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Making the ADA Work for Social Security Disability Beneficiaries: Life After *Cleveland v. Policy Management Systems*

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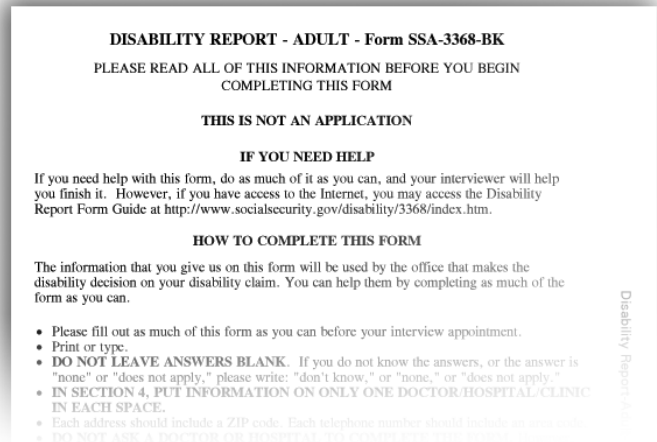
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There are many ways to describe disability. Two different definitions of disability as it relates to the ability to work are found in the

Americans with Disabilities Act of 1990 (ADA) and the Social Security Act.¹ ADA practitioners are already familiar with walking the ADA tightrope, that is, showing that an employee has a substantial limitation of “one or more major life activities” and is “qualified to perform the essential functions” of the job “with or without [a] reasonable accommodation.”² For individuals who bring ADA claims and receive social security disability benefits, the footing is even more treacherous.³

Is it inherently inconsistent for plaintiffs to claim that they are disabled from working under the Social Security Act but able to work under the ADA? No, said the U.S. Supreme Court unanimously and (seemingly) clearly in 1999 in *Cleveland v. Policy Management Systems Corporation*.⁴ However, eight years after *Cleveland*, ADA plaintiffs who are social security beneficiaries usually lose in federal court on the basis of their having applied for and received social security benefits.⁵ After analyzing the



¹Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12111(8) (2004); Social Security Act, *id.* § 423(d) (2005). Other articles in this issue discuss definitions of “disability” in other contexts; see, e.g., Arlene Mayerson, *Disability Rights Law: Roots, Present Challenges, and Future Collaboration*; Susan Ann Silverstein, *Expanding and Preserving Affordable Housing Opportunities for Persons with Disabilities*; Fred Fuchs, *Using the Reasonable-Accommodation Provision of the Fair Housing Act to Prevent the Eviction of a Tenant with Disabilities*; Kevin Liebkemann & Raymond Cebula, *Interplay Among Unemployment Insurance, Welfare, Social Security Disability, and SSI Benefits*.

²ADA, 42 U.S.C. §§ 12102(2), 12111(8) (2004).

³Although we focus primarily on social security disability benefits and ADA claims, the concepts also may apply to the interaction between other types of benefits and other employment laws. See also Liebkemann & Cebula, *supra* note 1.

⁴*Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795 (1999) (Clearinghouse No. 52,255).

⁵See Daniel B. Kohrman & Kimberly Berg, *Reconciling Definitions of “Disability”: Six Years Later, Has Cleveland v. Policy Management Systems Lived Up to Its Initial Reviews as a Boost for Workers’ Rights?*, 7 MARQUETTE ELDER’S ADVISOR 29, 34 (2005). In our article the term “social security beneficiaries” refers to individuals who on the basis of a disability receive financial benefits from the Social Security Administration from one of the following three programs: Social Security Disability Insurance (SSDI) (42 U.S.C. § 423 (2005)) (most plaintiffs received this benefit), Supplemental Security Income (SSI) (*id.* §§ 1381–83), or Disabled Adult Child (*id.* §§ 402(d), 423).

Cleveland decision, we use case law and other sources to offer practical strategies for pursuing Social Security Act claims and for representing social security beneficiaries asserting ADA employment claims. We also offer strategies for seeking social security benefits.⁶

I. The U.S. Supreme Court's *Cleveland* Decision

Carolyn Cleveland had a stroke on January 7, 1994, four months after beginning her job with Policy Management Systems Corporation.⁷ The stroke affected her concentration, memory, and language skills. Three weeks later Cleveland filed with the Social Security Administration an application stating that she was “disabled” and “unable to work.”⁸ Her condition improved, enabling her to return to work on April 11, 1994; this she promptly reported to the agency.⁹ As a result of her returning to work, the agency denied her application for benefits on July 11, 1994.¹⁰ To Cleveland’s chagrin, her employer terminated her employment four days later for “poor job performance” after denying her requests for various reasonable accommodations.¹¹

During the Social Security Administration’s appeal process and at the hearing, Cleveland reaffirmed to the agency her

statements regarding her disability and inability to work.¹² On September 29, 1995, the agency awarded her Social Security Disability Insurance (SSDI) benefits, retroactive to the date of her stroke.¹³ The SSDI award came exactly one week after she filed against her former employer an ADA lawsuit alleging disability discrimination based on wrongful termination and the failure to accommodate her disability.¹⁴

