recovers after a normal healing period. See 4 id. § 57.13.

56. In addition to varying definitions for the term disability, discussed infra, each state's workers' compensation laws employ varying methods to determine the amount of benefits to which a disabled worker is entitled. Total disability benefits are generally "expressed as a fraction of an injured worker's weekly wages, subject to a maximum." Rief, supra note 43, at 1156. These...
The disability concept in the workers’ compensation context is usually framed in terms of medical impairment, actual wage loss, or a combination of the two.57 However, the precise definitional standards for workers’ compensation recovery vary depending upon the applicable state law and benefits program. These differences can be significant. For example, some workers’ compensation statutes define “disability” in terms of a loss or reduction in wage earning capacity that results from a work-related injury.58 Other statutes may define disability in terms of impairment, as it relates to the worker’s decreased efficiency and ability to perform tasks as easily as before the injury, and not strictly in terms of loss of earning power.59 Under this type of statute, an injured worker may have a compensable “disability” even if he is employed at the same work and at the same wages as before the injury.60 Disability definitions under most workers’ compensation statutes generally do not consider the claimant’s ability to work with reasonable accommodations nor do they distinguish between marginal and essential job functions.61

A claimant is generally considered “totally disabled” in a workers’
compensation context, if his “condition is such as to disqualify him [temporarily or permanently] for regular employment in the labor market.” The definition recognizes that a claimant need not be entirely helpless or totally incapacitated to be found totally disabled. Accordingly, evidence that a claimant has been able to “earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability.” One may also be considered permanently or totally disabled under workers’ compensation statutes on the basis of a listed injury, condition, or loss. In these situations, evidence of the claimant’s actual earnings is immaterial.

2. Private Disability Insurance

An individual may also obtain disability benefits through a privately purchased or employer-sponsored, long-term disability insurance plan. Receipt of benefits pursuant to such plans is a contractual, rather than a statutory right. Private disability insurance is the least prevalent form of private loss insurance.

Most private disability insurance plans insure only against losses caused by total disability. The definition of what constitutes a “disability” varies depending upon the specific contractual language. Some policies define disability in terms of the inability of an insured to perform the primary duties of his occupation. Other policies define a

62. 4 LARSON & LARSON, supra note 51, § 57.00. “Conversely, when the claimant is unable to obtain employment because of his physical condition, medical evidence that he could perform such work if he could get it will not detract from his status of total disability.” 4 Id. Larson notes that “inability to get to work, traceable directly and substantially to a compensable injury, may be as effective in establishing disability as inability to perform work.” 4 Id. § 57.61(a).

63. See 4 id. § 57.51(a) (describing the “Odd Lot” doctrine, which is “accepted in virtually every jurisdiction”). Under the Odd Lot doctrine, total disability is not to be interpreted as utter helplessness. “[T]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are [handicapped to such an extent] that they will not be employed regularly in any well-known branch of the labor market.” 4 Id. § 57.51(a).

64. 4 Id.

65. A prima facie case of “permanent total disability” may be presumed under some workers’ compensation statutes for an employee who has, for example, lost vision in both eyes or has lost both arms or legs. See 4 id. § 57.52. An example of one such statute is OKLA. STAT. ANN. tit. 85, § 3(12) (West Supp. 1997). The SSA similarly presumes some disabilities are totally disabling. See infra notes 84–85 and accompanying text.

66. See 4 LARSON & LARSON, supra note 51, § 57.52; see also EEOC Guidance, supra note 32, at 163.

67. See Abraham & Liebman, supra note 50, at 81–82 (noting that approximately 22% of American workers are covered by private long-term disability plans, paying approximately $6 billion annually in benefits).

68. See Rief, supra note 43, at 1176.

69. See id.
disabled individual as one who cannot perform the duties of his job for which he is suited by his age, education, and experience. Still other disability insurance policies only consider an insured disabled if he cannot perform the important duties of any occupation. Frequently, the contractual definitions of disability make no allowance for an individual’s ability to work with reasonable accommodation, nor do they distinguish between marginal and essential functions.

3. Federal Disability Benefits Under the Social Security Act

The federal government provides disability benefits under two programs administered by the SSA. The Social Security Disability Insurance Benefits program provides benefits to disabled workers, dependents, and surviving spouses if the worker is insured under the provisions of the disability insurance program. The Supplemental Security Income program provides benefits to disabled individuals whose income and assets fall below a specified level. Although the eligibility criteria under the two programs is different (i.e., the Social Security Disability Insurance Benefits program is based on prior work record and the Supplemental Security Income program is based on financial need), many of the administrative requirements, procedures, and standards for assessing disability are virtually identical in both programs (collectively referred to as “social security disability benefits”). Together, these programs pay annual benefits in the range of forty-two to fifty-three billion dollars to eligible disabled individuals.

70. See id.
71. See id. at 1177.
72. 42 U.S.C. §§ 420-425 (1994). Whereas workers’ compensation covers only work-related disability, Social Security Disability Insurance Benefits are available regardless of whether a person’s disability or injury was caused by employment. In order to receive benefits, an individual must be insured for benefits, not have reached retirement age, have filed an application, and have a disability. See id. § 423(a)(1)(A)-(D). The term “disability” is defined as the “inability to engage in any substantial painful activity.” Id. § 423(d)(1)(A).
74. See id. §§ 1381a-1382d.
75. For example, both programs use the identical definition of disability. See id. §§ 423(d)(1)(A), § 1382c(a)(3)(A)-(B).
a. Disability Defined

The federal benefits programs are designed to provide minimal financial support for people who, because of a disability, are generally incapable of gainful employment.\footnote{77} As defined in the statutes, a person is "disabled" if he is unable 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."\footnote{78} To meet this definition, an applicant must have a "physical or mental impairment or impairments ... of such severity that he 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."\footnote{79}

b. Evaluating Disability Claims

The SSA follows a five-step sequential evaluation process to determine whether an applicant meets the statutory definition of disabled.\footnote{80} First, the SSA determines whether the applicant for benefits is currently engaged in "substantial gainful activity."\footnote{81} If yes, the applicant is not considered disabled, regardless of medical condition, age, education, and work experience.\footnote{82}

Second, the SSA determines whether the applicant has a severe


80. See 20 C.F.R. § 404.1520(a)-(f) (1997) (describing the general process by which claims of disability are evaluated); 20 C.F.R. § 416.920(a)-(f) (1997) (same). These two regulations are virtually identical. For ease of reference, this Author will hereinafter refer only to § 404.1520. See also Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 584-85 (D.C. Cir. 1997) (discussing the SSA’s sequential disability qualification process); BLOCH, supra note 77, § 2.10 (stating that the sequential evaluation process has been accepted by the courts as a proper method for adjudicating social security disability claims).

81. 20 C.F.R. § 404.1520(b). Substantial gainful activity is a key concept in the Social Security Act’s disability standard and is defined as work that “(a) Involves doing significant and productive physical or mental duties; and (b) Is done (or intended) for pay or profit.” Id. § 404.1510. The same definition of substantial gainful activity can be found at id. § 404.1572. Work activity is ordinarily considered substantial and gainful if earnings exceed a certain amount listed in the regulations. See SOCIAL SEC. ADMIN., supra note 42, at 9 (stating that an applicant whose earnings average more than $500 a month is generally considered not disabled).

82. See 20 C.F.R. § 404.1520(b).
impairment (or combination of impairments). An impairment is severe if it "significantly limits [the applicant's] physical or mental ability to do basic work activities." If the SSA determines that the applicant's impairment is "non-severe," he is not considered disabled for benefits purposes and the claim is therefore denied.

If the applicant's impairment is severe, the inquiry proceeds to the third step, which is based on the SSA's Listing of Impairments. If the impairment or medical condition meets the requirements of a listed disability or its medical equivalent, the SSA presumes that the applicant is disabled and awards benefits. If the applicant does not have a listed disability, the claim proceeds to a fourth step where the SSA determines whether the impairment prevents the applicant from performing his "past relevant work." If the applicant is able to perform past relevant work, he will be found not to be disabled and the claim will be denied.

If the claimant is prevented from performing past relevant work (and does not have a listed disability), the claim continues to a fifth step. Under this final step, the SSA evaluates whether the applicant can perform other work that is available "in significant numbers in the national economy."
economy,” considering the applicant’s residual functional capacity; age, education, and past work experience.

A person, who has a severe impairment, does not have a listed disability, and cannot perform past relevant work, is “disabled” unless the SSA proves that the applicant can perform other work which is available in significant numbers in the national economy. By this process, the SSA seeks to determine whether the claimant is unable to engage in substantial gainful activity and is thereby eligible to receive total disability benefits. Despite this seemingly stringent standard, the social security disability benefits laws also contain work incentive provisions entitling recipients to a “trial work period” during which they can test their ability to work without losing benefits.

89. Id. § 404.1560(c).
90. See id. § 404.1520(f)(1).
91. See id. § 1566(a).

We consider that work exists in the national economy when it exists in significant numbers either in the region where you live or in several other regions in the country. It does not matter whether (1) Work exists in the immediate area in which [the applicant] live[s]; (2) A specific job vacancy exits for [the applicant]; or (3) [The applicant] would be hired if [he] applied for work.

Id.

To determine whether a claimant can perform any work which exists in the national economy, the SSA considers what the individual still can do, given his/her functional limitations and vocational capabilities (age, education, and past work experience). Individuals who have marginal education, long work experience (i.e., 35 years or more) in only arduous unskilled physical labor, and can no longer do this kind of work may have a disability for SSA purposes be eligible for benefits even though they are capable of performing sedentary work.

EEOC Guidance, supra note 32, at 158-59 n.39.

92. The claims procedure for most social security disability benefits is initiated on special forms provided by the SSA. These are usually filed with a local Social Security office which makes the initial determination about an applicant’s entitlement to benefits. A dissatisfied claimant must request a reconsideration of the claim before receiving a hearing before an administrative law judge. The decision of the administrative law judge becomes final unless Appeals Council review is requested. Denials of review or decisions of the Appeals Council are the last step in the administrative review process. The applicant then has the option of instituting judicial proceedings by filing suit in a federal district court. See 20 C.F.R. § 404.900(a)(1)-(5) (1997).

93. See BLOCH, supra note 77, § 2.10 (noting that this is “the ultimate statutory question”).

94. See 20 C.F.R. § 404.1592(a)-(e). This regulation permits a beneficiary to test his ability to work, keep income earned for up to nine months, and still be considered disabled for benefits purposes, subject to some limitations. See also SOCIAL SEC. ADMIN., supra note 42, at 10 (explaining that social security disability “Benefits While You Work” incentives include a nine-month trial work period, extended eligibility period, deductions for impairment-related expenses, and medical continuation); SOCIAL SEC. ADMIN., PUB. NO. 05-10095, WORKING WHILE DISABLED: HOW WE CAN HELP 2 (1997) (explaining work incentive rules for recipients and providing information “to help you treat your disability as a ‘bridge,’ not the end of the road”).
c. Application Process/Disability Representations

The procedure for applying for social security disability benefits begins with an application made either in writing or by telephone. Applicants generally are asked about the disabling condition that prevents them from working, when they became unable to work, and whether they are still disabled. Applicants also must affirm that they will notify the SSA if their medical condition changes such that they are able to return to work. The application also includes the following proviso:

I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law by fine, imprisonment or both. I affirm that all information I have given in this document is true.

Applications for workers' compensation or private disability insurance typically require similar certifications by the applicant.

Based upon these representations in disability benefits applications, as well as disability determinations made by the SSA or other entities, many employers defending disability discrimination lawsuits invoke the doctrine of judicial estoppel. The defendants argue that the plaintiff, by virtue of their representation to be unable to work for purposes of receiving disability benefits, should be estopped from claiming to be "otherwise qualified" and therefore unable to maintain a disability discrimination lawsuit.

95. See SOCIAL SEC. ADMIN., supra note 42, at 7 ("You may file by phone, mail, or by visiting the nearest office.").
96. See Connell, supra note 17, at 10.
98. See Connell, supra note 17, at 12 (emphasizing that a plaintiff's statement regarding total disability on a disability benefits application is taken under the penalty of perjury). Connell also recommends that defense counsel confront ADA plaintiffs with the consequences of their prior representations, "that is, his or her criminal responsibility for perjury and/or welfare fraud." Id. at 27.
B. The Avenue of Mainstream Society: Disability Anti-Discrimination Laws

1. The Rehabilitation Act of 1973 and the Americans with Disabilities Act

Through the late 1960s, federal and state governments offered disabled individuals little more than access to disability-related benefits.99 Society made virtually no attempt to move disabled individuals into mainstream society. Although people with disabilities were not included in the civil rights laws of the 1960s, a change in public sentiment recognizing the rights of the disabled population began to emerge.100

Congress enacted the first major federal law to recognize the civil rights of individuals with disabilities with the Rehabilitation Act of 1973101 ("Rehabilitation Act"). However, this law applies only to the federal government, federal contractors, and those receiving federal financial assistance.102 Nearly twenty years later, Congress passed the

99. One commentator noted:

Until the late 1960s, the philosophy towards Americans with disabilities was a combination of paternalism and fear—the result was usually segregation. . . .

For the adult, the philosophy was to provide disability benefits—financial support so the individual could exist, but with little attempt to move the individual back into the mainstream of society.

LAURA F. ROTHSTEIN, DISABILITY LAW: CASES, MATERIALS, PROBLEMS 6 (1995); see also SHAPIRO, supra note 8, at 158-65 (describing the standard practice of institutionalizing people with disabilities).


102. See id. § 794.
prohibiting all forms of discrimination against individuals on the basis of disability. The ADA addresses the problem of discrimination in such critical areas as employment, public services, public accommodations, and telecommunications. Specifically with regard to employment, the ADA prohibits employers from discriminating against qualified individuals with disabilities in hiring, compensation, promotion, termination, and other decisions affecting employment.

Congress stated four major goals when it enacted the ADA. First, the ADA was intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Second, it was intended to establish "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." Third, the ADA was designed "to ensure that the Federal Government plays a central role in enforcing the standards [of the ADA] on behalf of individuals with disabilities." Finally, the Congress intended "to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."

