

**HAVING TOTAL DISABILITY AND CLAIMING IT, TOO:
THE EEOC'S POSITION AGAINST THE USE OF JUDICIAL
ESTOPPEL IN AMERICANS WITH DISABILITIES ACT CASES
MAY HURT MORE THAN IT HELPS**

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I. INTRODUCTION

A. *The Problem*

A growing trend among federal jurists has been to utilize the equitable doctrine of judicial estoppel to prevent claimants from representing that they are totally disabled for purposes of obtaining disability benefits and then suing for legal relief from discrimination related to the same disability under the Americans with Disabilities Act.¹ In February 1997, the Equal Employment Opportunity Commission (EEOC) announced its position with regard to the use of judicial estoppel and summary judgment in Americans with Disabilities Act² (ADA or the Act) cases where the claimant had previously made representations regarding his disability to disability benefit providers.³ The EEOC has suggested that such an equitable tool should never be a bar to claims under the ADA because of the Act's broad policy goals and the differences in the definition of "disability" found in other laws.⁴

The problem arises when an individual has declared that he is totally disabled and eligible to receive benefits based on a disability, whether it be through the Social Security Administration (SSA), a workers' compensation plan, or private disability insurer, and then sues for relief from discrimination under the ADA because of that same "total" disability. Can the employee later legitimately claim that he is a "qualified individual with a disability" under the terms of the ADA if he is receiving benefits based on an assertion of total incapacity to work? Many courts have answered that question in the negative.⁵

1. See Leo T. Crowley, *Disabilities Act Plaintiffs Face Estoppel Issues*, N.Y. L.J., Aug. 29, 1996, at 3.

2. 42 U.S.C. §§ 12101-12213 (1994).

3. ADA DIV., OFFICE OF LEGAL COUNSEL, EEOC, ENFORCEMENT GUIDANCE ON DISABILITY REPRESENTATIONS, EEOC 915.002 (Feb. 12, 1997) [hereinafter EEOC].

4. See EEOC, *supra* note 3, at 26.

5. See discussion *infra* Section II.

*B. The Americans with
Disabilities Act of 1990*

The ADA was passed in 1990 as a broad remedial law designed to prevent discrimination on the basis of handicap in the areas of employment and public accommodation.⁶ The relevant section of the Act for this Comment is Title I, which covers disability discrimination in employment.⁷ The Act prohibits employers from discriminating against individuals with disabilities⁸ and empowers the EEOC with regulatory and enforcement jurisdiction.⁹ The general rule prescribed by the Act is that no covered employer "shall discriminate against a qualified individual with a disability because of the disability" in employment, promotion, compensation and "other terms, conditions, and privileges of employment."¹⁰ An individual with a disability is afforded protection under the Act when he is found to be a "qualified individual with a disability"¹¹ and can prove that, absent discriminatory treatment by his employer, could have performed the "essential functions"¹² of his position with or without "reasonable accommodation."¹³

In order to present an ADA claim to a factfinder, a plaintiff must allege sufficient facts to create a prima facie case of discrimination under the *McDonnell Douglas*¹⁴ shifting burdens of

6. See 42 U.S.C. § 12101(b) (1994).

7. 42 U.S.C. §§ 12111-12117 (1994).

8. A disability with respect to an individual is defined as: "(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) being regarded as having such an impairment." *Id.* § 12102(2).

9. *Id.* § 12117.

10. *Id.* § 12112(a).

11. *Id.* § 12111(8) (defining a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

12. 42 U.S.C. § 12111(8) (1994) (determining "essential functions" to be those elements in the employer's judgment that are essential according to a written description prepared prior to hiring individuals into that job).

13. *Id.* § 12111(9) (defining "reasonable accommodation" as making facilities accessible and restructuring jobs, schedules, or procedures or providing other assistance for the individual with a disability); see also 29 C.F.R. § 1630.2(o) (1997) (defining what "reasonable accommodation" is not limited to).

14. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) ("The complain-

proof framework utilized in assessing allegations under a Title VII claim.¹⁵ A prima facie case of discrimination under the ADA requires that the plaintiff show that: (1) he is disabled within the meaning of the ADA; (2) he is qualified to perform the essential functions of his position with or without reasonable accommodation; and (3) that he has suffered adverse employment actions.¹⁶ To survive a motion for summary judgment and to shift the burden of production to the employer, the plaintiff's allegations must raise sufficient material factual disputes.¹⁷ A defendant will be able to obtain a favorable ruling on a motion for summary judgment under the Federal Rules of Civil Procedure¹⁸ if the facts, viewed in the light most favorable to the nonmoving party, do not provide proof of all of the elements of the charge.¹⁹ While summary judgment is an issue in this Com-

ant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

Should the defendant produce evidence of legitimate, nondiscriminatory reasons for the employment action, the burden of production returns to the plaintiff to prove that the reasons were pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993) ("If, on the other hand, the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. . . . The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture."). In most instances discussed in this Comment, this stage of analysis is never reached because the plaintiff is unable to produce sufficient evidence to present a prima facie case.

15. See *Olson v. General Elec. Astrospace*, 101 F.3d 947, 951 (3d Cir. 1996) ("It is now axiomatic that the familiar analytical framework first pronounced in *McDonnell Douglas Corp. v. Green* for resolution of suits brought under Title VII, also guides an analysis of claims brought under the ADA.") (citations omitted).

16. *Aucutt v. Six Flags Over Mid-America, Inc.* 85 F.3d 1311, 1318 (8th Cir. 1996).

17. FED. R. CIV. P. 56(c).

18. FED. R. CIV. P. 56 (motion for summary judgment).

19. *Celotex v. Catrett*, 477 U.S. 317, 322-23 (1986). In *Celotex*, the United States Supreme Court stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the

ment, the main focus is on the application of the doctrine of judicial estoppel against inconsistent prior statements or representations made by the plaintiff with regard to his subsequent declaration that he is a "qualified individual with a disability" protected by the Act.

C. *The EEOC's Enforcement Guidance*

The EEOC issued formal guidance to its investigators regarding the treatment of a charging party's claims when prior representations have been made about the party's disability.²⁰ While this document is designed for internal use and direction of EEOC investigators, items such as this can have a persuasive effect on courts looking for direction in the agency's area of expertise.²¹ The EEOC maintains that, while some prior statements may be relevant to the determination of whether the individual is protected under the Act, they are never a bar to action or wholly determinative of the situation.²² The EEOC reiterates that "representations made in connection with an application for disability benefits are not dispositive of whether a person is a 'qualified individual with a disability' for purposes of the ADA,"²³ and instructs investigators to conduct "assessment[s] of whether an individual with a disability is qualified . . . based on the capabilities of the individual with a disability at the time of the employment decision."²⁴ Additionally, the agency outlines relevant considerations the investigator is to make when factoring prior representations into an ADA claim and determining whether the charging party's claim should be pursued.²⁵ The EEOC's position is that "representations, and the application for disability benefits, do not bar the filing of an ADA charge, nor

nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. See also FED. R. CIV. P. 50(a) (motion for judgment as a matter of law).