Based on Cleveland’s statements to the Social Security Administration, the federal district court granted summary judgment for the employer.¹⁵ In affirming the district court’s decision, the Fifth Circuit held that “the application for or the receipt of social security disability benefits creates a *rebuttable* presumption” that the social security beneficiary be “judicially estopped from asserting that he is a ‘qualified individual with a disability.’”¹⁶ The Fifth Circuit opined that reconciling an ADA and a social security claim was “at least theoretically conceivable ... under some limited and highly unusual set of circumstances.”¹⁷ However, due to Cleveland’s consistent representations to the agency that she was “totally disabled,” the Fifth Circuit applied judicial estoppel against her ADA claims and found that she failed to overcome the “rebuttable presumption.”¹⁸

⁶Equip for Equality is the Illinois protection and advocacy agency. The Disability Law Center is the Massachusetts protection and advocacy agency. For more information on protection and advocacy agencies and how they can be resources and partners for legal aid attorneys, see Joan Magagna, *The Protection and Advocacy Network—a Resource for Legal Aid Attorneys*, in this issue; see also the National Disability Rights Network’s website, www.ndrn.org/.

⁷*Cleveland*, 526 U.S. at 798.

⁸*Id.*

⁹*Id.*

¹⁰*Id.*

¹¹*Cleveland v. Policy Management Systems Corporation*, 120 F.3d 513, 515 (5th Cir. 1997).

¹²*Cleveland*, 526 U.S. at 798–99.

¹³*Id.* at 799.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.* at 800.

¹⁷*Id.*

¹⁸*Id.* Judicial estoppel is based on the principle “where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.” *Davis v. Wakelee*, 156 U.S. 680, 689 (1895).

A. Different Standards Under the ADA and the Social Security Act

Cleveland appealed to the Supreme Court on the issue of whether courts should use a presumption applying judicial estoppel against ADA plaintiffs who are social security beneficiaries.¹⁹ In analyzing the issue, the Court noted that “[t]he Social Security Act and the ADA both help individuals with disabilities, but in different ways.”²⁰ According to the Court, “[t]he Social Security Act provides monetary benefits to every insured individual who ‘is under a disability,’ which the Act defines as an ‘inability to engage in any substantial gainful activity’ due to a ‘physical or mental impairment’ that can be ‘expected to result in death’ or last for at least twelve continuous months.”²¹ The impairment must cause the individual to be “unable to do [the individual’s] previous work” or “any other kind of substantial gainful work which exists in the national economy....”²²

The ADA, by contrast, seeks to help individuals with disabilities by eliminating “unwarranted discrimination” so that individuals with disabilities experience “equal opportunity” and provide “the Nation with the benefit of their consequently increased productivity.”²³ The ADA prohibits discrimination “against a qualified individual with a disability,” which the ADA defines as an individual who has a disability and can perform the “essential functions” of the individual’s job, “with or without a reasonable accommodation.”²⁴

The Supreme Court unanimously overruled the Fifth Circuit. Reconciling the

Social Security Act and the ADA is a probable outcome, not merely a philosophical possibility, the Court found pointedly.²⁵ The Court held that

pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient’s success under the ADA.²⁶[D]espite the appearance of conflict ..., the two claims do not inherently conflict to the point where courts should apply a special negative presumption like the one applied by the [Fifth Circuit].... [T]here are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side.²⁷

B. Five Possible Reasons (and One Bonus Argument)

In an attempt to provide practical direction for the lower courts and future claimants, the *Cleveland* Court identified five possible reasons to explain the “apparent inconsistency” of a social security beneficiary claiming inability to work under the Social Security Administration’s rules and the ability to work under the ADA.²⁸ The Court also gave plaintiffs a strong bonus argument when it noted that a plaintiff’s statements to the agency should be taken in their legal context: a “representation [to the Social Security Administration] of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely, ‘I am disabled for

¹⁹*Cleveland*, 526 U.S. at 797.

²⁰*Id.* at 801.

²¹*Id.* (citing Social Security Act, 42 U.S.C. § 423(a)(1), (d)(1)(A)).

²²*Id.* (citing Social Security Act, 42 U.S.C. § 423(d)(2)(A)).

²³*Id.* (citing ADA, 42 U.S.C. § 12101(a)(8), (9)).

²⁴*Id.* (citing ADA, 42 U.S.C. §§ 12111(8), 12112(a)).

²⁵*Id.* at 797.

²⁶*Id.* at 797–98.

²⁷*Id.* at 802–3.

²⁸*Id.* at 807.

purposes of the Social Security Act.”²⁹ The Court distinguished these context-based statements from factual statements such as “I cannot raise my arm above my head.”³⁰ Regarding purely factual inconsistencies, the Court noted on three occasions that it was leaving the law “where [it] found it.”³¹ Later courts interpreted this statement by the Court to allow judicial estoppel for “directly conflicting statements about purely factual matters.”³²

1. The ADA But Not the Social Security Act Considers Reasonable Accommodations

The *Cleveland* Court recognized that the concept of “reasonable accommodation” is central to the ADA but irrelevant to the Social Security Act.³³ This crucial distinction demonstrates that a plaintiff’s statements to the Social Security Administration for social security disability benefit applications are made in a different legal context from statements made to support ADA claims.