Through the ADA, Congress sought to do more than eradicate discrimination against qualified individuals with disabilities. The idea was to allow disabled individuals to receive an equal opportunity to fully participate in the workforce so that they would be able to live in an independent and self-sufficient manner. With the ADA's guarantee of nondiscrimination and reasonable accommodation, otherwise qualified disabled individuals are expected to move away from economic dependency upon the government and toward economic self-sufficiency through working.

104. See id. § 2(b).
106. The ADA applies to most employers who have 15 or more employees. See id. § 12111(5).
107. See id. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").
108. See id. § 12101(b).
109. Id. § 12101(b)(1).
110. Id. § 12101(b)(2).
111. Id. § 12101(b)(3).
112. Id. § 12101(b)(4).
113. See id. § 12101(a)(3).
114. See id. § 12101(a)(9) ("[T]he continuing existence of unfair and unnecessary discrimi-
To achieve protection under the employment provisions of either the ADA or the Rehabilitation Act, individuals must establish a prima facie case of discrimination. This case is met where a plaintiff establishes: (1) he is disabled within the meaning of the Act; (2) he is qualified and able to perform essential functions of the job; and (3) the employer discriminated against or terminated the disabled individual on the basis of his disability.

A person is "disabled" under the ADA when such individual has "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) [is] regarded as having such an impairment." An individual is "qualified" provided he can perform, with or without reasonable accommodation, the essential functions of the particular job that the individual holds or is seeking. Discrimination includes, inter

ation and prejudice . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

115. For ease of reading, references hereinafter to the "ADA" will also encompass like provisions of the Rehabilitation Act. See 42 U.S.C. § 12117(b); 29 U.S.C. § 794(d) (requiring that courts read the ADA and Rehabilitation Act as consistent with each other); see also Pritchard v. Southern Co. Serv., 92 F.3d 1130, 1132 n.2 (11th Cir. 1996) ("Congress intended for courts to rely on Rehabilitation Act cases when interpreting similar language in the ADA."); Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir. 1994) (noting that the legislative history of the ADA indicates a Congressional intent for case law developed under the Rehabilitation Act to be equally applicable to the term "disability" in the ADA).

116. In determining whether a prima facie case exists, courts apply the burden shifting framework for Title VII discrimination cases established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The three steps of the framework are as follows: (1) the plaintiff bears the burden of establishing a prima facie case of discrimination; (2) if the plaintiff's burden is satisfied,] the burden then shifts to the defendant, who must offer a legitimate non-discriminatory reason for the action; and (3) if the defendant satisfies this burden, the plaintiff must then come forth with evidence indicating that the defendant's proffered reason is merely a pretext.

117. See White, 45 F.3d at 360-61 (discussing the elements of a prima facie case under the ADA); Overton v. Reilly, 977 F.2d 1190, 1193-94 (7th Cir. 1992) (construing the elements of a prima facie case under the Rehabilitation Act).


119. See 42 U.S.C. § 12111(8). The term "essential functions" connotes the primary responsibilities involved in a particular position and does not include marginal ones. See 29 C.F.R. § 1630.2(n)(1) (1997). Determining whether someone is "qualified" under the ADA usually requires an individualized assessment of a number of factors, including identifying essential functions of the job in question, assessing the individual's capabilities, and determining whether the individual will be able to perform the job with a reasonable accommodation. See Wilkinson, supra note 46, at 912; see also White, 45 F.3d at 361 (discussing the analysis for determining whether an
alia, not making reasonable accommodations for an individual with a known disability or otherwise denying equal opportunities to such an individual based upon his disabled condition.

Both the Rehabilitation Act and the ADA provide substantial legal redress for individuals who can meet this burden and prove that they have been discriminated against because of their disability. Such individuals may obtain injunctive relief, such as reinstatement or an order to reasonably accommodate, and may additionally recover compensatory and punitive damages.

2. State Disability Discrimination Laws

Most states have enacted anti-discrimination legislation that protects individuals with disabilities. Some of these state laws rely upon the same analytical framework as the ADA and Rehabilitation Act. However, state anti-discrimination laws are inconsistent and usually provide limited enforcement power, leaving individuals with disabilities little in the way of a state remedy for discrimination.
C. Traveling Both Roads

Disability laws and programs have developed to recognize the rights of disabled individuals, not only to minimum financial security, but also to equal opportunity for employment. The laws providing for disability benefits are designed to provide financial subsistence so that disabled individuals can survive from day to day. The laws prohibiting discrimination in the workplace go further. They attempt to help those individuals with disabilities who are able to work, with reasonable accommodation if necessary, obtain employment, participate in social and economic mainstream society, and become free of economic dependence on the government. Thus, the foundation of both forms of public financial and legal protection is equitable in nature and seemingly consistent, if not interdependent.

Nevertheless, many courts have held that an individual may not travel both roads—that an individual who applies for or receives disability benefits cannot later claim disability-based discrimination in employment. Accordingly, millions of individuals with disabilities in the United States who apply for or receive disability compensation are potentially foreclosed from availing themselves of the civil rights protections that are accorded to them under the ADA.

III. The Roadblock: Judicial Estoppel and Summary Judgment

The statutory disability benefits programs and anti-discrimination laws are the major forms of legislative protection available to individuals with disabilities. Both statutes, however, are silent as to their impact or effect on the other. Neither provides that one or the other is an exclusive remedy. Nonetheless, individuals who have at various times applied for or received disability benefits, are continually encountering a formidable roadblock when pursuing legal remedies under the disability anti-discrimination statutes. A standard response to these claims by the defendant is to move for summary judgment on the grounds that the plaintiff, having claimed to be totally disabled or unable to work in the disability benefits process, is precluded from asserting to be “qualified” to work, thereby lacking a key element of an ADA prima facie claim.

The United States Supreme Court has yet to decide whether a person having claimed to be totally disabled in the benefits process may

126. See infra Part III.B.1.
127. See Wilkinson, supra note 46, at 915.
later bring an employment discrimination claim under the ADA. To date, the federal circuits have addressed the issue differently. The numerous federal district courts across the country which have also dealt with the issue are similarly divided. The common element, however, is that many courts analyze the issue, expressly or implicitly, through the common law doctrine of judicial estoppel.

A. Procedural Background

1. The Judicial Estoppel Doctrine

The common law doctrine of judicial estoppel prevents a party from assuming a position in a judicial proceeding that is inconsistent with a previous statement or contention made under oath in a prior proceeding. The doctrine's purpose is to promote the broad public policy objectives of "(1) preserving the sanctity of the oath by requiring consistency in sworn positions; and (2) protecting judicial integrity by avoiding inconsistent results in two proceedings." It is intended to protect judicial integrity by preventing litigants from playing "fast and loose with the courts" or "speak[ing] out of both sides of [their] mouth,"

128. The First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuit Courts of Appeals have addressed similar versions of this issue. The Second, Fourth, and Tenth Circuits have affirmed, without opinion, decisions applying judicial estoppel. See cases cited supra notes 21-29.

129. The judicial estoppel doctrine is distinct, with separate policy goals and elements, from other forms of estoppel, such as collateral estoppel and equitable estoppel. Collateral estoppel, to conserve judicial resources and prevent repetitive litigation, prevents relitigation of the same position or fact already adjudicated among the same parties. See Rand G. Boyers, Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw. U. L. Rev. 1244, 1247 (1986). Equitable estoppel is intended to maintain a level playing field between the parties and permits a litigant "to prevent his opponent from changing positions if (1) he was an adverse party in the prior proceeding; (2) he detrimentally relied upon his opponent's prior position; and (3) he would now be prejudiced if a court permitted his opponent to change positions." Id. at 1248. In the cases discussed herein, courts do not always identify the judicial estoppel doctrine as the basis of their decision but employ general principles of estoppel or preclusion. These courts implicitly apply judicial estoppel in this context, as no other legal doctrine permits a court to declare, as a matter of law, that a plaintiff is precluded from asserting a legal claim on the basis of prior inconsistent statements.

130. See 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4477 (1981 & Supp. 1997) (stating that the judicial estoppel doctrine is also known as the "doctrine against the assertion of inconsistent positions"); see also Henkin, supra note 19, at 1711 (same).


132. Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir. 1990) (quoting Rockwell Int'l Corp. v.
and from obtaining inconsistent results by appearing before different courts and presenting contradictory assertions. The doctrine is equitable in nature and is applied at the discretion of the court.\(^3\)

Despite these jurisprudential purposes, judicial estoppel has been criticized,\(^3\) and even rejected, in some circuits.\(^3\) Even courts recognizing the doctrine vary widely in interpreting and applying judicial estoppel. Although there is no clear agreement among the courts as to the exact requirements of judicial estoppel,\(^3\) four basic elements emerge among the tests cited by circuits recognizing the doctrine.\(^3\) First, the

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Hanford Atomic Metal Trades Council, 851 F.2d 1208, 1210 (9th Cir. 1988)).


134. See id. at 617; Yanez v. United States, 989 F.2d 323, 326 (9th Cir. 1993).

135. The doctrine has been criticized as leading to unfairly harsh results and precluding the search for truth—truth being the goal of the modern Federal Rules of Civil Procedure. See, e.g., Henkin, supra note 19, at 1729-43 (arguing that the modern and liberal pleading rules of the Federal Rules of Civil Procedure have made judicial estoppel an ancient and unnecessary doctrine). However, pleading in the alternative, permitted by FED. R. CIV. P. 8(e)(2), is not available in the discrimination context since the two claims (claims for discrimination and disability benefits) must be pursued in different fora. Cf. Eric A. Schreiber, Comment, The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel—A Doctrine Precluding Inconsistent Positions, 30 LOY. L.A. L. REV. 323, 333 (1996) (arguing that judicial estoppel does not interfere with the truth-seeking policies behind FED. R. CIV. P. 8(e)(2), alternative pleading, because judicial estoppel is not applied within a proceeding but only to subsequent litigations).

136. The Tenth and D.C. Circuit Courts of Appeals have rejected the doctrine of judicial estoppel outright. See Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1520 n.10 (10th Cir. 1991) (stating that the Tenth Circuit "does not recognize the doctrine of judicial estoppel"); Konstantinidis v. Chen, 626 F.2d 933, 938 (D.C. Cir. 1980) (stating that the "judicial estoppel doctrine has no vitality" in the D.C. Circuit because it is "out of harmony with [the modern rules of pleading] and would discourage the determination of cases on the basis of the true facts as they might be established ultimately" (quoting Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956))).

137. See, e.g., Nichols v. Scott, 69 F.3d 1255, 1272 (5th Cir. 1995) (describing judicial estoppel as an "obscure doctrine," lacking "defined principles" and subject to criticism as "basically an "ad hoc" decision in each case""); Alexander v. United States, 9 F.3d 368, 378 (5th Cir. 1993); Jackson Jordan, Inc. v. Plasser Am. Corp., 747 F.2d 1567, 1579 (Fed. Cir. 1984); Tedophone Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990) (stating that the doctrine must be "applied with caution to avoid impinging on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement").

138. The elements of judicial estoppel have been set forth as

(1) The inconsistent position first asserted must have been successfully maintained;
(2) a judgment must have been rendered; (3) the positions must be clearly inconsistent;
(4) the parties and questions must be the same; (5) the party claiming estoppel must have been misled and have changed his position; and (6) it must appear unjust to one party to permit the other to change.

28 AM. JUR. 2D Estoppel and Waiver § 70 (1966). The court in Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355 (3d Cir. 1996), established a two-part test which inquires into (1) whether the present position is inconsistent with the prior position and (2) if so, whether either
doctrine generally applies to a factual position taken under oath by a party in a previous judicial or quasi-judicial proceeding. Second, the prior inconsistent position must have been successfully maintained on its facts or adopted by the court in the prior proceeding. Third, the positions asserted must be completely inconsistent. Finally, some circuits require an element of bad faith or proof that the party intentionally asserted inconsistent positions, by "playing fast and loose with the courts." Other requirements mentioned are reliance upon and prejudice as a result of previous assertions made by the opposing party.

Even assuming courts were to agree that the above elements constitute judicial estoppel, they disagree as to its application, particularly when addressing disability discrimination claims by a plaintiff who has previously claimed total disability or inability to work in a disability benefits context. In this respect, many courts have determined that a claim for total disability benefits and a claim that one is nonetheless "qualified" in an ADA action are inherently inconsistent. Asserting both claims, according to those courts, is dispositive evidence that a party is playing "fast and loose" with the judicial system—regardless of whether all of the elements of judicial estoppel are satisfied.


139. See Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982) (holding that judicial estoppel does not apply to prior statements made in an "an uncontested, non-judicial, administrative proceeding"); Dockery, 909 F. Supp. at 1558 (stating that judicial estoppel does not apply to statements made in administrative filings that are taken under oath); see also infra notes 258-67 and accompanying text (discussing the judicial proceedings aspect).

140. This is the "prior success" requirement. See infra notes 267-78 and accompanying text; see also Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 601 (9th Cir. 1996) (noting that majority rule is that judicial estoppel is inapplicable unless previously adopted by another court); Schreiber, supra note 135, at 336 ("The current majority position . . . requires that a party's prior statement was actually accepted as true by a court or administrative agency before a later court can invoke judicial estoppel.").

141. Inconsistency in position is the single common element required by all circuit courts recognizing the doctrine. See DeShong v. Seaboard Coast Line R.R., 737 F.2d 1520, 1523 (11th Cir. 1984) (stressing that "inconsistency is the crucial element of the doctrine of [judicial] estoppel").

142. Ryan Operations, 81 F.3d at 361.

143. See Henkin, supra note 19, at 1722-24, 1756.

2. Summary Judgment

Defendants typically seek summary judgment to dispose of plaintiffs' ADA claims, expressly under judicial estoppel, or alternatively, by contending that a plaintiff's representations made in connection with the application for disability benefits means no genuine issue of fact exists as to whether the plaintiff is "qualified."