20. See EEOC, *supra* note 3.

21. See *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

22. EEOC, *supra* note 3, at 26, 30, 37.

23. EEOC, *supra* note 3, at 37-38.

24. EEOC, *supra* note 3, at 7.

25. EEOC, *supra* note 3, at 37-38.

should they prevent an investigator from recommending a cause determination²⁶ if the evidence supports such a determination.²⁷

This Note will discuss the elements and policy justification for application of judicial estoppel in the federal court system,²⁸ as well as some of the recent applications of this equitable doctrine. Part III will outline the EEOC's recent policy statement and its enforcement provisions. Finally, the implications of the new guidelines on the use of judicial estoppel and its appropriateness will be analyzed.

II. THE FEDERAL COURTS' USE OF JUDICIAL ESTOPPEL IN ADA CLAIMS

Federal courts have recognized two different approaches when barring an ADA claimant from "speak[ing] out of both sides of her mouth with equal vigor and credibility before [the] court"²⁹—judicial estoppel and motions for summary judgment.³⁰ Based on the mutual exclusivity of representations made by the claimant, federal courts are estopping the claimant from asserting a contrary position in a later proceeding.³¹ Judi-

26. A cause determination is a finding by the EEOC that "reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring under title VII or the ADA." 29 C.F.R. § 1601.21(a) (1997). The EEOC will pursue compliance with the law and may sue accordingly. 29 C.F.R. § 1691.9 (1997).

27. EEOC, *supra* note 3, at 38.

28. This Comment will focus on the use of the doctrine of judicial estoppel in the federal court system. State courts' usage of the doctrine is beyond the scope of this Comment.

29. *Reigel v. Kaiser Found. Health Plan*, 859 F. Supp. 963, 970 (E.D.N.C. 1994); *see also Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597 (9th Cir. 1996); *Dockery v. North Shore Med. Ctr.*, 909 F. Supp. 1550 (S.D. Fla. 1995).

30. *See McNemar v. Disney Store, Inc.*, 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997); *August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992); *but see Marvello v. Chemical Bank*, 923 F. Supp. 487 (S.D.N.Y. 1996) (denying defendant's 50(a) motion for judgment as a matter of law under similar circumstances).

31. *See Bollenbacher v. Helena Chem. Co.*, 934 F. Supp. 1015, 1026 (N.D. Ind. 1996); *see also Reiff v. Interim Personnel, Inc.*, 906 F. Supp. 1280, 1291 (D. Minn. 1995) (granting summary judgment for defendant when plaintiff could not raise one element of his prima facie case because his assertions were mutually exclusive where he represented to the disability insurance carrier that he could not perform the "substantial and material duties of his job" and then claimed that he was a

cial estoppel is a technical rule utilized at the discretion of the court to meet the broad public policy of preventing manipulation of the court system.³²

The more commonly utilized tool for preventing claimants from making inconsistent statements is the granting of summary judgment for the defendant in cases where the plaintiff is unable to make out a prima facie case of discrimination under the *McDonnell Douglas* framework.³³ In that instance, the court will determine that the claimant is unable to validly assert that he is a "qualified individual with a disability" eligible for protection under the Act when he has previously sworn elsewhere that he is totally disabled from performing the essential functions of his job in order to receive disability benefits.³⁴ The failure of the claimant to show that he is a "qualified individual with a disability" precludes him from presenting his claim to a jury because he cannot make out a prima facie case under the ADA.³⁵

"qualified individual with a disability" for purposes of the ADA).

32. *Dockery*, 909 F. Supp. at 1558.

33. See *supra* notes 14 & 19; see also discussion *infra* Section II.B.2.

34. See *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1483 (9th Cir. 1996) (holding that plaintiff did not present a genuine issue of fact as to her status as a "qualified individual with a disability"); *August v. Offices Unlimited, Inc.*, 981 F.2d 576, 584 (1st Cir. 1992) (holding that no genuine issue of material fact existed as to whether plaintiff was capable of performing the essential functions of his job); *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768, 772 (8th Cir. 1987) (finding no issue of genuine fact as to plaintiff's status as a qualified handicapped individual under § 504 of the Rehabilitation Act).

Some courts avoid the use of judicial estoppel by finding that the plaintiff is unable to assert a prima facie case of discrimination under the ADA. See *Kennedy*, 90 F.3d at 1481 n.3; *Robinson v. Neodata Serv., Inc.*, 94 F.3d 499, 502 n.2 (8th Cir. 1996) (affirming the district court's ruling that plaintiff was unable to prove that she was a disabled person covered under the Act because she was not discriminated against because of her "disability").

The Tenth Circuit does not recognize the doctrine of judicial estoppel; accordingly, courts in that Circuit seeking to prevent plaintiffs from asserting inconsistent positions look to the prima facie elements to exercise their discretion to preclude individuals from asserting inconsistent positions. See *EEOC v. MTS Corp.*, 937 F. Supp. 1503, 1511 (D.N.M. 1996) (noting that the court would have declined to apply the doctrine of judicial estoppel in this case even if it could because plaintiff raised genuine issues of fact regarding his status as a "qualified individual with a disability").

35. See *Kennedy*, 90 F.3d at 1482; see generally *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

A. *The Doctrine of Judicial Estoppel*

1. *Elements.*—Judicial estoppel, which is also known as the preclusion of inconsistent positions doctrine, seeks to block a party from gaining a litigation advantage by taking one position and then later asserting an incompatible position in the same or a related proceeding.³⁶ The doctrine “is applied to the calculated assertion of divergent sworn positions . . . and is designed to “prevent parties from making a mockery of justice by inconsistent pleadings.”³⁷ It prohibits a party from asserting such contrary positions in the “same or related proceedings” to its advantage.³⁸ However, the “theories that have evolved to avoid [the risk of exposing litigants to multiple liability] by precluding assertion of inconsistent positions do not draw directly from the fact of adjudication. Instead, they focus on the fact of inconsistency itself.”³⁹

Judicial estoppel is “an instrument of the courts, not of the parties,” and is invoked by the court at its discretion as the case demands.⁴⁰ While the elements of the doctrine differ from circuit to circuit,⁴¹ the common essential elements are: (1) the allegedly inconsistent statement was made under oath in a prior proceed-

36. See *Rissetto*, 94 F.3d at 600.

37. *Dockery*, 909 F. Supp. at 1558 (quoting *American Nat'l Bank v. Federal Deposit Ins. Corp.*, 710 F.2d 1528, 1536 (11th Cir. 1983)).

