"Totally disabled" now means whatever a claimant wants it to mean

EEOC, Supreme Court Open Floodgates for Disability Claims

By James M. Taylor

Criticisms of the Americans with Disabilities Act (ADA) often focus on individual cases where a rogue jury reaches a particularly outrageous verdict in favor of an unsympathetic plaintiff. However, the Equal Employment Opportunity Commission (EEOC) and the U.S. Supreme Court have completed a transformation of ADA that has done more damage to the notions of sensibility and justice than the verdict of any rogue jury.

According to the Supreme Court's recent decision in *Cleveland v. Policy Management Systems Corporation*, EEOC is correct in arguing that a person with a disability may assert contradictory positions under oath to maximize the benefits and damages he collects from the federal government and private employers. Specifically, a person may claim to be perfectly capable of performing a specific job for the purpose of alleging disability discrimination under ADA while also claiming to be totally disabled and unable to work for the purpose of obtaining Social Security Disability Insurance (SSDI) benefits. The Supreme Court's ruling has opened the floodgates to waves of new ADA lawsuits and Social Security claims.

JUDICIAL ESTOPPEL APPLIED IN EARLY CASES

In the first years after enactment of ADA, federal district courts recognized the dichotomy between persons who received SSDI benefits and persons who were qualified to perform their jobs under ADA. As a result, the courts frequently applied the doctrine of judicial estoppel to prevent a plaintiff from filing an ADA suit while simultaneously collecting from Social Security.

Under the principle of judicial estoppel, a party who makes a sworn statement to gain advantage in a legal or quasi-legal proceeding may not contradict that statement to gain an advantage in a later proceeding involving the same or similar issues. The doctrine is intended to "preserve the integrity of the judicial system by preventing parties from playing fast and loose with the courts." A federal district court in Texas applied judicial estoppel to prevent a sales representative from presenting an ADA discrimination claim when he was already collecting SSDI benefits. Despite the sales representative's strong case that he was fired because of his disability, the sales repre-

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sentative's earlier assertions to the Social Security Administration (SSA) that he could not work barred him from arguing that he could perform the job from which he had been fired. "The fact that the choice between obtaining federal or state disability benefits and suing under ADA is difficult does not entitle one to make false representations with impunity," stated the court (*Johnson v. Hines Nurseries, Inc.*).

A federal district court in North Carolina applied judicial estoppel in a similar case. According to the court, a plaintiff

> cannot speak out of both sides of her mouth with equal vigor and credibility before the court. Plaintiff now seeks money damages from [the defendant] on her assertion that she was physically willing and able to work during the same period of time that she was regularly collecting disability payments on her assertion that she was physically unable to work. (*Reigel v. Kaiser Foundation Health Plan of North Carolina*)

When judicial estoppel decisions reached federal appellate courts, the appellate courts generally agreed that individuals could not contradict their prior sworn statements to SSA in order to tap their former employers for a second source of disability-related benefits. The Third Circuit explained:

> It goes without saying that one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so. (*Fleck v. KDI Sylvan Pools, Inc.*)

Moreover

> to permit a party to assume a position inconsistent with a position it had successfully relied upon in a past proceeding would flagrantly exemplify…playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate. (*Scarano v. Central Railroad of New Jersey*)

Other federal appellate courts agreed with the Third Circuit analysis. In the Eighth Circuit, judicial estoppel applied against a plaintiff because he

> clearly represented that he was not able to return to his former job, and he is, in effect, making this representation continuously, because he is drawing the benefits that were granted in reliance upon it. (*Budd v. ADT Security Systems, Inc.*)

The Sixth Circuit reached an identical conclusion in a similar case (*Blanton v. INCO Alloys International, Inc.*).

EEOC REVERSES THE CONSENSUS

The consensus shifted in 1997 after EEOC issued its *Enforcement Guidance*. In the guidance, EEOC argues that a plaintiff's prior assertions to SSA are largely irrelevant in the context of an ADA action.

According to EEOC, a plaintiff's prior disability assertions are irrelevant because he may be "totally disabled and unable to work," as defined by SSA, yet "able to perform a desired job" under ADA. EEOC argues that a plaintiff's ability to work under ADA can be consistent with his inability to work under the Social Security Act because of four differences in the language of the laws:

- ADA requires employers to provide reasonable accommodation for an employee's disabilities; the Social Security Act does not mention the possibility of reasonable accommodation.
- The Social Security Act permits general presumptions about a person's inability to work; ADA requires an assessment of a person's particular capabilities.
- ADA asks whether a plaintiff can perform a job's essential functions; the Social Security Act does not distinguish between essential and marginal job functions.
- The Social Security Act inquires generally about jobs in the national economy; ADA inquires about particular positions in a specific job market.