The Federal Rules of Civil Procedure authorize a court to enter summary judgment when the entire record, consisting of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment must produce evidence establishing the absence of a genuine issue of material fact or identify those portions of the materials that will establish the absence of a triable issue for the court or a jury to consider. Once the movant makes a properly supported motion, the burden shifts to the nonmovant (usually the plaintiff) who must set forth, by affidavit or otherwise, "specific facts showing that there is a genuine issue for trial." In deciding whether a factual dispute is "genuine," a court is not to make credibility determinations or weigh conflicting evidence and must draw all inferences in the light most favorable to the nonmoving party. A court must determine whether the nonmoving party has sufficient evidence for a reasonable jury to return a verdict in his favor.

B. Judicial Analyses of the Effect of Total Disability Representations on ADA Claims

Courts have employed different analytical approaches in dealing with the scope of judicial estoppel's preclusive effect to statements on applications for disability benefits.
1. ADA Claims Barred

A significant number of federal courts have dismissed ADA claims due to prior representations of total disability or inability to work made in applications for state, federal, and even private insurance benefits. These courts barred subsequent ADA claims, usually on summary judgment grounds or related theories of preclusion. First, some courts adopt a per se or strict judicial estoppel approach, holding that a plaintiff who has applied for or received disability benefits upon representations of total disability is automatically barred or judicially estopped as a matter of law from presenting evidence or arguing he was qualified or able to perform essential functions of the position for purposes of the ADA. Four circuit courts of appeals, as well as numerous district courts, have expressly applied judicial estoppel to bar disability discrimination claims on this basis.


Second, rather than expressly applying judicial estoppel, a number of courts have precluded a plaintiff's subsequent ADA claim, ostensibly employing a summary judgment standard or "qualified individual" analysis. These courts have generally determined that because a plaintiff previously represented total disability, no genuine issue of material fact exists that the plaintiff is "qualified" for the position and hold that no reasonable juror could find the plaintiff to be qualified. In some instances, courts using this approach consider facts beyond the mere assertion of total disability on the disability benefits application form, such as repeated representations of total disability by the plaintiff, a physician, or attorney or continued receipt of disability benefits.

153. Courts use terminology familiar to the summary judgment standard, such as that the plaintiff either cannot (i.e., is precluded) establish an essential element of the ADA claim or that no reasonable jury could find in the plaintiff's favor because of prior disability representations. See e.g., Hindman, 1997 WL 786272, at *1 (affirming summary judgment based upon "traditional summary judgment principles" while declining to address the judicial estoppel issue); Kennedy v. Applause, Inc., 90 F.3d 1477, 1481-82 & n.3 (9th Cir. 1996) (stating that it is unnecessary to apply judicial estoppel when there is no genuine issue of material fact that plaintiff is totally disabled); August v. Offices Unlimited, Inc., 981 F.2d 576, 582 (1st Cir. 1992) (holding that no reasonable fact finder could conclude that plaintiff is qualified where plaintiff had declared that he was continuously and totally disabled on numerous disability applications); Hatfield v. Quantum Chem. Corp., 920 F. Supp. 108, 110 (S.D. Tex. 1996) (holding that plaintiff, who had previously represented himself as totally disabled, was not, as a matter of law, a "qualified individual" within the meaning of the ADA).

154. It is proper and necessary in this context, as with any summary judgment motion, for a court to consider all evidence in the record in addition to the statements made in the disability benefits context. See Fed. R. Civ. P. 56(c). As argued in Part IV, infra, this includes consideration of other facts and circumstances surrounding the disability benefits representations and the individual's ADA claim to determine if evidence exists as to whether the plaintiff is "qualified." While this is arguably the correct approach, a number of courts appear to use summary judgment as a disguised or interchangeable form of judicial estoppel.

155. See August, 981 F.2d at 582-83 (considering whether there was any evidence to contradict the representations of total disability made on the disability benefits application); Ott v. Crown Cork & Seal Co., No. C 96-2158 SBA, 1997 WL 231110, at *6 (N.D. Cal. Mar. 26, 1997) (ruling that plaintiff is not qualified under the ADA due to repeated representations of total disability made by the plaintiff and treating physicians); Buck v. Fries & Fries, Inc., 953 F. Supp. 896, 906 (S.D. Ohio 1996) (holding that no reasonable juror could conclude that plaintiff was qualified considering plaintiff's prior representations of disability to the SSA in conjunction with an "overwhelming" amount of evidence from the defendant that the plaintiff was not qualified); Johnson v. U.S. Steel Corp., 943 F. Supp. 1108, 1110, 1115 (D. Minn. 1996) (holding that plaintiff is not qualified as a matter of law where he made numerous certifications of complete disability and continued to receive benefits); Morton v. GTE N. Inc., 922 F. Supp. 1169, 1181-83 (N.D. Tex. 1996) (holding that no reasonable juror could find plaintiff was qualified under the ADA where both she and her physician continuously represented her inability to perform her job duties and continued to receive benefits), aff'd, 114 F.3d 1182 (5th Cir. 1997); Harden, 900 F. Supp. at 496-97 (holding that assertions by plaintiff, his physician, or attorney that plaintiff was totally disabled when applying for long-term disability benefits, though denied, required a finding that plaintiff cannot demonstrate he is now a qualified individual); Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 967-70 (E.D.N.C. 1994) (stating that no rational fact finder could find plaintiff was
ever, few courts have either considered or given weight to other facts and circumstances beyond the representations which might suggest the plaintiff could be qualified (such as accommodation issues and other factors discussed herein) and instead, found statements made in the disability benefits context so dominating as to preclude a triable issue of fact as to whether the plaintiff is qualified.\textsuperscript{156}

Third, other courts have treated a plaintiff's prior representations of total disability as nonrebuttable "binding admissions" of total inability to work and therefore held that the plaintiff cannot assert to be "qualified" in an ADA action.\textsuperscript{157}

Under these approaches, ADA claims have been summarily dismissed due to the plaintiffs' representations of inability to work made in the benefits application process. It generally did not matter to the courts that a plaintiff was working when the alleged discriminatory act occurred, that benefits had been denied, or that there was no actual determination of total disability in the benefits process. Nor did the courts give any weight to the fact that the reason for claiming total disability

\textsuperscript{156} The court in \textit{Dush v. Appleton Electric Co.}, 124 F.3d 957 (8th Cir. 1997) (quoting \textit{Mohamed v. Marriott Int'l, Inc.}, 944 F. Supp. 277, 282 (S.D.N.Y. 1996)), held that summary judgment is proper unless there is "strong countervailing evidence that the employee . . . is, in fact, qualified." \textit{Dush} mistakenly attributes this standard to \textit{Mohamed} by taking the language out of context. The court in \textit{Mohamed} was using this language for the purpose of describing the analysis of other courts as they applied judicial estoppel, not for the purpose of setting a standard as a reading of \textit{Dush} would lead a reader to conclude. \textit{Mohamed} stated: "In the absence of strong countervailing evidence that the employee or applicant is, in fact, qualified, these courts [applying judicial estoppel] appear to have determined that the prior representations carry sufficient weight to grant summary judgment against the plaintiff." \textit{Mohamed}, 944 F. Supp. at 282. \textit{Dush} also misstates the standard for ruling on summary judgment. On a motion for summary judgment, doubts are to be resolved in favor of the nonmoving party, and the nonmoving party need only demonstrate the existence of a genuine issue of fact. It is not, as \textit{Dush} holds, necessary to present "strong countervailing evidence." \textit{See Fed. R. CIV. P. 56(e)}.

\textsuperscript{157} Griffith v. Wal-Mart Stores, Inc., 930 F. Supp. 1167, 1171 (E.D. Ky. 1996), rev'd, No. 96-6361, 1998 WL 29870, at *6-7 (6th Cir. Jan. 29, 1998) (rejecting treatment of prior statements of inability to work as binding or "super admissions"); \textit{Reigel}, 859 F. Supp. at 969-70; \textit{see also} Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768, 771 (8th Cir. 1987) (holding that a plaintiff who admits she is unable to perform her work presently and in the future is not protected under the Rehabilitation Act); \textit{Erit v. Judge, Inc.}, 961 F. Supp. 774, 779 (D.N.J. 1997) ("Plaintiff's post hoc attempts to qualify his assertions of complete disability are unconvincing in light of the unequivocal language of the assertions themselves."); Bonnano v. Gannett Co., 934 F. Supp. 113, 115 (S.D.N.Y. 1996) (dismissing an ADA claim where plaintiff had made "unequivocal formal representations" of disability); \textit{Cheatwood v. Roanoke Indus.}, 891 F. Supp. 1528, 1538 (N.D. Ala. 1995) (holding that plaintiff is bound by his prior testimony in a workers' compensation proceeding that he could not perform essential functions of his job and therefore cannot assert he is qualified under the ADA).
was often due to an employer’s failure to accommodate or that disability benefits were granted based upon a listed or presumptive disability under the benefits guidelines, or that the standards for total disability determinations were different from the ADA.

a. Not “Qualified” Even if Working or Total Disability Is Presumed

In McNemar v. Disney Store, Inc., an assistant manager at a local Disney Store was hospitalized for pneumonia and shortly thereafter was diagnosed as HIV-positive. Upon returning to work, his district manager called him into her office and asked him if the rumors of his HIV-positive status were true. Presumably fearing discriminatory treatment, the employee lied (stating he had suffered from pneumonia) and returned to work. Ten days later, the employee was fired for taking two dollars from the cash register. Thereafter, the employee applied for and received state and social security disability benefits. To obtain these benefits, the employee and his doctors certified under oath that he was totally disabled and unable to work.

The employee later filed an action against Disney, alleging disability discrimination. Disney moved for summary judgment, arguing that the plaintiff was judicially estopped from asserting employment discrimination after having applied for and received disability benefits which he received based upon representations of total disability. The plaintiff argued that Third Circuit precedent provided that judicial estoppel be narrowly applied and only when the defendant showed the following: (1) the prior inconsistent position was made under oath in a judicial proceeding; (2) such statement was accepted by the tribunal; (3) both parties were litigants to the prior proceeding; and (4) prejudice would result unless estoppel were applied. These elements were arguably not met in the plaintiff's case.

The Employment Law Center and the EEOC filed amicus curiae

159. Incidentally, it is likely that this question was itself a violation of the ADA. The ADA prohibits an employer from “mak[ing] inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A) (1994).
160. See McNemar, 91 F.3d at 615-16.
161. See id. at 617. The plaintiff relied, in part, upon Scarano v. Central R. Co., 203 F.2d 510, 513 (3d Cir. 1953), in identifying these elements of judicial estoppel. The test currently used in the Third Circuit was articulated in Ryan Operations. See McNemar, 91 F.3d at 617-18 (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996)).
briefs on the plaintiff’s behalf also arguing that applying judicial estoppel to ADA claims based upon a disability benefit determination is inappropriate because the two systems “‘diverge significantly in their respective legal standards and statutory intent.’”

The McNemar court disagreed on all counts, declaring that a court may invoke judicial estoppel in its discretion when it feels a party is attempting to undermine the integrity of the judicial process. First, the court replied that “application of judicial estoppel is not limited in the formulaic manner urged by [the plaintiff].” The court reasoned that the basic premise of judicial estoppel is to protect the integrity of the courts; therefore, it is appropriate for a court to apply judicial estoppel when the party asserts an inconsistent position. McNemar noted that “well reasoned decisions” addressing similar situations used judicial estoppel to preclude a plaintiff’s employment discrimination claim. The court applied judicial estoppel even though (1) the plaintiff had been performing the essential functions of his job when terminated; (2) neither the district court in the ADA case nor the SSA ever made an individualized determination of his ability to work; (3) the plaintiff’s prior statements were not made in a judicial tribunal; and (4) the defendant was not a party in the prior benefits proceeding.

The pivotal factor in McNemar appeared to be that the plaintiff himself had claimed to be totally disabled and his later assertion in the ADA action that he was qualified was tantamount to his playing “fast and loose” with the court. Despite the argument that applying judicial estoppel to bar the ADA claim would place the plaintiff “‘in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA,’” the court said that the plaintiff had to make that choice unless the legislature stated otherwise. To the court, trying to maintain the position of having claimed total disability while asserting to be qualified to perform the es-

162. McNemar, 91 F.3d at 620.
163. See id.
164. Id. at 617.
165. See id. at 616-18.
166. Id. at 618.
167. See id.
168. See id. at 618. The opinion does not suggest that the court made an actual finding in this case that the plaintiff acted in bad faith or “deliberately asserted inconsistent positions in order to gain advantage,” as required by Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 363 (3d Cir. 1996), cited by the court.
sentential functions of a job is the equivalent of making "false representations with impunity." \textsuperscript{170}

b. Benefits Settlement

Similarly, the Ninth Circuit Court of Appeals, in \textit{Rissetto v. Plumbers & Steamfitters Local 343},\textsuperscript{171} held that the plaintiff was judicially estopped from asserting claims against an employer based upon her ability to work after she had obtained a workers’ compensation settlement based upon her assertion that she was unable to work.\textsuperscript{172} In response to the argument that a settlement does not meet the “prior success” element of judicial estoppel, the \textit{Rissetto} court reasoned that a favorable workers’ compensation settlement amounts to a favorable judgment for purposes of applying judicial estoppel.\textsuperscript{173} It applied judicial estoppel even though the plaintiff’s prior position was taken in a workers’ compensation proceeding rather than in a court.\textsuperscript{174} Finally, the court noted the perceived inequity that would result from allowing a plaintiff to assert the inconsistent positions and recover twice based upon those assertions.\textsuperscript{175}

c. Benefits Denied

Judicial estoppel has also been used to preclude a plaintiff’s ADA claim even though benefits were denied and the plaintiff was found not to be totally disabled. For example, in \textit{Bollenbacher v. Helena Chemical Co.},\textsuperscript{176} a worker was injured while driving a chemical applicator truck for his employer. The company first transferred the worker to a less demanding clerical position and then fired him.\textsuperscript{177} The worker had recovered on a workers’ compensation claim prior to being fired.\textsuperscript{178} After his termination, he applied for long-term disability benefits pursuant to an

\textsuperscript{170} Id.
\textsuperscript{171} 94 F.3d 597 (9th Cir. 1996).
\textsuperscript{172} See id. at 606.
\textsuperscript{173} See id. at 604-05; see also Simon v. Safelite Glass Corp., 943 F. Supp. 261, 268-69 (E.D.N.Y. 1996) (holding that a favorable settlement constitutes success for purposes of applying judicial estoppel), aff’d, 128 F.3d 68 (2d Cir. 1997).
\textsuperscript{174} See \textit{Rissetto}, 94 F.3d at 604.
\textsuperscript{175} See id. at 606. The risk that a plaintiff may recover twice is mitigated by a set-off remedy in the ADA action where damages may be reduced by disability benefits received during the relevant time period. See \textit{Swanks v. Washington Metro. Area Transit Auth.}, 116 F.3d 582, 587 (D.C. Cir. 1997).
\textsuperscript{176} 934 F. Supp. 1015 (N.D. Ind. 1996).
\textsuperscript{177} See id. at 1020.
\textsuperscript{178} See id. at 1031.
employee benefit plan. The insurer denied his application. He later filed suit against the company in federal district court, alleging wrongful termination in violation of the ADA, wrongful denial of long-term disability benefits in violation of ERISA, and retaliatory discharge under state law.