It is significant to note here that two courts have addressed the issue of alternative pleadings under the provisions of FED. R. CIV. P. 8(e). The District Court for the Southern District of New York noted that courts should apply judicial estoppel with caution and that the tension with the alternative pleading provisions of FED. R. CIV. P. 8(a) and (e) requires careful evaluation by the courts because “there may be legitimate reasons for a plaintiff to take apparently inconsistent positions in different proceedings.” *Mohamed v. Marriott Int'l, Inc.*, 944 F. Supp. 277, 281 (S.D.N.Y. 1996). However, the District Court for the Northern District of Indiana found such an argument to be unpersuasive and agreed with the defendant that the pleadings were not alternatives, but rather mutually exclusive ideas. *Bollenbacher*, 934 F. Supp. at 1026.

38. *Lawrence v. United States*, 629 F. Supp. 819, 822 (E.D. Pa. 1985); see also *Rissetto*, 94 F.3d at 600 (defining judicial estoppel).

39. WRIGHT & MILLER, *FEDERAL PRACTICE & PROCEDURE* § 4477 (1981) (citation omitted) [hereinafter WRIGHT & MILLER].

40. *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215, 221 (D.S.C. 1996), *aff'd*, No. 96-2784, 1997 WL 786272 (4th Cir. Dec. 23, 1997); see also WRIGHT & MILLER, *supra* note 39, § 4477.

41. *Rissetto*, 94 F.3d at 601 (outlining the majority and minority positions of the circuits).

ing; (2) the inconsistent statement was adopted in the prior proceeding; and (3) the party is now asserting a position inconsistent with the first.⁴² The issue of whether the party asserting the inconsistent statement prevailed in the prior proceeding is another one that has split the courts.⁴³

In the context of ADA cases, the doctrine of judicial estoppel has been used to prevent a plaintiff from taking positions that are "fundamentally at odds with the position which she has taken for purposes of obtaining . . . disability . . . benefits."⁴⁴ One of the main criticisms of the use of judicial estoppel in ADA cases is that the claimant often makes her statement in a setting that cannot be called a tribunal. In both SSA and workers' compensation claims, the claimant may have made statements regarding her disability under oath and witnesses may have been presented to testify as to the claimant's disability.⁴⁵ In these instances, the quasi-judicial nature of the administrative hearings is sufficient to warrant deferral to the first element of judicial estoppel requiring that the inconsistent statement be made under oath in a prior proceeding.⁴⁶ In other cases, the

42. See *Rissetto*, 94 F.3d at 601; see also *Dockery*, 909 F. Supp. at 1558 (defining the two elements of judicial estoppel in the 11th Circuit as (1) "the allegedly inconsistent pleadings were made under oath in a prior proceeding" and (2) "such inconsistencies must be demonstrated to have been calculated to make a mockery of the justice system"); *Smith v. Dovenmuehle Mortgage, Inc.*, 859 F. Supp. 1138, 1141 (N.D. Ill. 1994) ("Judicial estoppel consists of three elements: the later position must be clearly inconsistent with the earlier position, the facts at issue must be the same in both cases, and the party to be estopped must have been successful in convincing the first court to adopt its position.").

The Third Circuit Court of Appeals has a two-part initial inquiry in cases where inconsistent positions are alleged: "(1) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith—i.e., 'with intent to play fast and loose with the court?'" *McNemar*, 91 F.3d at 618 (citation omitted).

43. *Rissetto*, 94 F.3d at 601 (describing the majority view that the doctrine is inapplicable unless the inconsistent statement was actually adopted in the earlier litigation and the minority view that the change in position, even though a losing one in the prior litigation, is still violative of the policy it supports); *Muellner v. Mars, Inc.*, 714 F. Supp. 351, 357 (N.D. Ill. 1989) (noting Illinois' adoption of the majority view that the litigant must have been successful in the prior proceeding).

44. *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 554 n.4 (D. Kan. 1995).

45. See generally *Eback v. Chater*, 94 F.3d 410 (8th Cir. 1996) (SSA claims hearings); *Oswald v. Laroche Chem., Inc.*, 894 F. Supp. 988 (E.D. La. 1995) (workers' compensation claims hearings).

46. See *Rissetto*, 94 F.3d at 604 ("many cases have applied the doctrine where

SSA or workers' compensation agency merely adopts the claimant's assertions on claim forms signed under penalty of perjury or criminal action for making false statements to the agency.⁴⁷ These cases are troublesome because there is less clarity as to the claimant's understanding of the consequences of making a false statement, as well as a lack of full airing of the issues involved.

The scenario wherein application of estoppel is least clear involves disability insurance claims where no government entity is generally involved and the terms of the disability are contractually defined.⁴⁸ There is often a requirement of honesty when signing such claims, but little threat of criminal action.⁴⁹ There may be no determination consistent with the ADA's definition of a "qualified individual with a disability" as it relates to the individual's ability to do the essential functions of the job.⁵⁰ Rather, the insurance carrier or disability provider may make a wholesale adoption of the individual's disability based on an inability to do some portion of his job due to the disability.⁵¹

the prior statement was made in an administrative proceeding, and we are not aware of any case refusing to apply the doctrine because the prior proceeding was administrative rather than judicial"); see also *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215, 221 (D.S.C. 1996), *aff'd*, No. 96-2784, 1997 WL 786272 (4th Cir. Dec. 23, 1997) ("In order for the doctrine to apply, administrative and quasi-judicial proceedings suffice; the prior litigation need not actually transpire in a court because the truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.") (citations and internal quotation marks omitted).

Contrast these views with the court's statement in *Dockery* that "[j]udicial estoppel, as this court understands it, should not be applied to oaths undertaken in administrative filings, as in these ADA cases." *Dockery*, 909 F. Supp. at 1558. See also *Baker v. Asarco, Inc.*, No. CIV-94-1045-PHX-ROS, 1995 WL 795663, at *8 n.2 (D. Ariz. Nov. 9, 1995), *aff'd*, 121 F.3d 714 (9th Cir. 1997).

47. See *Muellner*, 714 F. Supp. at 358 ("The Disability Report [submitted to the Social Security Administration], which contained numerous representations that [plaintiff] was disabled, was not signed under oath, but was signed by [her] with full knowledge of the penalties which would result from misrepresentation.").

48. See JAMES M. NELSON, *HEALTH & WELFARE BENEFIT PLANS: A LEGAL GUIDE TO PLANNING & MANAGEMENT* § 2.06 (1996) [hereinafter NELSON].

49. Courts have suggested that insurance or other fraud investigations could result from the plaintiffs' inconsistent positions. See *Miller v. U.S. Bancorp*, 926 F. Supp. 994, 1000 (D. Or. 1996); *Reigel*, 859 F. Supp. at 969 n.7; *Muellner*, 714 F. Supp. at 359.

50. See NELSON, *supra* note 48, at 2-13.

51. See *August*, 981 F.2d at 581 (applying the estoppel doctrine even though the definition of "total disability" under the terms of the insurance policy were not in

In many cases, the application of the essential elements of judicial estoppel are appropriate. The ADA plaintiff may have previously asserted and proved through medical evidence that he was totally unable to perform the essential functions of his job in order to receive benefits.⁵² The successful recipient of benefits under such a regime should not be allowed to utilize the courts to rebut his previous assertions by granting him an opportunity to prove at a later date that he was indeed capable of performing those essential functions. To do so would frustrate the important public policies behind the doctrine; maintaining the integrity and fairness of the federal court system.