2. The Social Security Administration’s Determination Process Includes Listed Impairments

Cleveland noted that, to determine disability, the Social Security Administration uses listed impairments and a five-step procedure “that embodies a set of

presumptions about disabilities, job availability, and their interrelation.”³⁴ Because of these presumptions, “an individual might qualify for SSDI under the SSA’s [Social Security Administration’s] administrative rules and yet, due to special individual circumstances, remain capable of ‘perform[ing] the essential functions’ of her job.”³⁵

3. The Social Security Administration Recognizes that Beneficiaries May Work

Working and receiving social security benefits are not necessarily inconsistent. *Cleveland* observed that the “[Social Security Administration] sometimes grants SSDI benefits to individuals who not only can work, but are working” and referred to the agency’s “nine-month trial-work period during which SSDI recipients may receive full benefits.”³⁶ Post-*Cleveland* support of this explanation is in the Ticket to Work and Work Incentives Improvement Act of 1999 designed to aid social security beneficiaries “find, enter and retain employment.”³⁷

4. Conditions May Change Over Time

Because “the nature of an individual’s disability may change over time,” statements made to the Social Security Administration regarding an inability to work “may not reflect an individual’s

²⁹*Id.* at 802.

³⁰*Id.* at 801.

³¹*Id.* at 802, 805, 807.

³²*Id.* at 802; see, e.g., *Mitchell v. Washingtonville Central School District*, 190 F.3d 1, 7 (2d Cir. 1999) (citing *Cleveland* language quoted in text accompanying this note); *McClaren v. Morrison Management Specialists*, 420 F.3d 457, 466 (5th Cir. 2005) (under *Cleveland*, estoppel applies where plaintiff’s factual descriptions supporting disability preclude the possibility of qualification as of a certain date).

³³*Cleveland*, 526 U.S. at 803; see ADA, 42 U.S.C. § 12111(8) (“qualified individual with a disability” is an individual able to perform essential functions of job with or without reasonable accommodation). The Social Security Administration adopted *Cleveland* as Social Security Ruling (SSR) 00-1c. SSR 00-1c: Sections 222(c) and 223(a), (d)(2)(a), and (e)(1) of the Social Security Act (42 U.S.C. 422(c) and 423(a), (d)(2)(A), and (e)(1)) Disability Insurance Benefits—Claims Filed Under Both the Social Security Act and the Americans with Disabilities Act (Jan. 7, 2000), www.ssa.gov/OP_Home/rulings/di/01/SSR2000-01-di-01.html.

³⁴*Cleveland*, 526 U.S. at 804; see 20 C.F.R. pt. 404, subpt. P, app. 1 (2007) (Listing of Impairments); *id.* §§ 404.1520, 416.920 (explaining Social Security Administration’s five-step sequential evaluation for determining disability). The listed medical impairments presume functional limitations so severe as to preclude gainful work. *Id.* § 404.1525(a).

³⁵*Cleveland*, 526 U.S. at 804.

³⁶*Id.* at 805.

³⁷Ticket to Work and Work Incentives Improvement Act of 1999, 42 U.S.C. §§ 1305 *et seq.* (1999); 20 C.F.R. § 411.105 (2007).

capacities at the time of the relevant employment decision” for ADA purposes.³⁸

5. Pleading in the Alternative Is an Option When the Social Security Administration Has Not Yet Decided

In cases where social security benefits have been applied for but not awarded when the ADA claim is decided, “any inconsistency in the theory of the claims is of the sort normally tolerated by our legal system” because the Federal Rules of Civil Procedure allow pleading “alternately or hypothetically.”³⁹

C. What *Cleveland* Requires of Plaintiffs

However, that is not the end of the story. Even though parallel ADA and Social Security Act claims are “often consistent, each with the other,” the plaintiff bears the burden of explaining why this is so.⁴⁰ A plaintiff “cannot simply ignore” statements of an inability to work made to the Social Security Administration but must offer a sufficient “explanation of any apparent inconsistency with the necessary elements of an ADA claim.”⁴¹ According to the Court, “[t]o defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror’s concluding that, assuming the truth of, or the plaintiff’s good-faith belief in, the earlier statement, the plaintiff could nonetheless ‘perform the essential functions’ of her job, with or without ‘reasonable accommodation.’”⁴²

D. The *Cleveland* Afterglow

Because *Cleveland* seemed destined to improve the employment situation for people with disabilities, the decision was initially praised by an overwhelming majority of disability advocates who were

of the opinion that “*Cleveland* Rocks.”⁴³ However, the euphoria was short-lived. Soon after the decision, cracks in *Cleveland*’s armor started to appear. As interpreted by the lower courts, *Cleveland* has not benefited beneficiaries as much as was hoped.⁴⁴ Looking back, *Cleveland* has not rocked. Rather, courts have rolled over ADA plaintiffs.