The employer argued that plaintiff should be judicially estopped from asserting an ADA claim where he previously asserted that he was fully disabled and entitled to long-term disability benefits. The plaintiff argued that he had been denied long-term disability benefits and, therefore, was not asserting a position inconsistent with a successfully maintained prior position. Instead, he was simply seeking alternative forms of relief pursuant to Rule 8(a) and (e) of the Federal Rules of Civil Procedure.

The Bollenbacher court granted the defendant's motion to reconsider the court's order, allowing plaintiff leave to file an amended complaint and held that the plaintiff was estopped by his earlier claim for long-term disability benefits from asserting that he was an otherwise qualified individual under the ADA. The court declined to follow circuit precedent, in Overton v. Reilly, which said that an SSA determination as to benefits eligibility was not dispositive as to whether the recipient may be qualified under the ADA. The Bollenbacher court distinguished the Seventh Circuit precedent based upon the fact that in Bollenbacher, the plaintiff claimed to be totally disabled, whereas in Overton, the plaintiff merely collected trial disability benefits while continuing to work. Instead, the Bollenbacher court determined that there were cases applying judicial estoppel that were more factually similar and therefore more persuasive. The court expressed its concern "about the inequity of permitting a plaintiff to claim that he is totally disabled in order to receive disability benefits while also permitting him to allege that he is a 'qualified individual with a disability' in order to

179. See id. at 1020.
180. See id. at 1025.
181. See id. at 1026.
182. See id. at 1028.
183. See id. at 1026-27.
184. 977 F.2d 1190 (7th Cir. 1992). For a discussion of Overton, see infra notes 230-38.
185. See Overton, 977 F.2d at 1196.
186. See Bollenbacher, 934 F. Supp. at 1026-27.
187. See id. at 1027-28 (citing Miller v. U.S. Bancorp, 926 F. Supp. 994, 999-1000 (D. Or. 1996) (concluding that the holdings of Overton and Smith do not apply where a litigant claims total disability and then attempts to bring an ADA claim)).
Thus, the Bollenbacher court chose to apply the doctrine of judicial estoppel to the plaintiff’s claims of disability discrimination even though he brought his claims in the same proceeding and his claim for benefits had been denied.

d. Failure to Accommodate

A number of courts have precluded ADA claims despite plaintiffs’ contentions that they were unable to work or sought total disability benefits precisely because the employer denied requests to provide reasonable accommodations. For example, in Cline v. Western Horseman, Inc., the plaintiff was terminated after having applied for temporary total workers’ compensation benefits on the grounds that she was not able to perform her duties on a full-time basis because of disability, a factual circumstance that required the employer to consider a reasonable accommodation under the ADA. Although the court posed the issue as whether the plaintiff could perform the job with reasonable accommodation, it ruled that the plaintiff was estopped from claiming she was qualified because she had received total disability benefits after termination based upon representations of inability to work and doctor certifications to the same effect. According to the court, this evidence precluded a jury finding that the plaintiff was a qualified individual with a disability for ADA purposes. The court was impressed with the weight of authority applying judicial estoppel in this context and did not address whether the plaintiff could have been “qualified” had the employer provided the required accommodations.

The First Circuit Court of Appeals also addressed this issue in August v. Offices Unlimited, Inc. The plaintiff in August had taken
leave from his job to undergo psychiatric treatment. At a meeting several days after the end of the leave period, the plaintiff told the employer that he would likely be ready to return to work approximately two weeks later but would need accommodation in his schedule due to the side effects of anti-depressant medication. A day after this meeting with his employer, the plaintiff filed an application for disability insurance, wherein he stated that he was totally disabled. The employee failed to return to work after a second leave of absence and was terminated. Subsequently, the employee filed a claim under the state disability discrimination law (similar to the ADA).197

The First Circuit concluded that based upon the disability submissions, the plaintiff was totally disabled at all relevant times and therefore could not establish that he was "qualified" and entitled to file a claim under the state law.198 The court focused upon the plaintiff’s application for disability insurance and relied upon two Rehabilitation Act cases, one in which the plaintiff filed for disability insurance benefits after informing her employer that due to mental and physical problems she would be unable to work in the foreseeable future, and the other in which the plaintiff retired as totally disabled and later sought to be rehired by the employer.199 The court upheld summary judgment in favor of the employer, concluding that no genuine issues of material fact existed as to whether the plaintiff could have performed his job even if his disability had been accommodated. Specifically, the court stated that "[u]nder any definition of the term, [employee’s] declaration that he was ‘totally disabled’ means that he was not able to perform the essential functions of his job . . . , with or without reasonable accommodations."200

197. See id. at 578-80.
198. See id. at 582.
199. See id. at 582-83 (citing Beauford v. Father Flanagan’s Boys’ Home, 831 F.2d 768 (8th Cir. 1987), and Bento v. I.T.O. Corp., 599 F. Supp. 731 (D.R.I. 1984)). In both of these cases, the court found that the plaintiff was not "otherwise qualified" within the meaning of the Rehabilitation Act.
200. Id. at 581. The dissent in August, however, strongly argued that summary judgment should not have been granted because there remained a genuine issue of material fact on the question of whether the plaintiff could have returned to work had the employer accommodated his disability in the manner suggested by the plaintiff at his meeting with the employer. The dissent focused on statements made by the plaintiff at this meeting in which the plaintiff suggested ways he could be accommodated. The dissent also stated that the majority relied too heavily on the plaintiff’s characterization of himself as totally disabled on the disability insurance forms. The dissent noted that such forms are "imprecise" and that it would be logical for an employee to take full advantage of a company’s temporary disability benefits in the absence of a provision of an accommodation by his employer. That is, without the requested accommodations, the employee could honestly say he was incapable of working. See id. at 586 (Pettine, J., dissenting).
Accommodation issues remained unresolved in other cases holding that no factual issue existed as to whether the plaintiff was "qualified" because of representations of inability to work made in the disability benefits process. In these cases, even if the plaintiffs had a viable claim of discrimination, they were precluded from arguing the failure of the employer to reasonably accommodate the disability because of statements made on disability benefits applications.\footnote{201}

Despite the pending accommodation issues, many of these courts assume that "[t]here is no reasonable accommodation that can be given to a totally disabled person . . . to perform the essential functions of any job."\footnote{202} These courts typically did not determine which job functions were essential, whether the plaintiff could work with reasonable accommodation, or consider the employers' efforts (or lack thereof) to provide accommodations. In these cases, whether an employer actually refused to provide reasonable accommodations was never reached and did not pose a disputed issue preventing entry of summary judgment.

2. ADA Claims Permitted

ADA claims have been permitted despite plaintiffs' receipt of disability benefits in primarily two contexts.\footnote{203}

\section*{Notes}

\begin{footnotes}


\footnote{202}{Harden, 900 F. Supp. at 497.}

\footnote{203}{In addition to the mentioned areas, some courts have declined to apply judicial estoppel where statements of the plaintiff's total disability were made by others, such as a physician or attorney, rather than by the plaintiff directly. See, e.g., Marvello v. Chemical Bank, 923 F. Supp. 487, 491 (S.D.N.Y. 1996) (denying dismissal of an ADA claim and declining to apply judicial estoppel where there was no direct evidence plaintiff swore he was totally disabled); Department of Transp. v. Grave, 447 N.E.2d 467, 471 (Ill. App. Ct. 1983) ("[J]udicial estoppel is inapplicable to statements made in the course of prior proceedings by witnesses for a party against whom the doctrine is sought to be asserted."). Cf. Fussell v. Georgia Ports Auth., 906 F. Supp. 1561, 1576 (S.D. Ga. 1995) (reserving judgment as to the application of estoppel, although the SSA declared plaintiff 100% disabled and eligible for Supplemental Security Income, because "there is no direct evidence in the record showing that [the plaintiff] swore [he was permanently disabled]"); aff'd, 106 F.3d 417 (11th Cir. 1997). By contrast, other courts hold that a plaintiff adopts his agent's representations of total disability. See Harden, 900 F. Supp. at 496-97 (stating that where plaintiff, his physician, or attorney maintained that he was totally disabled when applying for long-term disability benefits (though denied), as a matter of law, cannot demonstrate he is a qualified indi-}
a. Statement-Based or “Qualified” Total Disability Exception

Courts have recognized a narrow exception to the strict estoppel presumption where a plaintiff qualified his statement of total disability in some way when applying for benefits. For example, where a plaintiff articulates at the time of applying for benefits that he could work had reasonable accommodation been provided, estoppel may be avoided. However, attempts to make such a qualification after having applied for benefits and upon filing an ADA action are not given the same consideration.

A striking example of such a qualification is evidenced in Ward v. Westvaco Corp. In Ward, the defendant sought summary judgment on plaintiff’s disability discrimination claim based upon his prior receipt of disability benefits. The defendant argued that the facts were similar to those in August and warranted summary judgment as a matter of law. The Ward court, however, distinguished August based upon the fact that the plaintiff in Ward qualified his assertion of disability by saying that he would have been able to perform his job had reasonable accommodations been provided. The plaintiff attached a letter to his disability insurance application, explicitly stating that “any statements made ... are not intended as a waiver by me of my position that I would have been able to continue to perform my duties as an employee of Westvaco if Westvaco had made reasonable accommodation for my disability.” The court concluded that “Ward’s clear and deliberate qualification of his handicap status in his application for disability benefits took the case outside the framework of August.”

The First Circuit Court of Appeals, in the case of D’Aprile v. Fleet Services Corp., gave significant weight to the fact that a plaintiff who suffered from multiple sclerosis made no “broad admission of incapac-

204. At least one commentator has advocated this “statement-based estoppel” approach where the court focuses on a plaintiff’s statements made during the benefits process. See Hamilton, supra note 150, at 155-57.
206. See id. at 614-15.
207. See id. at 615.
208. Id.
209. Id. The court noted that disputed issues existed as to whether the plaintiff was “qualified” because of the qualified benefit application statements and because his requests for accommodations, although belated, were denied prior to his termination. See id. at 616.
210. 92 F.3d 1 (1st Cir. 1996).
ity” and stated she could work with reasonable accommodations.\textsuperscript{211} The court held that the plaintiff could pursue her ADA claim against her former employer for refusing her request for accommodation in the form of a part-time schedule, notwithstanding her application for short- and long-term disability benefits after her termination. The court reasoned that at the time of the alleged unlawful action, the plaintiff was arguably qualified for the work because she had not yet claimed that she was totally disabled. In addition, it wasn’t until after her condition worsened due to the stress caused by her employer’s refusal to accommodate her request that she made a declaration of total disability.\textsuperscript{212}

\textit{D’Aprile} and \textit{Ward} are among a small number of cases declining to grant summary judgment or invoke judicial estoppel when plaintiffs qualified their statement of total disability at the time of applying for benefits.\textsuperscript{213} Courts are not as willing to consider qualification reasons, however, when a plaintiff attempts to explain in a disability discrimination lawsuit why a prior “total disability” statement was not completely accurate. For example, whether the plaintiff in \textit{Erit v. Judge, Inc.},\textsuperscript{214} could have performed his job with reasonable accommodation was not relevant because the court ruled that the plaintiff’s sworn representations of inability to work in order to obtain disability benefits precluded such an argument. The court rejected the plaintiff’s attempt to explain those statements, finding that the “[p]laintiff’s post hoc attempts to qualify his assertions of complete disability are unconvincing in light of the unequivocal language of the assertions themselves.”\textsuperscript{215}

The statement-based estoppel approach in part formed the basis of the district court’s denial of an employer’s motion for summary judgment in \textit{Mohamed v. Marriott International, Inc.}\textsuperscript{216} In \textit{Mohamed}, the plaintiff was a deaf employee who was unable to communicate without the use of sign language. The plaintiff worked for Marriott for approxi-

\textsuperscript{211} Id. at 4.
\textsuperscript{212} See id. at 3-5. Plaintiff was a systems support analyst and took an extended leave of absence after developing multiple sclerosis. When her symptoms abated, she requested a temporary part-time schedule before returning to full-time work. Her employer refused. She then applied for and received disability benefits. The court found that the timing was crucial. See id. at 3-4. The plaintiff “never claimed to have been totally disabled at the time she requested an accommodation.” Id. at 4. The case was remanded to district court for further proceedings. See id. at 5.
\textsuperscript{213} For another example of a court considering the plaintiff’s qualification regarding reasonable accommodations made pursuant to a claim of disability, see \textit{Anzalone v. Allstate Insurance}, No. CIV.A. 93-2248, 1995 WL 21672 (E.D. La. Jan. 19, 1995).
\textsuperscript{214} 961 F. Supp. 774 (D.N.J. 1997).
\textsuperscript{215} Id. at 779 (finding that the plaintiff “cannot be simultaneously unable to work and qualified to perform the duties of his position”).
\textsuperscript{216} 944 F. Supp. 277 (S.D.N.Y. 1996).
mately five years until October 1, 1993 when the employer accused him of taking a customer’s property. The employer conducted a hearing where it was determined that the employee should be terminated. Ten months later, the plaintiff applied for disability benefits and certified that he had become unable to work beginning October 1, 1993 due to “[t]otal [d]eafness.” The plaintiff also stated on his application, however, that he was actively seeking employment but had been unable to locate employment since his termination date. The plaintiff was awarded benefits on the basis of his deafness, a “listed” disability.218