2. *Policy.*—The policy behind the judicial estoppel theory is the preservation of the integrity of the court system by preventing plaintiffs from taking self-serving⁵³ and inconsistent positions in subsequent hearings.⁵⁴ “Courts do not relish the prospect that an adept litigant may succeed in proving a proposition in one suit, and then succeed in proving the opposite in a second.”⁵⁵ The use of the doctrine is designed to avoid “unfair results and unseemliness.”⁵⁶ In fact, the Eleventh Circuit has a

the record based upon the general insurance definition of “total disability” as in ability to perform a substantial part of the ordinary duties of a job); see also NELSON, *supra* note 48, at 2-13.

52. See *Rissetto*, 94 F.3d at 605-06; *Reigel*, 859 F. Supp. at 970.

53. See *Kennedy*, 90 F.3d at 1481 (noting that plaintiff's deposition testimony in support of her ADA claim that she was not totally disabled contradicted her previous representations on her Social Security claim forms and is “self-serving”).

54. See *Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 555 (D. Kan. 1995). In that case the court granted summary judgment for the defendant employer after plaintiff sought and received both SSA benefits and disability insurance benefits based on her Multiple Sclerosis condition after she was fired for inadequate performance. The court noted that:

Plaintiff, her counsel, and her physician have consistently represented that as of that date, because of injury or sickness, she has been unable to perform each material duty of her regular occupation. Having collected substantial benefits, based on these unambiguous and seemingly informed representations, plaintiff is estopped from now claiming that she could perform the essential functions of her position.

Id. The court was unconvinced by her argument that allowing an employer to defend its unlawful termination by asserting that the disabled employee was unable to perform her job subverted the meaning and intent of the ADA's remedial purpose. *Id.* at 556.

55. WRIGHT & MILLER, *supra* note 39, § 4477, at 779.

56. WRIGHT & MILLER, *supra* note 39, § 4477, at 779.

policy element in its definition of judicial estoppel requiring that the "inconsistencies must be demonstrated to have been calculated to make a mockery of the justice system."⁵⁷ The doctrine should not be applied when the party asserting the contrary position has made an "unthinking or confused blunder" but should be used in cases of "cold manipulation."⁵⁸

The main policy consideration is the integrity of the court system. "Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts" and "is intended to protect the dignity of the judicial process."⁵⁹ It is also designed to prevent the manipulation of the process by "chameleonic litigants."⁶⁰ This is a "consistently clear and undisputed jurisprudential purpose" of the doctrine.⁶¹

Additionally, the courts are concerned about issues of fairness when applying the doctrine. 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 bring an ADA claim" is a factor that supplements the concern over judicial integrity.⁶² Allowing such contrary positions is unfair to the defendant who has already defended one claim.⁶³ This unfairness would undermine the reputation of the judicial system if allowed to persist.

The policy goals sought to be effectuated by allowing the courts discretionary power to estop parties from asserting inconsistent positions are important to the continued efficacy of the judiciary as a whole. If parties are allowed to speak out of both sides of their mouths and succeed, the honor of the federal justice system will be in jeopardy. The courts are designed to uphold and protect the essential fairness of previous proceedings, and allowing parties to assert contradictory statements will undermine the finality of all previous judgments.

57. *Dockery v. North Shore Med. Ctr.*, 909 F. Supp. 1550, 1558 (S.D. Fla. 1995).

58. *Dockery*, 909 F. Supp. at 1558.

59. *Rissetto*, 94 F.3d at 601 (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

60. *Smith*, 859 F. Supp. at 1141 (citation omitted).

61. *McNemar*, 91 F.3d at 616.

62. *Bollenbacher*, 934 F. Supp. at 1028.

63. See *Hindman*, 947 F. Supp. at 221; *Dockery*, 909 F. Supp. at 1558.

An outgrowth of the ideas of finality and fairness relate to the policy behind the ADA and its effectiveness as a tool to eliminate discrimination. If disabled individuals are allowed to assert contradictory positions regarding their ability to perform the essential functions of their jobs, the legitimacy of all disability claims will become suspect.⁶⁴ The forums in which they make such statements are not always relevant. Allowing parties to make apparently inconsistent statements in court after they have asserted a different position in order to receive disability benefits perpetuates the perception of anti-discrimination laws as tools for clever plaintiffs. Complete refusal to estop plaintiffs from making discrepant representations will make it appear that courts approve of plaintiffs returning to the well for a second drink by relying on these inconsistent positions.

B. Application of Judicial Estoppel in the Federal Courts

1. Direct Application of the Doctrine in ADA Cases.—There are several instances where the application of judicial estoppel is clearly called for. For instance, where the claimant has asserted before a judicial tribunal or quasi-judicial forum that she is totally disabled in order to receive disability benefits, she should not be able to successfully sue her employer for discrimination under the ADA by claiming that she could have been reasonably accommodated as a “qualified individual with a disability.” In *Rissetto v. Plumbers and Steamfitters Local 343*,⁶⁵ the plaintiff filed for and received workers’ compensation benefits based on her total temporary disability.⁶⁶ She then filed suit against her employer after settling her workers’ compensation case claiming she was constructively discharged for discriminatory reasons.⁶⁷ The court never reached the discharge issue because they found that, based on her previous assertions regarding her inability to perform the essential functions of her job, she was estopped from presenting the elements of a prima facie case as a “quali-

64. See *Garcia-Paz*, 873 F. Supp. at 555-56.

65. 94 F.3d 597 (9th Cir. 1996).

66. *Rissetto*, 94 F.3d at 598.

67. *Id.*

fied individual with a disability.⁶⁸ Reasoning that she could not perform her job adequately if she had a total inability to work, the court affirmed the district court's grant of summary judgment based on the estoppel theory.⁶⁹

Another type of case where the doctrine is appropriately applied is where the plaintiff has made assertions under penalty of perjury regarding his disability status.⁷⁰ For example, in *McNemar v. Disney Store, Inc.*,⁷¹ the circuit affirmed the district court's use of judicial estoppel in a discriminatory discharge case under the ADA.⁷² The plaintiff, who was HIV positive, was accused of wrongdoing that was punishable with discharge, but did not reveal his health status until his termination interview.⁷³ Following his discharge, McNemar applied for state and federal disability benefits as well as deferral of educational loans, asserting that he was disabled by AIDS and unable to perform the regular duties of his job.⁷⁴ The district court estopped him from claiming that he was a "qualified individual with a disability" based on these prior statements made under penalty of criminal sanction.⁷⁵ McNemar argued that AIDS was a "presumptive disability" under the SSA and that he could still perform essential functions of his job to qualify for protection under the ADA.⁷⁶ The circuit court disagreed with his argument stating that "[w]hatever the Social Security Administration's criteria for eligibility for disability benefits, the fact remains that McNemar told the U.S. Government and the states of New Jersey and Pennsylvania under penalty of perjury that he was physically unable to work."⁷⁷

Situations where application of judicial estoppel is less clear

68. *See id.* at 606.