However, all is not lost. Based on *Cleveland*, its progeny, and the litigation strategies and ponderings of attorneys and advocates, below are practical strategies that can be used during the various stages of Social Security Act and ADA claims.

II. *Cleveland* Strategies for Social Security Act Claims

Cleveland suggests several issues that should be considered when filing a claim for social security disability benefits.

A. *Cleveland* Issue?

Given the potential problems that a social security disability claim may pose for an ADA plaintiff, social security advocates and attorneys should routinely ask their clients if an ADA or similar case is pending or contemplated. If so, the social security advocate and the ADA advocate should discuss overlapping issues and counsel the client regarding the possible effects of the benefits claim on the ADA case.

B. Onset-of-Disability Date

Timing is everything. On the one hand, one of the lessons of *Cleveland* and its progeny is that alleging an onset-of-disability date before or even the same date as the termination of employment can create the appearance of inconsistent positions with respect to the ability to

³⁸*Cleveland*, 526 U.S. at 805.

³⁹*Id.* (citing Fed. R. Civ. P. 8(e)(2)).

⁴⁰*Id.* at 797, 806.

⁴¹*Id.* at 798, 806–7.

⁴²*Id.* at 807.

⁴³“Cleveland Rocks” is the name of Ian Hunter’s 1979 rock anthem (and theme song for the *Drew Carey Show*).

⁴⁴Some of *Cleveland*’s shortcomings are discussed in Kohrman & Berg, *supra* note 5, at 41–42.

work.⁴⁵ On the other hand, some courts found, plaintiffs' statements to the Social Security Administration in support of benefit applications do not contradict statements made in ADA claims where the claimant alleges that the disability began after the date the employment ended.⁴⁶

In many cases, particularly where the disability does not arise from a single accident or traumatic event or a claimant has multiple disabilities, the onset of disability for Social Security Act purposes may not be clear. Claimants with multiple medical conditions should consider the effect of each impairment on the other impairment. For example, depression or anxiety following a termination of employment may exacerbate a physical disability. In such a case, alleging an onset date after the employment termination would be both advantageous to the ADA claim and perfectly appropriate under the Social Security Administration's rules.⁴⁷

C. Statements to the Social Security Administration

Some representations to the Social Security Administration may be so specific and sweeping as to foreclose the possibility that ADA plaintiffs could perform the essential functions of their job.⁴⁸ Thus supplying detailed descriptions of impairment and functional limitations

in agency paperwork only where necessary and noting that statements relate to the agency's definition of disability may be advisable.

On agency appeal forms, ADA plaintiffs should consider using general language. For example, where the Request for Hearing by Administrative Law Judge (HA-501-U5) and the Request for Reconsideration (SSA-561-U2) forms ask the claimant for the reasons that the claimant disagrees with the agency's claim determination, a statement such as "I am disabled under the Social Security Administration's rules" is accurate and less likely to interfere with an ADA claim than a statement such as "My herniated discs and major depression make me unable to do any work."⁴⁹

On some agency forms, however, avoiding the type of specific factual statements that might undermine an ADA claim is more difficult (and possibly inadvisable for purposes of the social security claim).⁵⁰ The social security claimant who requests accommodations (and has SSDI and ADA claims that overlap in time) should consider advertent to the inability to work without accommodations.⁵¹ As noted in *Cleveland*, the ability to work with accommodations is not fatal to a social security disability claim because an administrative law judge or vocational expert should not consider

⁴⁵*Cleveland*, 526 U.S. at 805–6; see, e.g., *Williams v. London Utility Commission*, 375 F.3d 424, 429 (6th Cir. 2004); *DiSanto v. McGraw-Hill Incorporated*, 220 F.3d 61, 65 (2d Cir. 2000). But see, e.g., *EEOC v. Stowe-Pharr Mills Incorporated*, 216 F.3d 373, 379 (4th Cir. 2000). For the criteria for establishing onset of disability, see SSR 83-20: Titles II and XVI: Onset of Disability (Aug. 20, 1980), www.ssa.gov/OP_Home/rulings/di/01/SSR83-20-di-01.html.

⁴⁶See, e.g., *Fox v. General Motors Corporation*, 247 F.3d 169, 178 (4th Cir. 2001) (Clearinghouse No. 53,731); *Tobin v. Liberty Mutual Insurance*, No. 01-11979-DPW, 2007 WL 967860, at *3 (D. Mass. 2007).

⁴⁷See SSR 83-20: Titles II and XVI: Onset of Disability (Aug. 20, 1980), www.ssa.gov/OP_Home/rulings/di/01/SSR83-20-di-01.html.

⁴⁸See, e.g., *Holtzclaw v. DSC Communications Corporation*, 255 F.3d 254, 258 (5th Cir. 2001) (Clearinghouse No. 53,902); *Reed v. Petroleum Helicopters Incorporated*, 218 F.3d 477, 479–80 (5th Cir. 2000).