Based upon the employer’s alleged failure to provide a reasonable accommodation during the pre-termination investigation, the plaintiff filed an ADA lawsuit.219 In a thorough discussion of the judicial estoppel doctrine and its applicability in light of the policies under the disability benefits and anti-discrimination statutes, the district court denied the employer’s motion for summary judgment, holding that judicial estoppel would not bar the plaintiff’s ADA claim.220 The court reasoned that the plaintiff had not made the sort of “unequivocal and manifestly inconsistent representations that call into question the ‘sacrosanctity of the oath’ or the ‘integrity of the judicial [system].’”221 Since total deafness qualifies under the SSA’s Listing of Impairments, the SSA did not further investigate plaintiff’s ability to work.222 As a result, the court did not believe that the SSA’s determination was the equivalent of “a formal adjudication on the merits that [plaintiff was] not a ‘qualified individual with a disability’ within the meaning of the ADA.”223

Mohamed could be interpreted as falling within the narrow exception created by the statement-based estoppel approach because the plaintiff qualified his inability to work at the time he applied for benefits. But in addition to pointing to the plaintiff’s qualifying circumstances, the court articulated several explanations why judicial estoppel might not apply at all—perhaps even as to those plaintiffs who had made “unequivocal” statements of inability to work in the benefits

217. Id. at 279.
219. See Mohamed, 944 F. Supp. at 279.
220. See id. at 281-84.
221. Id. at 284 (quoting Bates v. Long Island R.R., 997 F.2d 1028, 1038 (2d Cir. 1993)). The court emphasized that Mohamed made clear to the SSA that he was actively seeking employment but was unable to find work. See id.
222. See id.
223. Id.
The court noted important policy reasons for avoiding strict judicial estoppel, stating that “the different policy goals animating the ADA and the SSDI provisions of the Social Security Act counsel against perfunctory application of judicial estoppel to bar SSDI claimants from maintaining ADA actions.” The court added that both statutes were intended to benefit the disabled population, one by guaranteeing equal employment opportunities, the other by granting assistance in times of need while still encouraging a return to the workplace.

b. Judicial Estoppel Rejected

Due in part to the policy differences and concerns mentioned in *Mohamed*, other courts, led by the Seventh, and recently the D.C., Circuit Courts of Appeals, reject the notion that the receipt of disability benefits should automatically invoke the doctrine of judicial estoppel to automatically bar an ADA claim. Although many courts precluding ADA claims on the basis of representations made in the disability benefits process consider these positions taken in the different fora inherently suspect and irreconcilable, other courts have urged a closer analysis before summarily applying judicial estoppel. Some of these

224. *See id.* at 282-84 (“[i]t is inappropriate to invoke the fact-sensitive and limited doctrine of judicial estoppel to erect a *per se* bar to ADA protection for individuals who have also applied for and/or received SSDI benefits.”).

225. *Id.* at 284.

226. *See id.*

227. *See Talavera v. School Bd.*, 129 F.3d 1214, 1220 (11th Cir. 1997); Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 586 (D.C. Cir. 1997); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992); Griffith v. Wal-Mart Stores, Inc., 930 F. Supp. 1167, 1171 (E.D. Ky. 1996), rev’d, No. 96-6361, 1998 WL 29870 (6th Cir. Jan. 29, 1998). The EEOC also takes the position that representations made in the disability benefits context should not pose an automatic bar to ADA claims. *See EEOC Guidance, supra* note 32, at 182-85. The Fifth Circuit has also recognized that “[i]t is at least theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive.” *Cleveland v. Policy Management Sys. Corp.*, 120 F.3d 513, 517 (5th Cir. 1997). Therefore, the court declined to adopt a strict estoppel rule, instead holding that “the application for or the receipt of social security disability benefits 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.’” *Id.* at 518.

228. *See Harris v. Marathon Oil Co.*, 948 F. Supp. 27, 29 (W.D. Tex. 1996) (“To allow [plaintiff] to assert that he was able to perform the duties of his employment with [defendant] at the same time he collected disability benefits ... would countenance a fraud, either on this court or on the federal agency that awarded him those benefits.”), aff’d, 108 F.3d 332 (5th Cir. 1997). However courts have categorized the doctrine or approach, many courts interpret these two positions as evidence that plaintiffs are playing “fast and loose with the courts,” or “speak[ing] out of both sides of [their] mouth.” *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 618 (3d Cir. 1996) (quoting Reigel v. Kaiser Found. Health Plan, 859 F. Supp. 963, 970 (E.D.N.C. 1994)), *cert. denied*, 117 S. Ct. 958 (1997).
courts have declined to apply judicial estoppel because the traditional elements are not present. Conversely, other courts have declined to apply judicial estoppel or bar ADA claims on summary judgment, despite prior representations of total disability, upon examining the different statutory definitions and policy goals of the ADA and disability benefits programs, as well as other facts and circumstances in individual cases which indicate a plaintiff could be qualified under the ADA. In determining whether a factual issue is presented regarding plaintiff's qualification for a particular position, these courts treat statements made in the disability benefits context as a factor, but also consider other evidence, such as whether accommodations were denied, whether the plaintiff was working at the time of termination, whether an actual total disability determination was made, and whether other evidence exists indicating that the plaintiff could perform the essential functions of the particular job.229

The seminal case rejecting a per se dismissal of a disability discrimination claim based on prior receipt of disability benefits is Overton v. Reilly.230 In Overton, the SSA determined that the plaintiff suffered from severe emotional illness and qualified for disability-related benefits. Concurrent with the SSA’s determination, the individual was hired as a chemist by the Environmental Protection Agency (“EPA”) through a disability hiring program. Although the plaintiff was employed, the SSA awarded disability benefits on a trial basis. Less than one year later, the plaintiff was fired after an unfavorable evaluation due either to his inability to communicate effectively with the public or sleeping on the job. He then notified the SSA and had his benefits continued.231 In a subsequent disability discrimination action, the plaintiff contended that the EPA failed to accommodate his disability which affected his ability to communicate and at times caused sleepiness due to the side effects of his medication.232

The district court dismissed the plaintiff’s disability discrimination claim on estoppel grounds because of the plaintiff’s receipt of SSA disability benefits. On appeal, the Seventh Circuit reversed.233 The court first looked at the essential functions of the position, noting a genuine question existed as to whether communication with the public was an essential function of plaintiff’s job. The court then considered evidence

229. See, e.g., cases cited infra note 250 and accompanying text.
230. 977 F.2d 1190 (7th Cir. 1992).
231. See id. at 1191-92.
232. See id. at 1195.
233. See id. at 1196.
that the plaintiff could perform even the communication function with reasonable accommodation and also noted that if sleepiness is a function (or treatment) of his disability, the evidence showed Overton still got his work done. While the EPA presented some evidence suggesting Overton was not performing up to standards, the court held that the plaintiff had supplied adequate evidence of his ability to perform the essential functions of his job to establish a genuine issue of fact as to whether he is "otherwise qualified."234

With respect to the SSA’s determination that the plaintiff was disabled (or, by definition, unable to perform any “substantial gainful activity”),235 the court noted that the evidence presented showed that he adequately performed most of his work. The court further stated that a disability determination by the SSA may be consistent with a claim that a disabled person is qualified to do his job.236 For example, the SSA may award benefits on a finding that the claimant’s disability was among a pre-approved list of impairments, without inquiring into the plaintiff’s ability to work.237 The court also noted that the SSA’s inquiry into the ability to work in the national economy is not exhaustive and does not mean there is a complete absence of work for which the claimant is suitable. The Overton court concluded that the SSA’s determination of disability may be relevant with regard to determining the severity of an individual’s disability, but it should not form the basis for a judgment that a plaintiff is not otherwise qualified under the Rehabilitation Act.238

While Overton never expressly addressed the issue of judicial estoppel, courts in subsequent cases have attributed to Overton the rejection of judicial estoppel in employment discrimination suits.239 In Smith v. Dovenmuehle Mortgage, Inc.,240 for example, the court explicitly followed the reasoning of Overton when it refused to dismiss an individual’s ADA claim against his former employer on judicial estoppel grounds although the individual had received social security disability benefits.241

234. See id. at 1195.
236. See id. at 1196.
237. The plaintiff in Overton was granted benefits on that basis. See id.
238. See id.
241. See id. at 1141.
In *Smith*, the plaintiff was fired shortly after his HIV infection ripened into full-blown AIDS. After his termination, the plaintiff applied for, but was denied, disability benefits under the employer’s disability plan. He then applied for and received social security disability benefits on the basis that his AIDS condition caused him to cease working the day before he was terminated. The plaintiff claimed that he recovered sufficiently from his disability and was already employed elsewhere when he filed suit against his former employer under the ADA, alleging that the defendant fired him and denied him benefits because of his AIDS related illnesses. The defendant moved for summary judgment, arguing that regardless of whether Smith actually could perform the job, he was estopped from proving he was otherwise qualified for employment due to his representations in connection with his application for federal disability benefits.\(^{242}\)

The *Smith* court held that judicial estoppel did not apply to the plaintiff’s claim.\(^{243}\) Initially, the court noted that the requisite elements of judicial estoppel were not met.\(^{244}\) Next, the court cited *Overton* and agreed with its reasoning that “the SSA’s decision to award benefits is not synonymous with a determination that plaintiff is not a ‘qualified individual’ under the ADA. Nor does it amount to a determination that the plaintiff can not find work in the economy.”\(^{245}\) Finally, the *Smith* court expressed reservations about the inequitable nature of applying judicial estoppel in a case involving alleged discrimination. The court stated that the application of judicial estoppel “would place plaintiff in the untenable position of choosing between his right to seek disability benefits and his right to seek redress for an alleged violation of the ADA.”\(^{246}\) Such an inequity would conflict with the stated purposes of the ADA.\(^{247}\)

\(^{242}\) See id. at 1139-40. Smith had found another job and was receiving benefits at the time of trial as part of the SSA’s nine-month trial work period. See id. at 1140.

\(^{243}\) See id. at 1141.

\(^{244}\) See id. ("[A] genuine issue of material fact exists as to whether the position taken by plaintiff before the SSA is inconsistent with the position taken by plaintiff in this lawsuit . . . .").

\(^{245}\) Id.

\(^{246}\) Id. at 1142.

\(^{247}\) See id. Courts applying judicial estoppel have factually distinguished *Overton* based upon the fact that the plaintiff in that case never asserted that he was totally disabled and that he had continued working on a trial basis while receiving benefits which only became permanent after he was terminated. Similarly, *Smith* has been distinguished based upon the fact that Smith offered reasonable explanations (i.e., changes in his medical condition) for his seemingly inconsistent positions. See *Baker v. Asarco, Inc.*, No. CIV-94-1045-PHX-ROS, 1995 WL 795663, at *5 (D. Ariz. Nov. 9, 1995) (distinguishing *Smith*), aff’d, 121 F.3d 714 (9th Cir. 1997); *Bollenbacher v. Helena Chem. Co.*, 934 F. Supp. 1015, 1026-27 (N.D. Ind. 1996) (distinguishing *Overton* and
The D.C. Circuit also disagreed with the use of judicial estoppel in the ADA context. In two opinions, the D.C. Circuit forcefully held that ADA claims should not be barred based upon prior receipt of total disability benefits, particularly where the potential reason for a plaintiff's seeking disability benefits is the employer's failure to accommodate.\(^{248}\) The court emphasized the different statutory standards and purposes of the ADA and disability benefits programs and stated that forcing disabled individuals to choose between the programs "would undermine the pro-employment and anti-discrimination purposes of the two statutes."\(^{250}\) Other courts have also agreed with Overton and its progeny, stating that representations for disability benefits purposes are not dispositive on the issue of whether, under federal disability discrimination laws, a plaintiff is qualified, such as when other evidence indicates that the plaintiff may have been able to work with or without reasonable accommodations.\(^{250}\)

### IV. AT THE CROSSROADS—WHY JUDICIAL ESToppel

"NEED NOT APPLY"

The foregoing analysis of relevant case law illustrates the varied decisions courts across the country are reaching in cases involving employment discrimination claims by individuals who previously filed for disability benefits. Courts employing the judicial estoppel doctrine, ex-
pressly or often implicitly under the related qualified individual analysis, essentially hold that a claim for disability benefits, based upon representations of inability to work, and a claim that one is “qualified” under the ADA constitute an irreconcilable contradiction. The “statement-based estoppel” approach recognizes an exception where a claimant qualifies or explains his inability to work in the disability benefits application. Yet, this still precludes individuals with similar extenuating circumstances who did not understand the importance or opportunity to provide such detail in the standard form for benefit applications. The no-estoppel approach holds that representations made in the benefits process should not per se preclude ADA claims—but is this too lenient?

Determining the proper approach for analyzing and deciding whether to preclude employment discrimination claims by plaintiffs who previously sought disability benefits based upon representations of their inability to work requires analysis of three primary considerations. First, the doctrine of judicial estoppel itself needs further examination. Second, the critical issue under any of the approaches is whether the plaintiffs in these cases are truly and knowingly asserting inconsistent positions. This second inquiry requires a closer examination of the statutory definitions of disability as well as of factual circumstances which may at least create a genuine issue of material fact as to whether the plaintiff is a “qualified individual with a disability” under the ADA, even in light of representations made in the disability benefits process. Finally, the practical as well as policy implications of these approaches must be considered in determining which course is most appropriate.