69. *Id.*

70. For additional cases that provide examples of this situation, see *Taylor v. Food World, Inc.*, 946 F. Supp. 937 (N.D. Ala. 1996); *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215 (D.S.C. 1996), *aff'd*, No. 96-2784, 1997 WL 786272 (4th Cir. Dec. 23, 1997); *Bollenbacher*, 934 F. Supp. at 1015; *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995).

71. 91 F.3d 610 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 958 (1997).

72. *McNemar*, 91 F.3d at 620, 623.

73. *Id.* at 614-15.

74. *Id.* at 615-16.

75. *Id.* at 616.

76. *Id.* at 620.

77. *McNemar*, 91 F.3d at 620.

include those where the disability policy does not define "total disability" in a way that would preclude an ADA claim, but the claimant has either exerted excessive effort in applying for benefits or has received substantial benefits.⁷⁸ Some courts have found the exertion of effort by the claimant to receive disability benefits to be indicative of the inconsistency of the two positions.⁷⁹ Others have noted that the continued receipt of benefits based on the previous representations regarding disability is proof that the claimant considers himself disabled.⁸⁰ In these situations, the court should carefully evaluate whether the effort of the claimant or receipt of benefits is so overwhelming as evidence that the ADA claim should be precluded because there is no legitimate way that he can now assert his ability to work with or without reasonable accommodation.

There are, however, cases where the application of the doctrine is not appropriate based on the facts presented. Where a plaintiff has recovered sufficiently and can perform the essential functions of his position, genuine questions of fact arise. The plaintiff in *Smith v. Dovenmuehle Mortgage, Inc.*,⁸¹ was battling a serious AIDS-related illness when he was fired for an alleged failure to inform his supervisors of a work backlog.⁸² He filed for SSA disability benefits and long-term disability benefits (which were denied) following his termination, asserting that he was suffering from AIDS and unable to work.⁸³ After he began receiving the SSA benefits, he recovered sufficiently to work

78. See *Dockery*, 909 F. Supp. at 1558 (refusing to apply judicial estoppel merely because plaintiff received benefits based on prior representations, but granting summary judgment based on plaintiff's failure to present a prima facie case); see also *Reigel*, 859 F. Supp. at 970; *August*, 981 F.2d at 581.

79. See *Reigel*, 859 F. Supp. at 969-70.

80. See *Buck v. Fries & Fries, Inc.*, 953 F. Supp. 896, 903 (S.D. Ohio 1996) ("He continues to receive SSA benefits to date. Every time the Plaintiff cashes a check from the SSA, he ratifies his assertion that he is disabled and unable to work, and reaps the benefits of such representations."); *Reiff v. Interim Personnel, Inc.*, 906 F. Supp. 1280, 1291 (D. Minn. 1995) ("[T]his Court cannot discount: 1) Reiff's acceptance of disability benefits; 2) the representations that he and his authorized physician made to NAL; and 3) the fact that the acceptance of the checks and the representations made are directly and indisputably at odds with his present claim.").

81. 859 F. Supp. 1138 (N.D. Ill. 1994).

82. *Smith*, 859 F. Supp. at 1139.

83. *Id.* at 1140.

again, and at the time of the disposition of the case, he was working full-time.⁸⁴ The court found that there was sufficient evidence and explanation for the prior statements to raise a factual question as to Smith's status as a "qualified individual with a disability" under the ADA and that since "no inconsistency present[ed] itself under these facts, the court conclude[d] that judicial estoppel [did] not apply."⁸⁵ The court was also concerned about the general policy consideration of an individual with a disability having to choose between his "right to seek disability benefits and his right to seek redress for an alleged violation of the ADA."⁸⁶ This complex case presents some of the reasons courts hesitate to apply the doctrine of judicial estoppel to prior statements made about a disability in ADA cases. It is precisely this type of case that must have persuaded the EEOC to issue its new guidelines.

As these cases show, there are times when it is appropriate to estop a plaintiff from asserting inconsistent positions. Where the plaintiff has consistently and vigilantly asserted that she is completely unable to work at all, she should be estopped from claiming that she can perform the essential functions of her job and will not be protected by the ADA.⁸⁷ The cases also show that there are times when it is appropriate to delve deeper into the facts in order to allow the plaintiff to distinguish between his prior statements and his current posture.⁸⁸ For example, when the disability definition differs significantly from ADA standards, or where the plaintiff has sufficiently recovered by the time the discrimination occurs to perform the essential functions of his job, the court should allow the plaintiff to have his day in court to prove his case.⁸⁹ Consistent and deliberate review of the factual postures of these cases will uphold both the policy of eliminating discrimination against disabled persons and the policy of protecting the integrity of the courts.

84. *Id.* at 1141.

85. *Id.* at 1143.

86. *Id.* at 1142.

87. *See Risetto*, 94 F.3d at 597.

88. *See Smith*, 859 F. Supp. at 1143.

89. *See Mohamed v. Marriott Int'l*, 944 F. Supp. 277, 282-83 (S.D.N.Y. 1996); *Smith*, 859 F. Supp. at 1140.

2. *Indirect Application.*—The use of summary judgment is an indirect application, in many cases, of the principles of the doctrine of judicial estoppel.⁹⁰ While the court may formally claim that the plaintiff is unable to assert genuine issues of material fact, the dicta of several courts indicate that the courts are also considering the defendant's estoppel argument as legitimate.⁹¹ Either way, the court is upholding its integrity by preventing individuals from utilizing the ADA to "extort" double damages based on contradictory and inconsistent positions in different proceedings.⁹²

An example of a case where a defendant's motion for summary judgment was granted because of the plaintiff's exertion to prove she was disabled is found in *Reigel v. Kaiser Foundation Health Plan*.⁹³ The plaintiff, a physician, was injured and unable to use her right arm.⁹⁴ She filed applications for disability benefits with her workers' compensation and disability carriers, as well as with the Social Security Administration, indicating that she was totally disabled.⁹⁵ These applications were accompanied by doctors' statements and prognoses that indicated she was unable to do the essential functions of her job.⁹⁶ The court found that she raised no genuine issue of fact that she was a "qualified individual with a disability" based on these statements.⁹⁷ The court expressed its concern that the plaintiff had

90. See *supra* note 30; see also *supra* note 31.

91. See *supra* notes 34-35; see also *Kennedy*, 90 F.3d at 1481 n.3 (declining to rely on the doctrine of judicial estoppel since the court found no genuine issue of material fact).