⁴⁹Request for Hearing by Administrative Law Judge—Form HA-501-U5 is www.ssa.gov/online/ha-501.html; Request for Reconsideration—Form SSA-561-U2 is www.ssa.gov/online/ssa-561.html.

⁵⁰See, e.g., Disability Report—Adult—Form SSA-3368-BK, downloadable from www.ssa.gov/online/ssa-3368.pdf. Or claimants may fill out a version of the form, Adult Disability and Work History Report, online at <https://s044a90.ssa.gov/apps6z/i3369/ee001-fe.jsp>. A new online version of the form that representatives and other advocates may fill out for their clients is at <https://s044a90.ssa.gov/apps6z/i3368PRO/main.html>. This form (i3368PRO) is called the Adult Disability and Work History Report—PRO [Professionals]; the Social Security Administration refers to the form as both the i3368 for Professionals and the Internet Adult Disability and Work History Report for Professionals, Representatives, and Organizations.

⁵¹The Disability Report itself offers that opportunity. See Disability Report—Adult—Form SSA-3368-BK § 2, question H.

reasonable accommodations in assessing a claimant's ability to work.⁵²

III. *Cleveland* Strategies for ADA Cases

Although the *Cleveland* decision provided a road map to follow when social security beneficiaries raise ADA claims, several roadblocks have reappeared in the journey toward justice. *Cleveland* appeared to replace the use of a "rebuttable presumption" applying judicial estoppel with a summary judgment standard requiring that plaintiffs "sufficient[ly]" explain any "apparent inconsistency" in a way that satisfies the "reasonable juror."⁵³ Significantly the Court differentiated between context-based conclusory statements of disability to the Social Security Administration and factual inconsistencies.⁵⁴ However, courts sometimes still apply judicial estoppel without placing a plaintiff's statements to the agency in their legal context.⁵⁵

On the other hand, every court has consistently followed the Supreme Court's requirement that ADA plaintiffs bear the burden of explaining away any "apparent contradiction" between their ADA and Social Security Act claims.⁵⁶ As noted, the Supreme Court kindly identified five possible reasons that can be used to meet this burden.⁵⁷ Failing to give an explanation likely results in defeat on summary judgment.⁵⁸ Defeat also is the likely result if the plaintiff merely contradicts or repudiates the plaintiff's prior statements to the Social Security Administration in the ADA case; this is because the Court stated in *Cleveland* that the plaintiff's explanation in the ADA case must assume "the truth of, or the plaintiff's good-faith belief in, the earlier statement...."⁵⁹ Thus claims of mistake, confusion, or a lack of legal training have not been successful.⁶⁰

The post-*Cleveland* decisions emphasize the intense diligence required of all ADA plaintiffs in each element of their claim.

⁵²*Cleveland*, 526 U.S. at 803 (Social Security Administration does not take possibility of reasonable accommodation into account in determining whether individual is disabled for SSDI purposes); see also *Poulos v. Commissioner of Social Security*, 474 F.3d 88, 95 (3d Cir. 2007) (under *Cleveland*, administrative law judge is not entitled to consider potential accommodation by employers in determining whether jobs that claimant can perform are available in national economy); Memorandum from Daniel L. Skoler, Associate Commissioner for Hearings and Appeals, Social Security Administration, to Headquarters Executive Staff, Administrative Appeals Judges, Regional Chief Administrative Law Judges, Hearing Office Chief Administrative Law Judges, Administrative Law Judges, Supervisory Staff Attorneys (June 2, 1993) ("Americans with Disabilities Act of 1990 (Pub. L. 101-336)—Information"), reprinted in 2 SOCIAL SECURITY PRACTICE GUIDE, 15-399, 15-401 to 15-402, app. §15C[9] (2007) (hypothetical inquiries about whether employer would or could make accommodations that would allow employee to return to prior job or whether or how employer might be willing (or required) to alter job duties to suit specific individual's limitations would not be relevant because Social Security Administration's assessment must be based on broad vocational patterns rather than on any individual employer's practices).

⁵³*Cleveland*, 526 U.S. at 802, 807. The word "sufficient" is used for the summary judgment standard and the level of explanation needed to overcome any "apparent contradiction." *Id.* at 805-6.

⁵⁴*Id.*

⁵⁵For cases in which the court failed to recognize the different contexts of social security and ADA claims and applied judicial estoppel to dismiss the case, see, e.g., *McClaren*, 420 F.3d at 466. For cases in which the court failed to recognize the different contexts of social security and ADA claims and in which the employees lost on summary judgment, see, e.g., *DiSanto*, 220 F.3d at 65; *Feldman v. American Memorial Life Insurance Company*, 196 F.3d 783, 790 (7th Cir. 1999) (Clearinghouse No. 52,768); *Rando v. Texaco Refining and Marketing*, 165 F. Supp. 2d 1209, 1221-22 (D. Kan. 2001). For cases in which the court placed the plaintiff's statements to the Social Security Administration in a legal context and in which the plaintiffs prevailed at least on summary judgment, see, e.g., *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 609-10 (3d Cir. 2006); *Kiely v. Heartland Rehabilitation Services Incorporated*, 359 F.3d 386, 389-90 (6th Cir. 2004) (Clearinghouse No. 55,652); *Lawson v. CSX Transportation Incorporated*, 245 F.3d 916, 927-28 (7th Cir. 2001) (Clearinghouse No. 53,678); *Smith v. Midland Brake Incorporated*, 98 F. Supp. 2d 1233, 1242 (D. Kan. 2000).