A. Judicial Estoppel Reconsidered

The judicial estoppel doctrine itself requires more critical scrutiny, particularly as it is regularly being used to prevent people with disabilities from pursuing a trial on the merits for their discrimination claim. As demonstrated by the foregoing description of the doctrine and its


252. For cases barring ADA claims because of plaintiffs’ prior representations of total disability made in the benefits process, see supra notes 150-202 and accompanying text. See also Shannon P. Duffy, 3rd Circuit Indicates Readiness to Overturn Criticized McNemar, LEGAL INTELLIGENCER, Oct. 1, 1997, at 1 (quoting plaintiff’s attorney in McNemar, Alan B. Epstein, as stating that many cases were not filed in the Third Circuit because under McNemar precedent, “you had to tell [clients] that they probably had no chance of winning if they were getting long-term disability, worker’s compensation or Social Security”).

http://scholarlycommons.law.hofstra.edu/hlr/vol26/iss2/4
varied application, the doctrine itself is arguably in flux and its application unpredictable.253

Under this common law doctrine, a party who has maintained a factual position in one judicial proceeding is estopped from asserting a totally inconsistent position in another judicial proceeding. Its basic purpose is to protect the “integrity of the judicial system” and the “sacredness of the oath.”254 Courts invoking the doctrine intend to prevent a litigant from playing “fast and loose” with the courts by “speaking out of both sides of his mouth” and to prevent a litigant from obtaining inconsistent results by asserting contradictory propositions before different courts. However, the doctrine is construed differently among the circuits and even rejected outright in two circuit courts of appeals.255

Even assuming arguendo that judicial estoppel were appropriate in this context, in many cases, judicial estoppel is misapplied. This misapplication can have harsh consequences for litigants who are unaware of the consequences of their statements. Moreover, the doctrine’s objectives are not necessarily achieved by barring ADA claims, and in any event, can be monitored by other, less drastic measures.

An obvious problem is that courts apply the doctrine even if the formal doctrinal elements are not present. Instead, courts applying judicial estoppel appear to selectively choose from the traditional conditions warranting judicial estoppel.256 Some circuits have reduced the doctrine to a test which only inquires into whether the statements are apparently inconsistent and made in bad faith.257 Often the test rests on a court’s sixth sense that a plaintiff is playing “fast and loose,” the price—a total dismissal of a plaintiff’s ADA claim.

For example, the “judicial proceeding” requirement (and namesake

253. See discussion supra Part III.A.
254. See supra notes 129-34 and accompanying text.
255. Criticisms waged against the use of the doctrine in these cases relate not only to courts’ dilution of the doctrine’s definitional elements, but also because it leads to harsh results without an examination of the underlying truth of the statements and perhaps is even unnecessary under the Federal Rules of Civil Procedure which provide mechanisms for penalizing claims brought in bad faith or without factual support under Rule 11. See supra notes 135-37. The District of Columbia and Tenth Circuits reject the doctrine. See supra note 136. The Second Circuit applies it only when a party changes their position after prevailing in a prior judicial proceeding where the court adopted the inconsistent statement. See Bates v. Long Island R.R., 997 F.2d 1028, 1037-38 (2d Cir. 1993).
256. Cf. McNemar v. Disney Store, Inc., 91 F.3d 610, 617 (3d Cir. 1996) (noting that courts have discretion in the application of judicial estoppel and that the application of judicial estoppel is not limited in any formulaic manner, i.e., no set of elements must be set forth before the doctrine is applied), cert. denied, 117 S. Ct. 958 (1997).
257. See supra note 138 (citing test from Third Circuit).
of the doctrine) is often not met in these cases. Applications for disability benefits are made on paper, either to an administrative agency, such as the SSA, state workers’ compensation authority, or a private insurance carrier often in a nonadversarial setting. These applications are generally preprinted check-box forms that do not request detailed explanations of extenuating circumstances relevant to the particular applicant (such as an employer’s refusal to accommodate).258 Claimants file these applications, often without consulting counsel, sometimes at the request of the employer, and even over the telephone.259 Benefit determinations often do not involve a formal hearing, presentation of evidence, or adversarial adjudication.260

These differences in a typical judicial proceeding and an administrative proceeding for the determination of benefits eligibility are relevant. As noted by the court in Mohamed, “[t]he streamlined procedures giving rise to the SSA’s determination of disability should, at a minimum, give pause to a court considering barring the courtroom door to a plaintiff alleging employment discrimination.”261 The equitable basis in

258. See August v. Offices Unlimited, Inc., 981 F.2d 576, 586 (1st Cir. 1992) (Pettine, J., dissenting) (stating that disability forms are imprecise); Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1447 (N.D. Cal. 1996) (“Where an employee is merely responding to questions on disability applications, often only checking boxes or filling in blanks which have little room, the employee may not have a fair opportunity to accurately explain the details of the employee’s medical condition and his ability or inability to work.”).

259. See supra note 95.


261. Mohamed, 944 F. Supp. at 284. Even if the Tenth Circuit recognized judicial estoppel, it would not apply the doctrine to the facts of a case where the plaintiff completed his SSA application “over the phone, outside the judicial machinery, without the benefit of counsel, and arguably under a great deal of emotional stress. In addition, . . . Defendants forced [Plaintiff] into the untenable position of being unemployed, in the advanced stages of AIDS, and emotionally devastated by their discriminatory conduct.” EEOC v. MTS Corp., 937 F. Supp. 1503, 1511 (D.N.M. 1996); see also Norris, 948 F. Supp. at 1447 (declining to apply judicial estoppel in part because plaintiff’s statements of disability were made on written applications to a private insurer or were preprinted responses on disability forms rather than through oral testimony and language selected by the plaintiff); Dockery v. North Shore Med. Ctr., 909 F. Supp. 1550, 1558 (S.D. Fla. 1995) (“Judicial estoppel . . . should not be applied to oaths undertaken in administrative filings, as in these ADA cases.”).
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applying judicial estoppel based upon statements in written applications is also questionable where an employee is "merely responding to questions on disability applications, often only checking boxes or filling in blanks which have little room, [and] the employee may not have a fair opportunity to accurately explain the details of the employee’s medical condition and ability or inability to work."\textsuperscript{263}

Despite the different nature of administrative and judicial proceedings, few courts have refused to apply the doctrine solely because the prior proceeding was administrative rather than judicial.\textsuperscript{264} The Ninth Circuit, in \textit{Rissetto}, broadly endorsed judicial estoppel, ruling that the doctrine was not rendered inapplicable "by the fact that plaintiff’s prior position was taken in a workers’ compensation proceeding rather than in a court."\textsuperscript{265} The use of statements made in an administrative setting was justified on the ground that "[t]he truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law."\textsuperscript{266} Holding the plaintiff to his prior statement of oath seems to be the linchpin for courts that bind a plaintiff to prior statements, even if made on a form to a private insurance company.\textsuperscript{266}

\textsuperscript{262} \textit{Norris}, 948 F. Supp. at 1447; \textit{see also} United States \textit{ex rel.} Am. Bank v. C.I.T. Constr. Inc., 944 F.2d 253, 258 (5th Cir. 1991) (holding that judicial estoppel is applied only when an individual has taken inconsistent positions before two courts, thereby posing a "threat to the judicial process" by making it likely that one court has been misled); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599-600 (6th Cir. 1982) (concluding that the plaintiff's prior inconsistent statement on a benefits application did not bar subsequent judicial action where the prior statement was not made before a "judicial body"); \textit{Dockery}, 909 F. Supp. at 1558 (stating that judicial estoppel does not apply to statements made under oath in administrative filings).


\textsuperscript{264} \textit{Rissetto}, 94 F.3d at 604. During the discussion of this point, the Ninth Circuit, in a footnote, cited with apparent approval a number of cases where courts "have estopped litigants who had claimed to be totally disabled in applying for disability benefits from claiming to be 'qualified' under the Americans with Disabilities Act." \textit{Id.} at 604 n.4.


\textsuperscript{266} Some courts interpret the doctrine to apply as long as the court is convinced that a plaintiff is threatening the integrity of the courts or the judicial process as a result of inconsistent statements. \textit{See}, e.g., Griffith v. Wal-Mart Stores, Inc., 930 F. Supp. 1167, 1170-71 & n.6 (E.D. Ky. 1996) (adopting the view that allowing a plaintiff to assert such inherently inconsistent positions
Applying judicial estoppel in this context, however, which results in denying plaintiffs a forum for disability discrimination claims on the basis of prior representations (usually made on a form), stretches and distorts the doctrine. Fundamental differences exist between the processes and procedures used in pursuing a disability benefits claim in an administrative setting and a formal lawsuit alleging discrimination. The doctrine's requirement of a "judicial" or at a minimum, a "quasi-judicial" proceeding is sound. The process involved in a judicial proceeding determining one's qualifications under the ADA implies that a person is given an informed, full, and fair opportunity to explain his position or statement, and that specific and individualized findings were made in a formal adversarial litigation. By contrast, the standards, procedures, and circumstances under which an individual applies for and receives disability benefits vary according to the particular public or private program. Certainly, an individual's signature or response on a benefits application form does not carry the same procedural safeguards. Penalties for perjury or bad faith are available without impeding the truth-seeking function of the judicial process. Accordingly, the judicial requirement should not be taken lightly.

Courts are also inconsistent with respect to the "prior success" requirement. Many circuits hold that judicial estoppel does not apply unless the inconsistent statements were actually adopted by the court—that the plaintiff was successful. Other courts hold that success in the prior


268. See supra notes 258-62 and accompanying text.

269. See Henkin, supra note 19, at 1745 (asserting that the modern rules of evidence and attorney/litigant sanctions provide far better methods of protecting the interests that judicial estoppel seek to protect, while promoting the deeper policies behind the modern system of pleading).

270. See id. at 1744 (asserting that the integrity of the system would still be protected by allowing a party to come forward with evidence seemingly contrary to previous assertions and that "[s]uch evidence could include proof of a lack of full and fair opportunity to litigate the issue in the previous action, perhaps due to burden of proof or discovery differences, fraud, honest mistake, inadvertence, changed facts, or unavailability of facts at the time of the prior assertion").
proceedings is not required if the plaintiff's change in position is intended to play "fast and loose" with the court.\(^\text{272}\) Under the strict estoppel approach, the mere filing for benefits is sufficient for the application of judicial estoppel.\(^\text{273}\) In these instances, courts have applied preclusion whether the plaintiff's prior claim for benefits was denied or agreed to by settlement and thus even when an individual was said to have not been disabled.\(^\text{274}\) Even an award of benefits, however, does not necessarily mean that the administering entity "accepted as true" the claimant's inability to work representations because an award may be based upon other criteria not requiring a specific finding that the claimant is unable to work (such as a presumed disability or the availability of accommodations).

The "prior success" requirement (like the "judicial proceeding" element) provides a safeguard against overreach and against an actual risk of inconsistent results.\(^\text{275}\) The discretionary aspect of whether to apply the doctrine should enter only once these elements are present.\(^\text{276}\)

\(^{272}\) The Circuit rejects the judicial estoppel doctrine, "judicial estoppel would only apply if the party adopting the inconsistent positions had actually succeeded in the earlier litigation"); Lowery v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996), cert. denied sub nom. Lowery v. Redd, 117 S. Ct. 954 (1997); Bates v. Long Island R.R., 997 F.2d 1028, 1038 (2d Cir. 1993); United States ex rel. Am. Bank v. C.I.T. Constr. Inc., 944 F.2d 253, 258-59 (5th Cir. 1991); Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1548 (7th Cir. 1990); Edwards, 690 F.2d at 598.

\(^{273}\) See, e.g., Rissetto, 94 F.3d at 601 n.3 (disagreeing that prior success is required and citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996), as holding "emphatically that success in the prior proceeding is not required"); Morris v. California, 966 F.2d 448, 453 (9th Cir. 1991); Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987) (holding the doctrine applies even when litigant was unsuccessful if by change of position he is playing "fast and loose" with the court).


\(^{275}\) See cases cited supra note 189. But see Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980) ("A settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel.").

\(^{276}\) Factors that judges should consider in balancing the policies behind judicial estoppel include:

- the importance of the right that would be lost if judicial estoppel were invoked; the significance of the position in the prior litigation, reliance, fairness, bad faith; actual damages suffered by the court, the litigant, and the opposing party; the fear of double recovery or unjust enrichment; and overall considerations of justice.
Courts which interpret judicial estoppel to apply when it is believed that the plaintiff is acting in bad faith or "fast and loose," do so because of a perceived threat to the integrity of the judicial system. However, making such a factual determination on the basis of representations on disability benefits applications is premature, particularly at the summary judgment stage. This assessment inherently requires a factual finding of intentional self-contradiction or bad faith.

Precluding a plaintiff's ADA claim on the basis of his application for disability benefits is tantamount to holding that the plaintiff waives rights under the ADA by pursuing disability benefits. Waiver requires an intentional relinquishment of a known right. It is unreasonable to expect that a layperson who may be desperate to obtain income from disability benefits understands that by filing a disability benefits claim he is waiving and releasing rights to assert an ADA claim later. Indeed, applicants are not informed in this process that their rights to assert claims for disability discrimination are thereby relinquished. The apparent inconsistencies may be unintentional or reconciled upon gathering additional factual information. Summary dismissal is a harsh result unless the litigant intentionally has taken an inconsistent position.