Conversely, where a court applied judicial estoppel against a plaintiff who had sworn that she was totally disabled, it also stated that had it not used the doctrine it would have still granted summary judgment for defendant employer based on the fact that plaintiff's prior statements of total disability precluded her claim that she was a "qualified individual with a disability." *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215, 225 (D.S.C. 1996), *aff'd*, No. 96-2784, 1997 WL 786272 (4th Cir. Dec. 23, 1997).

92. See *Rissetto*, 94 F.3d at 606 (holding that plaintiff is estopped from claiming she is a "qualified individual with a disability" after she has asserted for workers' compensation purposes that she is totally disabled because "[p]laintiff cannot be permitted to recover money twice on these inconsistent positions"); see also *McNeill v. Atchison, Topeka & Santa Fe Ry. Co.*, 878 F. Supp. 986 (S.D. Tex. 1995).

93. 859 F. Supp. 963 (E.D.N.C. 1994).

94. *Reigel*, 859 F. Supp. at 964.

95. *Id.* at 967-69, 971-73.

96. *Id.*

97. *Id.* at 976 ("In view of the totality of the evidence . . . the court is satisfied

made statements to establish her total disability for purposes of obtaining benefits and then rebutted the accuracy of such statements by claiming that she was qualified under the terms of the Act.⁹⁸

This case highlights one of the appropriate reasons for precluding plaintiffs from suing under the ADA in such situations. The court must view the plaintiff's representations made in support of an application for benefits as truthful.⁹⁹ If the court assumes that the statements were not truthful, then a fraud investigation, should be initiated.¹⁰⁰ Either the court should accept the statements as truthful on their face and find that plaintiff is not a "qualified individual with a disability," or the court should notify the appropriate authorities to instigate a fraud investigation after they have allowed plaintiff to rebut the previous representations.

However, this is not to say that the application of summary judgment to such cases is always appropriate. The Ninth Circuit's decision in *Kennedy v. Applause, Inc.*,¹⁰¹ shows the interchangeable problems of judicial estoppel and summary judgment. In that case, the circuit court affirmed the district court's grant of the defendant employer's motion for summary judgment because the plaintiff failed to allege a genuine issue of material fact with regard to her status as a "qualified individual with a disability."¹⁰² The plaintiff was terminated from her position as a sales representative after she requested an extension of her medical leave of absence for Chronic Fatigue Syndrome.¹⁰³ The district court held as a matter of law that the accommodation requested was unreasonable and granted summary judgment.¹⁰⁴ The district court noted that Kennedy's deposition testimony declaring that she could perform her job if given a "work-when-able" schedule "belied . . . her detailed and definite sworn state-

that plaintiff has failed to establish a *prima facie* case against the [defendant] under the Americans with Disabilities Act.") (emphasis in original).

98. *Id.* at 969 n.7.

99. *See Reigel*, 859 F. Supp. at 969.

100. *See Miller*, 926 F. Supp. at 1000; *Reigel*, 859 F. Supp. at 969 n.7; *Muellner*, 714 F. Supp. at 359.

101. 90 F.3d 1477 (9th Cir. 1996).

102. *Kennedy*, 90 F.3d at 1483.

103. *Id.* at 1479-80.

104. *Id.*

ments to the contrary on her disability benefit claim forms.¹⁰⁵ The circuit court's analysis of the case failed to consider the plaintiff's contentions of ability to perform the essential functions of her job based on the court's perception that "[h]er deposition testimony in this case in support of her ADA claim to the effect that she was *not* totally disabled is uncorroborated and self-serving . . . [and] flatly contradicts both her prior sworn statements and the medical evidence."¹⁰⁶ Nor did the fact that her Social Security Insurance claim was denied sway the court.¹⁰⁷

Kennedy presents an argument against the use of summary judgment in such cases because of the apparent inconsistencies between the record and the standards. The court foreclosed her arguments under the ADA based on her sworn statements on her application for disability benefits without considering that she failed to receive those benefits.¹⁰⁸

III. THE EEOC'S POLICY STATEMENT

On February 12, 1997, the Chairman of the Equal Employment Opportunity Commission, Gilbert F. Casellas, issued enforcement guidelines for EEOC investigators.¹⁰⁹ In this document, the EEOC outlined its opposition to the use of judicial estoppel and summary judgment in cases involving a claimant who had made representations to a disability benefit provider regarding his status as totally disabled.¹¹⁰ The purpose of the Enforcement Guidance is to explain why "representations made in other contexts about the ability to work are not necessarily a bar to an ADA claim."¹¹¹ It instructs EEOC investigators to consider specifically the definitions of disability, the content and context of representations, how the employer learned of the representations,¹¹² and other relevant factors to determine if the

105. *Id.*

106. *Id.* at 1481 (emphasis in original).

107. *Kennedy*, 90 F.3d at 1481.

108. *Id.*

109. EEOC, *supra* note 3.

110. See EEOC, *supra* note 3, at 26-37.

111. EEOC, *supra* note 3, at 2.

112. For considerations regarding the effect of after-acquired evidence on discrimi-

charging party still remains a "qualified individual with a disability" for protection under the Act.¹¹³ The EEOC concludes that the application for disability benefits does not "bar the filing of an ADA charge, nor should [it] prevent an investigator from recommending a cause determination if the evidence supports such a determination."¹¹⁴

A. *The Premise of the Enforcement Guidelines*

1. *Purposes and Standards are Fundamentally Different from Other Statutory Schemes.*—Under the terms of the ADA, an individual may invoke the Act's protection when he qualifies as an individual with a disability.¹¹⁵ The primary purpose of the ADA is to eliminate barriers that prevent individuals with disabilities from participating in "the economic and social mainstream of American life"¹¹⁶ and to provide those individuals equal opportunities in employment and other areas.¹¹⁷ Because the definitions of disability and "qualified individual with a disability" are broad to meet the remedial goals of the Act, they are not consistent with the same or similar terms in other laws and benefit programs.¹¹⁸ Therefore, according to the EEOC, representations made under other laws and programs are "not determinative of coverage under the ADA."¹¹⁹ The purposes and standards of the ADA are defined and assessment policies summarized in the document.¹²⁰ The document then outlines the purposes and structures of the three main statutory schemes and contractual rights that conflict with the ADA: the Social Security Act, Workers' Compensation laws, and disability insurance

natory behavior and the remedies available, see *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

113. See EEOC, *supra* note 3, at 38-39.

114. EEOC, *supra* note 3, at 38.

115. See *supra* note 8.

116. EEOC, *supra* note 3, at 3 (quoting S. REP. NO. 101-116, at 26 (1989) & H.R. REP. NO. 101-485, pt. 2, at 55 (1990)).