After EEOC issued its guidance, many federal appellate courts began reversing district court decisions that applied judicial estoppel against recipients of SSDI benefits. Some circuits, led by the District of Columbia Circuit, agreed with EEOC that prior disability assertions are largely irrelevant. In language mirroring that of EEOC, the D.C. Circuit held that the Social Security Act "focuses on the general availability of work and says nothing about reasonable accommodation, nor does the Act elsewhere address the effect of accommodation on a claimant's disability status" (*Swanks v. Washington Metropolitan Area Transit Authority*). According to the D.C. Circuit, a plaintiff's disability assertions to SSA are relevant in an ADA case only when the plaintiff explicitly, specifically, and at his unprompted initiative asserts to SSA that he cannot perform his desired job "even with" the assistance of reasonable accommodation.

In other circuits, a middle ground emerged in which a plaintiff who collects SSDI benefits is "presumed" unable to perform his desired position but is not estopped from arguing otherwise. Such a plaintiff is entitled to present evidence demonstrating that he could in fact perform his desired position, but he must present "strong countervailing evidence" to defeat the initial presumption.

SUPREME COURT EXAMINES "MIDDLE GROUND"

The U.S. Supreme Court agreed to review a typical example of the middle ground position, as presented in *Cleveland v. Policy Management Systems Corporation*. The plaintiff, Carolyn Cleveland, took a leave of absence from her position with Policy Management Systems Corporation (PMSC) in Dallas after suffering a stroke. The stroke

caused aphasia, a condition that affects concentration, memory, and language functions such as speaking, reading, and spelling. Upon taking her leave, Cleveland filed an application for SSDI benefits in which she stated that she had become "unable to work because of a disabling condition."

A few months later, however, her doctor released her to return to work, but she did not perform well. She requested several accommodations, including computer training, a transfer to a new position, permission to take her work home, and permission for the Texas Rehabilitation Commission to provide a counselor to assist her with her job. PMSC denied each of her requests and fired her for poor performance.

Cleveland then renewed her application for SSDI benefits, giving a sworn written statement that "I could no longer do the job because of my condition." SSA approved her application and granted her SSDI benefits retroactive to the time of her stroke.

Just a week after SSA notified Cleveland that it was approving her request for benefits, she filed a discrimination suit against PMSC, claiming that she had been fired in violation of ADA and the Texas Labor Code. She asserted that she was fully capable of performing her job but had been fired because her employer unlawfully discriminated against her.

PMSC moved for partial summary judgment, asserting that Cleveland's representations in her application for SSDI benefits precluded her from claiming to be able to perform her job under ADA.

The Fifth Circuit Court of Appeals agreed with PMSC, recognizing that it seemed "logically inconsistent" for an individual to assert an ADA claim while receiving SSDI benefits. Accordingly, the plaintiff's assertions of total disability created a rebuttable presumption that she could not perform the essential functions of her position.

The appellate court conceded that "it is at least theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive." In the case at hand, however, the employee "continuously and unequivocally represented to SSA that she is totally disabled and completely unable to work." The court left standing the presumption that she was unqualified to perform her job, and accordingly found for the defendant.

EEOC PREVAILS AT SUPREME COURT

In an opinion written by Justice Breyer, the Supreme Court rejected the Fifth Circuit's ruling. A unanimous Court ruled that Cleveland could indeed receive SSDI benefits while claiming to be qualified to perform her job under ADA. Moreover, Cleveland's pursuit of SSDI benefits created no presumptions regarding her ADA suit.

How can an individual claim "I am able to work" while claiming "I am unable to work"? The Supreme Court deferred in large part to EEOC's parsing of the language of the Social Security Act in relation to the language of ADA. But do the differences in statutory language justify such contradictory assertions? Can a person be eligible for SSDI benefits and yet qualified to perform a particular job under ADA?

EEOC's first argument is that ADA requires employers to provide reasonable accommodation for an employee's disabilities, while the Social Security Act is silent about reasonable accommodation. According to this argument, ADA and SSA standards differ because the Social Security Act does not mention the possibility of reasonable accommodation. The argument is flawed, however, because ADA applies at all times to all parties. If a person asserts to SSA that he is unable to work, he is by definition asserting that he would be unable to work even if he were offered reasonable accommodation, because ADA clearly requires all employers to provide reasonable accommodation whenever it is needed. SSA's failure to explicitly reiterate ADA's legal mandate does not mean that the legal mandate ceases to exist.

An analogy can be drawn from the laws that apply to a motorist driving in an ice storm. Although a road sign may read "Speed Limit 70 MPH," the motor vehicle laws specify that a posted speed limit assumes optimal driving conditions. Even though the road sign does not explicitly reiterate the legal assumption, the underlying assumption does not cease to exist. A motorist who careens down an ice-covered highway at 65 MPH is speeding, regardless of the road sign's failure to explicitly reiterate the legal fine print.

EEOC's second argument is that the Social Security Act permits general assumptions about a person's inability to work, while ADA requires a more individualized assessment. EEOC correctly points out, as an example, that the Social Security Act lists specific medical impairments that are deemed so severe that persons afflicted by them will receive SSDI benefits regardless of their ability or inability to find work. A person with no hands or feet, for example, will receive benefits because of his impairment, without having to assert that he is incapable of working. But because a person who collects presumptive benefits is not necessarily asserting that he is incapable of working, federal courts have uniformly recognized that the collection of presumptive benefits does not invoke judicial estoppel. In other words, EEOC's second argument is simply a red herring.