⁵⁶*Cleveland*, 526 U.S. at 806; see, e.g., *Johnson v. ExxonMobil Corporation*, 426 F.3d 887, 892 (7th Cir. 2005); *Kiely*, 359 F.3d at 389.

⁵⁷*Cleveland*, 526 U.S. at 803-5.

⁵⁸See, e.g., *Sullivan v. Raytheon Company*, 262 F.3d 41 (1st Cir. 2001) (Clearinghouse No. 54,052); *Feldman*, 196 F.3d 783 (7th Cir. 1999); *Rando*, 165 F. Supp. 2d 1209.

⁵⁹*Cleveland*, 526 U.S. at 807; see, e.g., *Sullivan*, 262 F.3d 41.

⁶⁰See, e.g., *Johnson*, 426 F.3d at 892 (mistake); *Lee v. City of Salem*, 259 F.3d 667, 675-78 (7th Cir. 2001) (Clearinghouse No. 54,030) (confusion); *Gilmore v. AT&T*, 319 F.3d 1042, 1045, 1047 (8th Cir. 2003) (lack of legal training).

Some suggestions for tackling *Cleveland* issues at each stage of an ADA claim follow.

A. Asserting *Cleveland* Reason No. 1

When asserting that the ADA but not the Social Security Act considers reasonable accommodations, advocates may find the following strategies helpful.

1. Request a Reasonable Accommodation

Ideally an individual with a disability should prepare for possible *Cleveland* issues while the individual is still employed, especially if the individual needs a reasonable accommodation.⁶¹ However, a plaintiff likely loses if the requested accommodation is not reasonable, for example, if the requested accommodation reassigns or eliminates “essential functions” or causes an undue hardship.⁶² Even if an employer considers an employee’s accommodation request to be unreasonable, the regulations still require the employer to engage in the “interactive process” to attempt to determine an appropriate reasonable accommodation.⁶³

When the ADA requires medical information to support an accommodation request, submitting a brief doctor’s report with the limited information required under the ADA is preferable to submitting an authorization for the release of medical information.⁶⁴ If possible, the

report should not contain evidence that the employee is not qualified to perform the essential job functions.⁶⁵

2. File a Charge of Discrimination with the EEOC

Before preparing an Equal Employment Opportunity Commission (EEOC) charge of discrimination, either the client or the attorney should obtain and review documents such as personnel and medical records. Where applicable, the charge should contain specific accommodations requested but not received, a broader allegation of ADA violations to encompass nonspecified accommodations, and allegations of a failure to engage in the “interactive process.”⁶⁶ Plaintiff’s having received social security benefits need not be mentioned, although plaintiffs should be prepared to discuss their application for social security benefits and related *Cleveland* issues.

3. File a Federal Complaint

The suggestions for filing EEOC charges of discrimination also apply to filing federal complaints. Besides requesting personnel and medical files, the client or attorney should obtain the entire EEOC file before the attorney prepares the complaint. In general, federal complaints are more specific than charges of discrimination filed with the EEOC, although the Federal Rules of Civil Procedure require only notice pleading for complaints.⁶⁷

⁶¹For cases where courts did not apply estoppel because employers did not provide requested accommodations, see e.g., *Voeltz v. Arctic Cat Incorporated*, 406 F.3d 1047, 1049 (8th Cir. 2005) (jury verdict upheld for employee where employer denied accommodation requests for modified job duties and consulting with occupational therapist); *Wells v. District Lodge 751, International Association of Machinists and Aerospace Workers AFL-CIO*, 5 F. App’x 605, 607 (9th Cir. 2001) (unpublished) (jury verdict upheld for employee where employer denied reasonable-accommodation request to extend sick leave).

⁶²ADA, 42 U.S.C. § 12111(8) (2004) (“essential functions”); *id.* §§ 12111(10), 12112(b)(5)(A) (undue hardship); see, e.g., *Lloyd v. Hardin County*, 207 F.3d 1080, 1084 (8th Cir. 2000) (Clearinghouse No. 52,975).

⁶³29 C.F.R. § 1630.2(o)(3) (2007) (“interactive process”); see, e.g., *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1284–85 (7th Cir. 1996). Employers may have this duty even without a specific accommodation request. See, e.g., *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128, 1136 (9th Cir. 2001) (Clearinghouse No. 53,450).

⁶⁴ADA, 42 U.S.C. § 12112(d)(4) (2004); see also EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 27, 2000), www.eeoc.gov/policy/docs/guidance-inquiries.html.