117. EEOC, *supra* note 3, at 3.

118. EEOC, *supra* note 3, at 3.

119. EEOC, *supra* note 3, at 3.

120. See EEOC, *supra* note 3, at 4-7; see also discussion *supra* Section I.B and accompanying notes.

plans.¹²¹

a. Social Security Act

The Social Security Act (SSA) establishes a social insurance program designed to provide a basic level of financial support for people who cannot support themselves because of disability.¹²² A SSA definition of disability, according to the EEOC, "reflects the obligation to provide benefits to people who generally are unable to work. As a result, the definition focuses on what a person cannot do and on whether s/he [sic] cannot find work in the national economy in general."¹²³ The determination of disability under the SSA is a sequential evaluation process that looks to the claimant's ability to perform "substantial gainful activity" and whether the claimant can perform any type of work in the national economy.¹²⁴

The EEOC distinguishes three main differences between the ADA and the SSA. First, "the SSA permits general presumptions about an individual's ability to work;" the ADA looks individually at each claimant's ability to perform a particular job.¹²⁵ Second, the SSA looks to generalized or customary requirements of jobs in the national economy rather than the availability of individualized reasonable accommodations, as required under the ADA.¹²⁶ Finally, the SSA does not consider the possibility of reasonable accommodation as the ADA requires.¹²⁷

The EEOC's categorical dismissal of all SSA disability determinations involves exactly the same complaint the EEOC has with SSA disability claims. Often, the claimant will have to undergo an analysis regarding his disability or be subjected to a hearing with testimony regarding the exact nature of his disability.¹²⁸ While there are presumptive disabilities under the SSA

121. See EEOC, *supra* note 3, at 7-17.

122. See 42 U.S.C. § 1381 (1994); EEOC, *supra* note 3, at 8.

123. EEOC, *supra* note 3, at 8.

124. See EEOC, *supra* note 3, at 9-11.

125. EEOC, *supra* note 3, at 11.

126. EEOC, *supra* note 3, at 12.

127. EEOC, *supra* note 3, at 12-13.

128. See 20 C.F.R. § 404.1520 (1997); see also *Eback v. Chater*, 94 F.3d 410, 412 (8th Cir. 1996) (discussing disability determinations based on functional demands of jobs in national economy).

such as AIDS and blindness, not all seemingly life-altering disabilities fall into that category.¹²⁹ The job analysis performed under an SSA claim is not as perfunctory or limited as the EEOC would suggest.¹³⁰ The SSA has a program for trial work periods in which a disabled person may work for nine months without loss of her benefits to see if she is able to perform substantial gainful activity.¹³¹ The analysis of an individual's case under the SSA should be given deference when it appears to have considered factors relevant to an ADA determination of eligibility as a "qualified individual with a disability." When the claimant was awarded benefits because of a presumptive disability or because of a lack of job market, less deference should be given to a SSA disability designation.

b. Workers' Compensation Plans

Workers' compensation laws provide a system of settling employee claims for occupational injury or illness against an employer in a fair and speedy manner.¹³² The definitions of disability under these laws emphasize the lost earning capacity of the worker because of compensable injury rather than ability to perform work with or without accommodation.¹³³ The laws vary from state to state, but they ordinarily classify disabilities based on severity or extent of injury, as well as duration of the disability.¹³⁴ The EEOC claims that the main focus of these laws is earning capacity rather than ability to perform essential job functions.¹³⁵

The EEOC's criticisms of workers' compensation laws are

129. See 20 C.F.R. pt. 404, subpt. P, app. 1 (1997) (listing presumptive impairments which are permanent or expected to result in death); see also *McNemar*, 91 F.3d at 610; *EEOC v. MTS Corp.*, 937 F. Supp. 1503 (D.N.M. 1996); *Smith*, 859 F. Supp. at 1138 (all discussing AIDS as SSA presumptive disability).

130. See 20 C.F.R. § 404.1520 (1997).

131. See generally *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992); see also 20 C.F.R. § 404.1592 (1997) (discussing the trial work period).

132. See 1 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKER'S COMPENSATION LAW*, § 1.10 (1997) [hereinafter *LARSON & LARSON*].

133. See *EEOC*, *supra* note 3, at 16; see also *LARSON & LARSON*, *supra* note 132, § 57.10.

134. *EEOC*, *supra* note 3, at 14.

135. *EEOC*, *supra* note 3, at 15.

not wholly misplaced.¹³⁶ However, the differentiated levels of disability suggest that full individualized consideration of the disability is made under this regime. The concern that a workers' compensation claimant can receive disability benefits while working would lead to the conclusion that reasonable accommodations are possible and that some individuals labeled "disabled" under workers' compensation definitions are still covered by the ADA. Therefore, those individuals should not be denied coverage under the ADA based on workers' compensation definitions of "total" disability.

c. Disability Insurance Plans

The main criticism that the EEOC has with the definition of disability under insurance programs is that the insurance eligibility terms are a contractual right rather than a statutory one.¹³⁷ The purpose of disability insurance is to provide partial wage replacement based on an individual's inability to earn income as a result of injury or sickness.¹³⁸ The EEOC's position as to disability program definitions is that they are unrelated to the necessary qualifications for ADA coverage because of their purpose and apparent lack of focus on reasonable accommodation of the disabled individual.¹³⁹

Because the definition of disability varies from contract to contract and is generally described as the incapacity to perform one or more duties of one's regular occupation, the EEOC cannot make blanket generalizations about disability programs. Some plans may meet the standards of individualized determinations, others will not.

2. Fundamental Differences Exist Between ADA and Other Statutory and Contractual Disability Benefits Programs as to the Definition of Disability.—The fundamental differences, as defined by the EEOC, between the ADA's definition of a "qualified individual with a disability" and disability definitions under oth-

136. See LARSON & LARSON, *supra* note 132, § 57.12(a) (describing the various types of disability categories under most workers' compensation systems).

137. EEOC, *supra* note 3, at 16.

138. EEOC, *supra* note 3, at 16.

139. EEOC, *supra* note 3, at 16-17.

er regimes led the agency to conclude that representations made by a claimant in these other forums are not determinative of their disability status.¹⁴⁰

Because of the inherent differences in the definitions of the term "qualified individual with a disability" under the ADA and the terms used in the SSA, state workers' compensation laws, disability insurance plans, and other disability benefits programs, and because the ADA considers whether a person can work with reasonable accommodation, an individual can meet both the eligibility requirements for receipt of disability benefits and the definition of a "qualified individual with a disability" for ADA purposes. Thus, a person's representations that s/he is "disabled" or "totally disabled" for purposes of disability benefits are not necessarily inconsistent with his/her representations that s/he is a "qualified individual with a disability."¹⁴¹

Since these representations are not inconsistent, the EEOC believes that the application of the doctrine of judicial estoppel or granting summary judgment in such cases is inappropriate.¹⁴²

The EEOC next argues that the representations, as evidence in determining whether an individual qualifies for protection under the ADA as a "qualified individual with a disability," should be given weight based on their particular context and timing.¹⁴³ The evaluation should consider the similarity of terminology, the timeframe in which the statements were made, whether the application or claim requires the applicant to describe her disabling condition or simply to check off boxes, and any changes that may have occurred in the individual's physical or mental condition.¹⁴⁴ Other circumstantial considerations include who suggested applying for benefits and whether the applicant applied for benefits because of the alleged discriminatory conduct.¹⁴⁵

These considerations are very legitimate given several of the criticisms discussed previously with regard to some disability

140. EEOC, *supra* note 3, at 2.

141. EEOC, *supra* note 3, at 26-27.

142. EEOC, *supra* note 3, at 27.

143. EEOC, *supra* note 3, at 30.

144. EEOC, *supra* note 3, at 30-31.

145. EEOC, *supra* note 3, at 32-33.

definitions under the SSA, state workers' compensation plans, and disability insurance plans.¹⁴⁶ Where the review of the individual's abilities is cursory and not individualized, less weight should be given to such prior statements.