Generally, the employer in these cases is not unfairly prejudiced by a plaintiff's prior application for benefits. Plaintiffs in these cases usually apply for benefits after having been terminated, denied accommodation, or upon the request of the employer. In these situations, judicial estoppel is a great benefit for the employer since the merits of the case...
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are never reached. The EEOC has asserted that this result, allowing an employer to use benefits information to challenge whether the plaintiff was “qualified,” is analogous to the “after-acquired evidence” practice restricted by the United States Supreme Court in McKennon v. Nashville Banner Publishing Co.²⁸²

In McKennon, the Supreme Court addressed the issue of whether evidence of a plaintiff’s wrongdoing, or “unclean hands,” discovered after termination barred an otherwise viable employment discrimination suit.²⁸³ The Court looked to the important public policy purposes of the anti-discrimination statutes²⁸⁴ and held that barring the suit in such circumstances “would undermine the [statutory] objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from [unlawful] discrimination.”²⁸⁵ The Court stressed that “[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the [anti-discrimination statute]” and that the broader “objectives of the [anti-discrimination statutes] are furthered when even a single employee establishes that an employer has discriminated against him or her.”²⁸⁶ Under McKennon, employer liability for unlawful discriminatory conduct is determined solely by information available to the employer “at the time of the decision.”²⁸⁷ Therefore, benefits information acquired after termination should not bar employment discrimination claims but may better serve as a means to limit damages.²⁸⁸

The Third Circuit in McNemar was unpersuaded by this argument, however, holding that “after-acquired evidence” is an affirmative defense that is utilized by the defendant and does not become an issue until the plaintiff has established a prima facie case of discrimination.²⁸⁹ The policy considerations set forth in McKennon do, however, seem to

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²⁸². 513 U.S. 352 (1995). The EEOC also asserted this argument in an amicus curiae brief filed in McNemar, 91 F.3d at 620-21.
²⁸⁴. See id. at 357-58.
²⁸⁵. Id. at 362.
²⁸⁶. Id. at 358.
²⁸⁷. Id. at 360 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989)).
²⁸⁹. See id. at 620 (rejecting the EEOC’s assertion that plaintiff’s representation of total disability on a benefits application should not be considered in determining whether the plaintiff is “qualified” and stating that the plaintiff must first establish a prima facie case and that “after-acquired evidence” could be used by the defendant to limit damages).
apply equally to "after-acquired evidence" of inability to work representations made in the benefits context. In *McNemar*, the employer avoided a trial on the question of whether it discriminated against McNemar on the basis of his AIDS disability only because the plaintiff filed for disability benefits after his alleged unlawful termination. Under this practice, unlawful discrimination goes unredressed and perhaps is even encouraged.  

Finally, the integrity of the judicial process is not necessarily compromised by allowing plaintiffs who have previously asserted disability to proceed with their ADA claims. The judicial estoppel doctrine is rooted in the notion that the doctrine should only be invoked when allowing a party to maintain inconsistent positions would sanction an injustice.  

"[The doctrine] is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims . . . ." Likewise, employers should not be permitted to use judicial estoppel as a sword against plaintiffs who may very well have valid ADA claims simply because such plaintiffs sought and received disability benefits to sustain themselves financially, especially during periods of unemployment which may be due to discrimination on the basis of their disability.

**B. Are the Positions Really Inconsistent?**

A critical question in determining the propriety of precluding employment discrimination claims in these cases, under the judicial estoppel approach or otherwise, hinges upon whether such plaintiffs are in fact asserting inconsistent positions. On the surface, these two claims

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290. For example, rather than comply with an employee's request for a reasonable accommodation, an employer could give the employee the ultimatum of taking medical leave and applying for disability benefits or face termination. In a later disability discrimination action, the employer would argue the plaintiff's claim of inability to work made in the benefits process precludes an ADA claim. If accepted, the employer is able to escape liability by setting up or forcing the employee to apply for disability benefits. In *Fredenburg v. County of Contra Costa*, No. C-96-3136-VRW, 1997 U.S. Dist. LEXIS 5564 (N.D. Cal. Apr. 18, 1997), the court acknowledged that the employer may have violated the ADA in requiring the plaintiff to undergo a mental examination but held that the plaintiff was not qualified under the ADA based on her prior representations of disability and therefore not covered by it. See id. at *3-8; see also Johnson v. Hines Nurseries, Inc., 950 F. Supp. 175, 177-78 (N.D. Tex. 1996) (applying judicial estoppel despite plaintiff's claims that he was forced to apply for benefits because of defendant's refusal to accommodate); Miller v. U.S. Bancorp., 926 F. Supp. 994, 996, 1000 (D. Or. 1996) (applying judicial estoppel although plaintiff applied for disability benefits at the employer's insistence).


292. *Id.*

appear plainly irreconcilable. If a person is "totally disabled" and unable to work so as to qualify for disability benefits, it appears logically impossible that the person is nonetheless capable of "perform[ing] the essential functions of the employment position that such individual holds or desires." Proponents of judicial estoppel would argue that the ADA, in providing rights to disabled individuals who can work with or without accommodation, simply does not cover disabled individuals who cannot work at all, a requisite for most disability programs. Although it may seem unfair to discriminate or bar a claim of an employee who is no longer able to do his job, so the argument goes, that sort of discrimination is simply not within the protection of the ADA.

This reasoning is superficially appealing. However, whether a conflict exists between a plaintiff's claim of "total disability" for social security disability benefits purposes and "qualified individual with a disability" in an ADA action requires a closer examination of the definitions and meanings of those terms in their relative statutory frameworks.

1. Statutory Definitional Differences

As discussed in Part II, the definitional standards and the determination procedures under the statutory and private disability benefits programs are varied and distinct from those under the federal disability discrimination laws. While sometimes subtle, these differences are significant and may explain why there may be situations in which a claim for disability benefits and disability discrimination may not be inconsistent. In summary, the following reasons are advanced as to why there may be situations in which a claim for disability benefits and disability discrimination may not be inconsistent: (1) the disability benefits programs and the ADA contain distinct definitional standards of "disability"; (2) the Social Security Act considers some "presumptive" or "listed" disabilities without regard to the individual's actual ability to

296. Because the definitional standards under state workers' compensation laws and private disability benefits programs vary, only a comparison of statutory definitions under the ADA and SSA standards for awarding benefits is made herein.
297. Several courts, including the Seventh Circuit and D.C. Circuit Courts of Appeals, as well as the EEOC and SSA, have maintained that these fundamental differences may explain why plaintiffs in ADA cases are not necessarily asserting "inconsistent" positions. See cases cited supra notes 230-40; see also McNemar, 94 F.3d at 620 (noting the arguments made by the EEOC and Employment Law Center in opposition to the application of judicial estoppel in this context).
work; (3) the Social Security Act requires only a generalized inquiry into ability to work as opposed to the ADA's individual assessment requirement; (4) the Social Security Act implicitly recognizes that recipients of its disability benefits can work and encourages this activity through work-incentive programs; and (5) significant factual circumstances in individual cases may create disputed factual issues warranting a determination by the fact finder as to whether the plaintiff is "otherwise qualified."

Significant differences exist between the disability determinations in the benefits context and under the ADA. For example, for purposes of the Social Security Act, "disability" is defined in part as the "inability to engage in any substantial gainful activity." The individual's condition must be one that is "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." Under the ADA, an individual with a disability is a person who has "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) [is] regarded as having such an impairment." A "qualified person with a disability" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

The determination of eligibility for disability benefits purposes and whether a person is "qualified" in a disability discrimination claim involves two very different analyses. Even the SSA's seemingly strict five-step inquiry is a generalized inquiry into an applicant's ability to find work and can result in a finding of total disability even though the applicant can return to his old job or find new work. For example, the

298. These reasons are set forth by the EEOC as well as noted by various courts. See generally EEOC Guidance, supra note 32, at 18-33; see also Swanks v. Washington Metro. Area Transit Auth., 116 F.3d 582, 583 (D.C. Cir. 1997) (holding that the receipt of social security disability benefits does not preclude ADA relief "[b]ecause the Social Security Act and the ADA employ quite different standards and objectives"); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (finding that an SSA award based on a listed disability and generalized inquiry into whether the claimant can work in the national economy does not mean that the plaintiff is not able to assert that he is qualified); Mohamed v. Marriott Int'l, Inc., 944 F. Supp. 277, 283-84 (S.D.N.Y. 1996) (noting significant differences between the ADA and SSA standards and procedures).
300. Id.
302. Id. § 12111(8).
303. See supra notes 80-92 and accompanying text.
304. See Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (stating that the SSA contemplates a "generalized" inquiry into the individual's "ability to find work in the national economy").
SSA provides benefits to those whose impairments are the same as or
equivalent to those on the SSA’s list of presumed disabling impair-
ments, without regard to the applicants’ age, education, or past work
experience. By contrast, the ADA requires an individualized inquiry
into the ability of the individual to meet the requirements of a particular position. The ADA does not permit presumptions that an individual with a disability cannot be “qualified” to work; in fact, the purpose of the law is to eradicate such presumptions. In addition, “in determining whether a person meets the SSA definition of disability, the SSA looks at the customary requirements of jobs as usually performed in the national economy without focusing on the essential functions of a particular position.”

Perhaps the most significant difference between the two statutory
disability schemes is the notable absence from the SSA’s definition of
any consideration of whether the person could work with reasonable ac-
commodation. An employee with a disability could be qualified to work
under the ADA if given a reasonable accommodation. Under the Social
Security Act, a person is entitled to disability benefits only if his im-
pairments are “of such severity that he is not only unable to do his pre-
vious work but cannot, considering his age, education, and work expe-
rience, engage in any other kind of substantial gainful work which exists
in significant numbers] in the national economy.”

Meanwhile, the ADA’s requirement that an employer make
“reasonable accommodations,” requires that an employer consider op-
tions, such as modifying existing job functions to create a job suitable
for a particular employee with a disability. Since the frequency with
which such suitable jobs may exist in the national economy could be
relatively low, a person with a disability, who would be able to perform
the essential functions of such a job with reasonable accommodations,
would still be disabled and therefore able to receive benefits under the

305. See supra note 90 and accompanying text; see also Overton, 977 F.2d at 1196 (“[T]he SSA may award disability benefits on a finding that the claimant meets the criteria for a listed dis-
ability, without inquiring into his ability to find work within the economy.”).
306. See 29 C.F.R. § 1630.2(m) (1996); see also School Bd. v. Arline, 480 U.S. 273, 287
(1987) (noting that an “individualized inquiry” into whether a person is “otherwise qualified” un-
der the Rehabilitation Act is essential to the “goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear”).
308. EEOC Guidance, supra note 32, at 160.
310. See 42 U.S.C. § 12111(9).
Therefore, an individual may be eligible for social security disability benefits due to the small number of jobs that exist in the national economy which are designed to accommodate his particular needs, but due to the fact that a particular job could be restructured to accommodate such needs, the individual is still within the class of people Congress intended to protect when it enacted the ADA.\textsuperscript{311}

The SSA also recognizes that the ADA’s definition of “qualified individual with a disability” is not synonymous with “disability” under the Social Security Act.\textsuperscript{312} The SSA has acknowledged that whether a claimant may be able to work with accommodations is not relevant to its disability determination.\textsuperscript{313} Accordingly, a person who meets the Social Security Act’s statutory definition of “disability” is not necessarily totally unable to work. In fact, through work incentive programs, recipients of disability benefits are encouraged to attempt to get back into the workforce and can receive benefits for a trial period while making the transition into employment.\textsuperscript{314}

2. Significant Factual Circumstances May Create Disputed Factual Issues

In addition to the definitional and analytical differences between disability benefits standards and the ADA, relevant factual circumstances in individual cases may create disputed factual issues warranting a determination by the fact finder of whether the plaintiff is “otherwise qualified.” These factors include outstanding issues of reasonable accommodation, timing questions as to when the plaintiff sought disability benefits or sought to return to work, the possibility of an improvement in condition, and whether the plaintiff was working at the time of the

\begin{itemize}
\item \textsuperscript{312} See id.; see also Memorandum from the Associate Commissioner, Social Security Administration, Americans with Disabilities Act of 1990—Information, reprinted in 15 SOC. SECURITY F. 8, 9 (1993) (hereinafter ADA Memorandum) (noting that the ADA and Social Security Act have different purposes and bear no direct relationship to each other and stating that the SSA’s determination whether there are available jobs that the claimant can do is based on broad vocational patterns and not on whether a particular employer is willing to make accommodations for a given individual).
\item \textsuperscript{313} EEOC Guidance, supra note 32, at 161 n.44 (referencing the ADA Memorandum, supra note 312).
\item \textsuperscript{314} See id. at 160-61.
\item \textsuperscript{315} See 20 C.F.R. § 404.1592(a) (1997); see also Charles G. Scott, Disabled SSI Recipients Who Work, 55 SOC. SECURITY BULL. 26, 36 (1992) (“Enabling beneficiaries with disabilities to achieve a better and more independent lifestyle by helping them take advantage of employment opportunities is one of SSA’s highest priorities.”).
\end{itemize}
alleged discrimination and applied only after termination or deterioration of condition.

In its *Enforcement Guidance*, the EEOC instructs its investigators to examine the following issues "when deciding what, if any, weight to give to [a claimant's] representations made while pursuing disability benefits": 316 (1) "the definitions of terms such as 'disability,' 'permanent disability,' 'total disability,' 'inability to work,' etc. under the relevant statute" or insurance policy (i.e., whether these terms involve an inquiry into that applicant's ability to perform the essential functions of a particular job as opposed to general kinds of work, or a presumption of disabled status based upon a listed condition, or take into account reasonable accommodation); (2) "the specific content of the representations [(in particular, whether they were qualified)], who made them, and the purpose for which they were made"; (3) "whether the representations are in [the claimant's] own words"; (4) "when the representations were made, the period of time to which they refer, and whether [the claimant's] physical or mental condition has changed since the representations were made"; (5) "whether [the claimant] was working during the period of time referred to as a period of total disability"; (6) "whether the employer suggested that [the claimant] apply for benefits"; (7) "whether [the claimant] asked for and was denied a reasonable accommodation"; (8) "when the employer learned of the representations"; and (9) "other relevant factors, such as advances in technology or changes in the employer's operations that may have occurred since representations were made that may make it possible for [the claimant] to perform the essential functions of the position, with or without reasonable accommodation." 317

Any of these factors may explain a perceived inconsistency, or at a minimum, pose a genuine issue of material fact as to whether a plaintiff, even having applied for or received disability benefits, can be "qualified" to assert an ADA claim as to the particular position at issue. A number of courts have denied summary judgment in the employer's favor when one or more of these circumstances are present, reasoning that contradictions between representations of total disability in the benefits process and trial evidence are matters for the trier of fact. 318

317. *Id.* at 186-87.
C. Practical and Policy Considerations

A final and important consideration in determining the propriety of precluding ADA claims involves examining the practical and policy implications of such practice.