⁶⁵See, e.g., *Administrator of Estate of Mendez v. City of Chicago*, 174 F. App’x 342, 346–47 (7th Cir. 2006) (unpublished); *Smith v. Frank Implement Company*, 188 F. App’x 549, 551 (8th Cir. 2006) (unpublished).

⁶⁶29 C.F.R. § 1630.2(o)(3) (2007) (“interactive process”); see, e.g., *Norris v. Sysco Corporation*, 191 F.3d 1043, 1048–49 (9th Cir. 1999).

⁶⁷Fed. R. Civ. P. 8.

4. Prepare the Client and Other Witnesses

Discovery is the most critical stage for dealing with *Cleveland* issues. Likely at the plaintiff's deposition, defense attorneys almost certainly ask about the plaintiff's having received social security benefits. Defense lawyers may even steal a line from Charles Laughton's cross-examination of Marlene Dietrich in the film *Witness for the Prosecution*, "Were you lying then, or are you lying now, or are you not in fact a chronic and habitual LIAR?!" (Emphasis in original.) In such a situation, the plaintiff should proffer the "sufficient explanation" that *Cleveland* requires.⁶⁸

Much of the foregoing discusses strategies for asserting *Cleveland* Reason No. 1. Other strategies are appropriate for the other four *Cleveland* reasons.

B. Asserting *Cleveland* Reason No. 2

When asserting that the Social Security Administration's determination process includes listed impairments, advocates should remember that, as discussed, because of the presumptions embedded in the Social Security Administration's five steps in determining disability, individuals can be both capable of working and disabled under the agency's rules.⁶⁹ The primary example of this situation cited in *Cleveland* is the Listing of Impairments; the listing uses medical rather than vocational criteria to determine disability.⁷⁰

The Medical-Vocational Guidelines are another example.⁷¹ The plaintiff should know the basis of the agency's disability finding and be prepared to discuss the relevant agency rules for determining disability. If the social security case goes to an administrative hearing, the plaintiff and attorney should review the administrative law judge's decision.

C. Asserting *Cleveland* Reason No. 3

When asserting that the Social Security Administration recognizes that beneficiaries may work, plaintiffs who were receiving social security disability benefits when their ADA claim arose should be prepared similarly to discuss any of the Social Security Administration's work incentives that they were using, such as the nine-month trial work period, which the Supreme Court mentioned in *Cleveland*.⁷²

D. Asserting *Cleveland* Reason No. 4

When asserting that conditions may change over time, advocates should bear in mind that, where the period of disability entitling the plaintiff to SSDI starts after the adverse employment action, courts are less likely to view the plaintiff's positions as contradictory.⁷³ If the plaintiff's condition changed over time, the medical information should discuss and support the change in the plaintiff's medical condition.⁷⁴ As discussed, plaintiffs should carefully consider the onset-of-disability date alleged in their social security applications.

⁶⁸*Cleveland*, 526 U.S. at 803–5, 807.

⁶⁹See *supra* notes 34–35 and accompanying text.

⁷⁰*Cleveland*, 526 U.S. at 804; see 20 C.F.R. pt. 404, subpt. P, app. 1 (2007) (Listing of Impairments); see also *Kiely*, 359 F.3d at 389 (blindness is a "listed" impairment" under the Social Security Act, and plaintiff's SSDI application was based on blindness, not on inability to work).

⁷¹Medical-Vocational Guidelines, 20 C.F.R. subpt. P, app. 2 (2007).

⁷²*Cleveland*, 526 U.S. at 805; see, e.g., *Schneider v. Landvest Corporation*, 2006 WL 322590, at *32, 33 (D. Colo. 2006) (unpublished) (discussing Social Security Administration's trial work period in reaching its verdict in favor of employee). Work incentives temporarily preserve social security benefit eligibility despite substantial work or medical improvement. For a listing of social security work incentives, see SOCIAL SECURITY ADMINISTRATION, THE RED BOOK—A GUIDE TO WORK INCENTIVES (last reviewed or modified May 30, 2007), www.socialsecurity.gov/redbook/; see also James R. Sheldon Jr., *Work Incentives for Persons with Disabilities Under the Social Security and SSI Programs*, 35 CLEARINGHOUSE REVIEW 759 (March–April 2002).

⁷³See, e.g., *Fox*, 247 F.3d 169; *Tobin*, 2007 WL 967860. But see *Williams*, 375 F.3d 424, 429–30 (a one-day time difference is insufficient).

⁷⁴See 29 C.F.R. § 1630.2(m), app. at 355 (2007) ("The determination ... is ... made at the time of the employment decision.").

E. Asserting *Cleveland* Reason No. 5

Because pleading in the alternative is an option when the Social Security Administration has not yet made a decision, ADA plaintiffs who have not yet been awarded social security disability benefits should not be estopped, as *Cleveland* stated, from pursuing their ADA claim.⁷⁵ In such cases, attorneys should assert that estoppel should not apply because the Federal Rules of Civil Procedure allow pleading in the alternative.⁷⁶

F. More Strategies

The plaintiff has several other possible strategies when pursuing an ADA claim.