3. Public Policy Requires that Prior Representations not be an Absolute Bar.—As mentioned previously, the goal of the ADA is to eradicate discrimination and barriers faced by individuals with disabilities.¹⁴⁷ The EEOC's position is that allowing individuals to pursue their lawsuits is crucial to this goal because "[p]rivate lawsuits . . . play a critical role in the enforcement of the ADA."¹⁴⁸ The individual bringing a suit "acts not only to vindicate his or her personal interests in being made whole, but also acts as a 'private attorney general' to enforce the paramount public interest in eradicating invidious discrimination."¹⁴⁹

In addition to supporting important public policy goals, the EEOC states that courts should not preclude subsequent ADA claims because this forces the individual to choose between applying for disability benefits and seeking enforcement of her rights under the ADA.¹⁵⁰ An individual's right to be free from discrimination and right to receive disability benefits, when she meets the eligibility requirements, are not inexorably linked. There are, however, instances where putting a claimant 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" will be appropriate based on prior representations.¹⁵¹ Where the claimant has either previously exerted

146. See discussion *supra* Section III.A.1.

147. Discussion *supra* Section I.B.

148. See EEOC, *supra* note 3, at 35; see also 42 U.S.C. § 12117(a) (1994) (providing remedies to "any person alleging [employment] discrimination on the basis of disability"); see also *Smith*, 859 F. Supp. at 1142 (stating that not allowing a person to seek both disability benefits and pursue alleged violation of the ADA would conflict with the ADA's stated purpose).

149. EEOC, *supra* note 3, at 36 (quoting *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1234 (3d Cir. 1994), *vacated*, 115 S. Ct. 1397 (1995), *modified on other grounds*, 65 F.3d 1072 (3d Cir. 1995)).

150. EEOC, *supra* note 3, at 37.

151. *Smith*, 859 F. Supp. at 1142.

great effort to convey her inability to work¹⁵² or where there is apparent deception regarding the nature of the claimant's disability,¹⁵³ prior statements should be used to prevent illegitimate discrimination claims from being sanctioned by the courts.

B. Practical Effect

The EEOC contends that "representations made in connection with an application for disability benefits are not dispositive of whether a person is a 'qualified individual with a disability' for purposes of the ADA,"¹⁵⁴ and that investigators must focus on the "exact definition used by the benefits program, the precise content of the individual's representations, and the specific circumstances surrounding the application for disability benefits."¹⁵⁵ The guidelines provide some important factors for the investigator to consider when determining the relevancy of the previous representations to the current claim for relief under the ADA.¹⁵⁶

The EEOC thus asserts that these prior representations are only relevant to ADA claims when they take into consideration the same standards and definitions provided for under the ADA.¹⁵⁷ This assertion is made because "an individual may be 'unable to work' for purposes of a disability benefits program and yet still be able to perform the essential functions [of her job] with or without reasonable accommodation."¹⁵⁸ If the individual can meet the ADA standards despite her status with the disability carrier, he should be afforded the protection of the Act.¹⁵⁹

However, several of the cases explored above indicate the

152. *Reigel*, 859 F. Supp. at 967.

153. *McNeill*, 878 F. Supp. at 986 (granting defendant's motion for summary judgment where plaintiff had received a \$305,000 FELA judgment for a work-related permanently disabling injury eight days prior to applying for reinstatement with defendant).

154. EEOC, *supra* note 3, at 37-38.

155. EEOC, *supra* note 3, at 38.

156. Discussion *supra* Section III.A.2 and notes 142-45.

157. See EEOC, *supra* note 3, at 38.

158. EEOC, *supra* note 3, at 18.

159. EEOC, *supra* note 3, at 18.

necessity of careful consideration of the prior statements.¹⁶⁰ For example, in *Reigel* the plaintiff made assertions to seven entities regarding her total inability to perform any of the essential functions of her job.¹⁶¹ Because the courts must rely on the attestations of parties, insurance fraud investigation may be appropriate if a court is going to allow inconsistent positions.¹⁶² Additionally, the perception of anti-discrimination laws as allowing double-dipping can be perpetuated by cases where the plaintiff contradicts his previous representations.¹⁶³ Therefore, the EEOC's concrete statement that prior representations are "never determinative" and are "never an absolute bar" to pursuing a claim under the ADA conflict with the goals of both the Act and the judiciary.¹⁶⁴

IV. CONCLUSION

The EEOC has some legitimate concerns surrounding the use of representations made by claimants which are inconsistent with their status as "qualified individuals with a disability" to be afforded protection under the ADA. However, there are still instances where the application of judicial estoppel to prevent claimants from self-serving assertions is important to preserve the integrity of the judicial system. The EEOC fails to recognize that most courts are conducting an individualized evaluation of each claimant's situation and appear to be evaluating the previous representations based on the same factors the EEOC considers relevant. It would appear that the courts disagree with the EEOC as to the correctness of applying judicial estoppel in many cases.

The considerations that the EEOC outlines for its investigators to use are legitimate, but the agency's profession that the representations that claimants make can never be determinative is short-sighted and ill-conceived. In a time of growing concern over the effectiveness of the federal judiciary, the application of

160. See discussion *supra* Section II.B.1.

161. *Reigel*, 859 F. Supp. at 967.

162. *Miller*, 926 F. Supp. at 1000; *Reigel*, 859 F. Supp. at 969 n.7; see *Muellner*, 714 F. Supp. at 359.

163. See *Rissetto*, 94 F.3d at 606; *McNeill*, 878 F. Supp. at 991.

164. EEOC, *supra* note 3, at 26, 35.

judicial estoppel preserves the reputation of the courts by eliminating frivolous or duplicative claims by those who are using the system to get the most out of it.

Additionally, the application of judicial estoppel preserves the public policy goals of the ADA by eliminating claims that bring such laws under suspicion as tools for employees to extort damages from employers. The goal of the Act is to eliminate the widespread discrimination faced by individuals with disabilities on a daily basis. By upholding the integrity of claims under the Act, it becomes a more respected tool to enforce the rights of all. The argument that an individual should not have to choose to sue or to receive disability benefits is more difficult. Because an individual will not know with certainty whether his rights under the ADA have been relinquished, the courts will have to look closely to the circumstances surrounding both claims to determine if the rights are indeed independent.

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