1. The Untenable Choice

First, the practical impact of barring claims by applicants or recipients of total disability benefits is simply to eliminate their recourse to pursue statutory rights against disability discrimination under the ADA. Under this course, disabled individuals confront the "untenable position" of whether to pursue relatively immediate disability benefits needed for financial sustenance or to wait and "gambl[e] on the uncertainty of an ADA lawsuit." Which road many will take given this choice is not difficult to deduce.

2. Disability Policy Goals Undermined

Whether this "untenable" result is warranted must be weighed against a comparison of the public policy goals of both statutes. The ADA seeks to eradicate

the continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

It is expected that the ADA will provide the opportunity for individuals with disabilities, rather than continually receiving government disability benefits, to become financially self-sufficient through working. Although a unique purpose of social security disability benefits is to keep disabled individuals from becoming indigent, the Social Security Act

1141 (N.D. Ill. 1994).

319. It is estimated that there are approximately forty-three million Americans with disabilities. See 42 U.S.C. § 12101(a)(1) (1994). Approximately 500,000 of them are social security disability benefits recipients who are properly and legally working while receiving benefits. See Scott, supra note 315, at 30 & tbl.5.


323. See id. § 12101(a)(8). The ADA was passed with the assumption that many individuals on the disability rolls can, with assistance, obtain employment. See ADA LEGISLATIVE HISTORY, supra note 8, at 107, 305.
and the ADA share the common goal of promoting work activity among disabled individuals, as evidenced by the work-incentive provisions which permit a beneficiary to receive benefits while working.  

Allowing disabled individuals to avail themselves of the rights and protection of both programs, as a transition or as a safety net when unlawfully discriminated against, seems consistent with policy goals of both programs. No policy objectives would be advanced by precluding disabled individuals from asserting their rights to a discrimination-free employment based upon prior application or receipt of disability benefits.

3. Unlawful Discrimination Goes Unredressed

Another troubling risk in dismissing ADA claims in these scenarios is that the merits of the underlying discrimination claim are never reached and possible unlawful discrimination goes unredressed. The ADA was passed due to a concern that individuals who are discriminated against "on the basis of disability have often had no legal recourse to redress such discrimination." Private lawsuits play a critical role in the enforcement of the ADA. Precluding disability discrimination claims, regardless of the merits of the underlying claim, simply because of statements made on disability benefit applications, permits an employer to escape liability even if it unlawfully discriminated or denied a reasonable accommodation to an otherwise qualified employee and thus undermines the enforcement objectives of the ADA.

4. The Future

The differences in definitional standards are not the only reason judicial estoppel may be inappropriate in these cases. It is possible that benefits programs, including those created by the Social Security Act, may amend their statutory definitions of "disability" to incorporate issues of reasonable accommodations and individualized inquiries and thus more closely align with the ADA's definitions. Arguably this

325. See id. at 284 ("[E]stopping [plaintiff] . . . would undermine the legislative policy of providing the disabled with both protection against destitution and a genuine opportunity to participate fully in the job market.").
327. See, e.g., Fredenburg v. County of Contra Costa, No. C-96-3136-VRW, 1997 U.S. Dist. LEXIS 5564, at *7 (N.D. Cal. Apr. 18, 1997) (acknowledging that the defendant arguably violated the ADA by imposing upon the plaintiff a broad medical examination, yet this discrimination went excused since the court ruled the plaintiff was judicially estopped from asserting she was qualified after having sought state disability benefits).
328. See Problems in the Social Security Disability Programs: The Disabling of America?:

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creates a more problematic situation. If the definitions under the benefits programs and the ADA are essentially identical, preclusion seems more warranted. But does it? Would this make the "untenable" choice inevitable? This more difficult question must be assessed in view of the practical differences and the policy objectives of the ADA and benefits programs.

Even with these proposed changes, the objectives of the ADA would seem to be seriously undermined. Granted, an individual who can perform his job, but instead seeks disability benefits and then turns around and sues the employer claiming disability discrimination ("double dipping"), 329 deserves little sympathy. Presumably, the factfinder will agree. But it cannot be assumed that all who pursue both forums act nefariously. An employee terminated or discriminated against because of disability may have difficulty finding new or comparable work and in the interim will likely need to choose the relatively immediate disability benefits, rather than gamble on an ADA lawsuit. Here the due process procedural protections underlying the "judicial proceeding" requirement, including a provision for notice to recipients of potential foreclosure of ADA claims, are extremely relevant.

Perhaps Congress needs to evaluate disability policies comprehensively. If the disability definitions are matched, then the SSA, as part of its disability determination process, should work with the employer to determine whether or not reasonable accommodations can be provided. However, the agency obviously does not have the resources to make detailed, individualized assessments in every case. 330

It may be easier for private disability plans and state worker compensation programs to incorporate the ADA disability and qualified individual definitions. These programs typically work more closely with the employer and can better identify the issues interfering with an em-

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330. "The average [SSA] claim takes one and a half years to process. The tremendous backlog has also, arguably, compromised the integrity and accuracy of disability determinations. There are no face-to-face interviews during these first steps of the determination process." Wilkinson, supra note 46, at 926 (footnote omitted).
ployee’s ability to work.331 If accommodation issues are explored at this stage, perhaps the employee can get back to work and avoid litigation. But the problem resurfaces if accommodations are wrongfully denied. The employee would be considered “totally disabled” under the benefits plan, but the need for recourse under the ADA is even more urgent. Under such circumstances, is the employee precluded from claiming he is “qualified” to state that claim? Again, unless the procedural protections at the benefits stage are sufficient to ensure the claimant was totally unable to perform the essential functions of the particular job, a per se bar to a subsequent ADA claim is inappropriate.

D. Using Disability Benefits as a Bridge Rather than a Fork in the Road—A Proposal

1. How Disability Representations Should Be Treated in ADA Cases

The foregoing discussion attempts to illustrate why representations made in the disability benefits process should not pose an automatic bar to a plaintiff’s ADA claim. However, a plaintiff’s representations of inability to work or receipt of disability benefits should not be ignored entirely.332 Courts declining to apply judicial estoppel, as well as the EEOC, recognize that such statements, although not dispositive, may be relevant to a proper disposition of a disability discrimination claim.333

331. Alternative dispute resolution is also encouraged under the ADA, but no formal mechanism is in place for individuals to pursue this possibly effective option. See 42 U.S.C. § 12212.

332. The court in Dockery v. North Shore Medical Center, 909 F. Supp. 1550 (S.D. Fla. 1995), stated:

The receipt of disability benefits in no way provides an unfair advantage to a plaintiff in an ADA case. To the contrary, such an admission can only hinder any attempt by a plaintiff to later claim that she was not totally disabled.

... The receipt of disability benefits is one more piece of evidence that a Court should take into account when determining whether, as a matter of law, plaintiff can survive a motion for summary judgment. Id. at 1559.

333. See Robinson v. Neodata Servs., Inc., 94 F.3d 499, 502 n.2 (8th Cir. 1996) (“At best, the Social Security determination [is] evidence for the trial court to consider in making its own independent determination.”); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (“The determination of disability may be relevant evidence of the severity of [plaintiff’s disability], but it can hardly be construed as a judgment that [he] could not do his job ...”); Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418, 1448 (N.D. Cal. 1996) (“[A] defendant can be given ... a full opportunity to use a plaintiff’s words or representations against the plaintiff at trial as evidence undermining the persuasive force of her claims in litigation.”); Hughes v. Reinsurance Group of Am., 957 F. Supp. 1097, 1101 (E.D. Mo. 1996) (“The fact that she applied for disability benefits is
These statements may be used at trial on cross-examination, as an evidentiary admission, or for impeachment purposes if viewed as inconsistent with specific assertions made by the plaintiff in the ADA litigation. Information relating to receipt of disability compensation may also be admitted at the relief stage when assessing damages in an ADA action.

The central issue in these cases is whether there exists a genuine issue of fact as to whether the plaintiff is "otherwise qualified." That is, is there sufficient evidence for the plaintiff to get to the jury on the question of whether he could perform the essential functions of his job with or without reasonable accommodation? In this respect, evidence that the plaintiff represented to be totally disabled, applied for, or received various disability benefits may be relevant to disprove that the plaintiff is "qualified" or not "disabled" under the ADA. In addition, the court merely evidence to be used in determining the outcome of [the qualified person] issue."); Morton v. GTE N. Inc., 922 F. Supp. 1169, 1181-82 (N.D. Tex. 1996) (considering representations made in the disability benefits context as a factor, but not a dispositive one, in deciding whether to grant a summary judgment motion), aff'd, 114 F.3d 1132 (5th Cir. 1997); EEOC Guidance, supra note 32, at 179-81.

334. For example, in Daffron v. McDonnell Douglas Corp., 874 S.W.2d 482 (Mo. Ct. App. 1994), the plaintiff applied for and received disability benefits. See id. at 483. After commencing his disability employment discrimination lawsuit, the plaintiff submitted an affidavit alleging that, despite the fact that he received disability benefits, "he was capable of performing his job duties, and was in fact performing those duties up until the date he was laid off." Id. at 487. The plaintiff was apparently advised by his physician to apply for full disability benefits because of his various medical limitations which would have made it difficult for him to obtain a new job. The court refused to grant summary judgment, finding that the plaintiff's representations in the disability process were not determinative as to the issue of whether the plaintiff is a qualified individual. Rather, the court found that such representations are "evidentiary admission[s] subject to explanation or impeachment by other evidence at trial." Id. The court noted that inconsistencies in the plaintiff's current and prior assertions are matters properly dealt with by the fact finder and are not proper grounds for summary judgment. See id. at 488.

When application of estoppel is inappropriate, the party's prior inconsistent position still may be used as evidence to impeach the party and attack his credibility. In this way, the judicial system is protected from the general damage resulting from inconsistent positions without resort to the extreme measure of judicial estoppel. Boyers, supra note 129, at 1255 (footnote omitted).

335. See Swanks v. Washington Metro. Transit Auth., 116 F.3d 582, 587 (D.C. Cir. 1997) ("Set-offs [based on previously awarded disability benefits] may provide a way to prevent windfall recoveries while guaranteeing disabled persons the full protection of both Acts."); Overton v. Reilly, No. 90 C 412, 1993 U.S. Dist. LEXIS 20890, at *27 (N.D. Ill. Aug. 13, 1993) (ordering, in the damages phase of trial, that the plaintiff's front pay award shall be offset by the amount of social security disability compensation the plaintiff will receive); cf. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362-63 (1995) (ruling that the amount of a plaintiff's back pay can be limited by the discovery of "after-acquired evidence of wrongdoing" where the employer can prove that it would have terminated the employee had it been aware of the wrongdoing at the time of discharge).
should consider the entire evidentiary record. Where the record also contains evidence that the plaintiff could have performed the essential functions of his job with or without a reasonable accommodation, a fact question is presented and summary judgment based upon the prior benefits representations is improper.

2. A Proposed Approach

Rather than treating evidence of a plaintiff’s disability representations as dispositive, courts in these cases should apply summary judgment standards but make an individualized assessment of whether an individual is qualified.\(^{336}\) Evidence should be admissible on the question of whether the plaintiff establishes a prima facie ADA claim, but in determining whether the plaintiff is asserting inconsistent positions or otherwise acting in bad faith, a closer individualized examination is warranted.

Specifically, each court should make a detailed inquiry into the pertinent definitional standards and procedural measures applied in the disability benefits context. Second, the court should determine the specific context and circumstances under which the statements were made. In this respect, the court should consider the various factors proposed by the EEOC which may present a disputed issue of fact.\(^{337}\) Additionally, the essential functions of the position in question should also be determined and considered with evidence of the plaintiff’s capabilities to perform the particular job with or without reasonable accommodation. Finally, in recognition of the principles underlying the judicial estoppel doctrine, any specific evidence of fraud, bad faith, or intent to mislead (such as a history of work-avoidance, feigned injuries, etc.) should be examined and balanced accordingly. As in any ADA case, the court should make an individualized fact determination of whether the plaintiff is a “qualified individual with a disability,” considering evidence of the plaintiff’s alleged capabilities. Apparent contradictions between the plaintiff’s proffered evidence and information obtained during the benefits process are matters best left for the trier of fact and not proper grounds for summary judgment.

\(^{336}\) For a discussion of summary judgment standards, see supra notes 145-49 and accompanying text.

\(^{337}\) See EEOC Guidance, supra note 32, at 178-82; supra note 306 and accompanying text (noting that the ADA requires an individualized inquiry).
V. CONCLUSION: TRAVELING BOTH ROADS

The interplay between ADA claims and disability benefits is more complex than the judicial estoppel doctrine allows. Because of fundamental differences between disability benefits programs and the ADA, it is not necessarily inconsistent for a person to say he cannot work when applying for disability benefits, but that he could perform a particular job if provided a reasonable accommodation when filing an ADA claim. Moreover, it is unreasonable to expect a layperson who may be in desperate need to receive income from disability benefits to appreciate that by filing a disability benefits claim he is simultaneously waiving rights to assert an ADA claim in the future. Denying these individuals an opportunity to pursue their civil rights, by virtue of having pursued concomitant rights to disability benefits, is an unnecessarily harsh penalty.

Disabled individuals have made slow but steady progress into mainstream society. Through the political process, individuals with disabilities gained minimal guarantees of subsistence-level financial support. They also fought through societal stereotypes to attain basic civil rights, including the right to live and work in mainstream society. It would be unfair for the judiciary to take away what disabled individuals have achieved through the political process and rights Congress has specifically bestowed upon them. Forcing plaintiffs to choose, expressly or implicitly, by judicial estoppel, between rights to minimum financial security and vindication of rights against disability discrimination imposes a judicial roadblock that should be removed.