1. Describe the Employer's Actions

During discovery, the plaintiff should describe the employer's actions, particularly if the company involuntarily placed an individual on medical leave; terminated an employee whose job performance was satisfactory at the time, with or without an accommodation; changed the workplace conditions; treated or regarded an employee as being disabled; constituted a hostile work environment; or harassed or retaliated against an individual.⁷⁷ However, these arguments are not always successful.⁷⁸

2. Argue Against the Employer Using Benefits Information Acquired After an Adverse Employment Action

In *Cleveland* the plaintiff applied for disability benefits while she was still employed. In many other situations people seek disability benefits only after an alleged discriminatory termination. In these situations the plaintiff can argue that an employer should not be permitted to use benefits information acquired after an adverse employment action to challenge whether the plaintiff was a "qualified individual with a disability."⁷⁹

3. Note When Social Security Administration Information Is Not from Claimant

Cleveland applies only to sworn statements to the Social Security Administration made by the plaintiff when seeking disability benefits.⁸⁰ Thus courts should not use statements made by a physician, wife, or others to defeat a plaintiff's claim.⁸¹

4. Move to Exclude Statements Made to the Social Security Administration

On summary judgment, care should be taken to distinguish between factual in-

⁷⁵*Cleveland*, 526 U.S. at 805 (citing Fed. R. Civ. P. 8(e)(2)); see also *Parker v. Columbia Pictures Industries*, 204 F.3d 326, 335 (2d Cir. 2000) (Clearinghouse No. 52,960) (plaintiff's statements to Social Security Administration do not trigger judicial estoppel where SSDI application was ultimately denied).

⁷⁶Fed. R. Civ. P. 8(e)(2).

⁷⁷For cases where the employee won, at least in part, due to the employer's adverse actions, see, e.g., *Fox*, 247 F.3d at 178 (hostile work environment); *Giles v. General Electric Company*, 245 F.3d 474, 484 (5th Cir. 2001) (employer added statements of disability to employee's social security application); *Pals v. Schepel Buick and GMC Truck*, 220 F.3d 495, 498 (7th Cir. 2000) (employer treated plaintiff as permanently disabled); *Norris*, 191 F.3d at 1048 (employer failed to respond to accommodation requests); *Tobin*, 2007 WL 967860, at *1 (employer failed to provide requested accommodations).

⁷⁸For cases where the argument failed that the employer's conduct rather than the employee's disability caused the employment to end, see, e.g., *Devine v. Board of Commissioners of Elkhart County*, 49 F. App'x 57 (7th Cir. 2002) (unpublished) (alleged retaliation); *Lee*, 259 F.3d at 675-78 (employer allegedly "hammered" disability into employee's head).

⁷⁹ADA, 42 U.S.C. § 12111(8) (2004) ("qualified individual with a disability"); see, e.g., *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352, 359 (1995) (Clearinghouse No. 50,578) (employer liability is determined solely by information available to employer at time of decision).

⁸⁰*Cleveland*, 526 U.S. at 802.

⁸¹See, e.g., *Murphey v. City of Minneapolis*, 358 F.3d 1074, 1080 (8th Cir. 2004) (physician); *Tobin*, 2007 WL 967860, at *3 (wife). But see *Opsteen v. Keller Structures Incorporated*, 408 F.3d 390, 392-93 (7th Cir. 2005) (estoppel applied on the basis of statements made by employee's wife and physician).

consistencies and context-based statements such as “I am disabled” or “I am unable to work” that the plaintiff made to the Social Security Administration. Advocates can argue that any apparent inconsistencies in a plaintiff’s statements should be resolved by the jury and not by judicial estoppel.⁸² Case law, in addition to the above-described strategies, supports excluding statements that a plaintiff made to the agency from trial in order to prevent jury confusion.⁸³

5. Help the Judge and Jury Understand the Plaintiff’s Predicament

As with any trial, the attorney needs to tell a good story. The attorney needs to help the judge and jury understand the difficulties facing an individual with a disability in working and the strong effort required by the individual to find and maintain employment. The attorney should use the beneficial *Cleveland* language in drafting jury instructions to help the judge and jury understand the legal context of a plaintiff’s statements to the Social Security Administration as well there being nothing inherently and legally improper about seeking the benefits of both laws. The attorney should highlight the nation’s goals of maximizing the employment potential of people with disabilities while minimizing their dependence on government benefits.



When the Supreme Court decided *Cleveland*, advocates hoped that pursuing ADA claims would be easier for social security disability beneficiaries. Although already difficult ADA cases become even more treacherous for social security beneficiaries, *Cleveland* and lower-court rulings do provide some guidance in suggesting strategies for advocates and attorneys to pursue when representing individuals in social security or ADA claims.

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⁸²See, e.g., *Norris*, 191 F.3d at 1049.

⁸³See, e.g., *Praseuth v. Rubbermaid Incorporated*, 406 F.3d 1245, 1254 (10th Cir. 2005); *Radovich v. Secretary of the U.S. Department of the Treasury*, 116 F. App’x 783, 787 (9th Cir. 2004).

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