EEOC's third argument is that the Social Security Act asks whether an applicant can perform a job as it is customarily performed, while ADA asks whether a plaintiff can perform a job's essential functions. Although that semantic distinction may seem unimportant, the argument touches on a central provision of ADA. An employer usually hires and retains an employee who is not disabled only if the employee can satisfactorily perform all aspects of his job. Some tasks may be more essential than others, but it is the employer's prerogative to insist on the satisfactory performance of all tasks, regardless of their relative importance. ADA applies a less demanding stan-

dard to determine satisfactory job performance by a disabled employee; that is, an employer may not punish a disabled employee for failing to perform marginal tasks if the employee can perform the job's essential functions.

The fallacy of eeoc's third argument is similar to the fallacy of eeoc's first argument. Any disabled person who asserts to ssa that he is incapable of working is admitting that he cannot work even after a job is stripped to its essential functions. Simply because ssa does not explicitly reiterate an employer's ada obligations, the ada obligations do not cease to exist.

eeoc's fourth argument is that the Social Security Act inquires about jobs in general, while ada inquires about a person's ability to work in a particular position in a specific job market. Here again, eeoc's preoccupation with semantics misses the point. ssa and ada may make different inquiries, but the ssa inquiry is broader in scope and fully encompasses the ada inquiry. A person who makes a "general" assertion to ssa that he cannot perform any kind of substantially gainful work is by definition asserting that he cannot perform any particular position in any specific job market.

In sum, eeoc's four arguments are specious. A person who asserts to ssa that he is categorically unable to perform any meaningful work is admitting that he cannot perform *any* particular job as contemplated under ada, regardless of anyone's tortured reasoning to the contrary.

Finally, the Supreme Court offered another justification for its decision in *Cleveland*, a justification not suggested by eeoc: Because the severity of an individual's disability may change over time, a person who, after his termination, states that he cannot work is not necessarily stating that he could not work at the time he was fired.

The severity of a person's medical condition may indeed change over time, but a plaintiff is required by law to file an ada charge within 180 or 300 days after the contested termination. (The interval depends on whether eeoc has a work-share agreement with a correlating state or local government agency.) Only rarely will a person's ability or inability to work change drastically—and conveniently—in the relatively brief interval between a contested termination and the initiation of an ada suit. A rebuttable presumption against such a quick, dramatic, and convenient change in medical status is entirely appropriate.

ECONOMIC AND LEGAL IMPLICATIONS OF THE SUPREME COURT'S DECISION

In addition to challenging our notions of sensibility and justice, the Supreme Court's decision will likely cause a significant drain on the economic resources of employers and the federal government. Although employers prevail in a majority of ada suits, the cost of a successful defense can easily exceed $100,000. The Court, by eliminating the logical prohibition against suits based on a simultaneous ability *and* inability to work, has opened the floodgates to waves of new lawsuits by persons who have already admitted that they are unable to work.

Similarly, the Court's decision invites all persons with disabilities to demand ssdi benefits, even those persons who are, or who can be, gainfully employed. Indeed, according to the Court's decision, a person may simultaneously receive (1) ada compensation based on his ability to work for a particular employer, (2) ssdi benefits based on his inability to work for any employer, and (3) regular paychecks from a job with a new employer. Congress clearly did not intend such an outcome when it enacted ada and the Social Security Act.

Finally, the Supreme Court's decision in *Cleveland* sets the tone for the many other ada disputes that are making their way through the courts. Because ada is a relatively new law, federal appellate courts are still searching for consensus solutions to important issues arising under the statute. District courts have in many cases found consensus, only to have eeoc urge appellate courts to overrule the consensus. The Supreme Court's decision in Cleveland tells appellate courts that they should ignore lower courts and placate eeoc instead.

readings

- *Blanton v. Inco Alloys International, Inc.*, 3 ADD (CCH) ¶3-234 (6th Cir 1997).
- *Budd v. ADT Security Systems, Inc.*, 3 ADD (CCH) ¶3-151, 53, 864 (8th Cir 1996).
- *Cleveland v. Policy Management Systems Corp.*, 6 ADD (CCH) ¶6-184 (US SCt 1999); and 4 ADD (CCH) ¶4-122 (5th Cir 1997).
- *EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990 (ADA).* 2 ADA (CCH) ¶140,190.
- *Fleck v. KDI Sylvan Pools, Inc.*, 981 F2d 107, 121 (3d Cir 1992).
- *Johnson v. Hines Nurseries, Inc.*, 4 ADD (CCH) ¶4-006, 54,667 (N.D. Tex. 1996).
- *McNemar v. The Disney Store,* 3 ADD (CCH) ¶3-013, 53,135 (3d Cir. 1996).
- *Reigel v. Kaiser Foundation Health Plan of North Carolina,* 859 F.Supp. 963, 970 (E.D. N.C. 1994).
- *Scarano v. Central Railroad Co. of New Jersey*, 203 F2d 510, 513 (3d Cir 1953).
- *Swanks v. Washington Metropolitan Area Transit Authority*, 4 ADD (CCH) ¶4-070, 54, 978 (D.C. Cir 1997).