J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 6(1) 49-69, 1997-98

SUING UNDER THE AMERICANS WITH DISABILITIES ACT OR SEEKING DISABILITY BENEFITS: *A HOBSON'S CHOICE FOR PEOPLE WITH DISABILITIES*

SCOTT JOHNSON
Franklin Pierce Law Center, Concord, New Hampshire

ABSTRACT

In this article a relatively new development in the law is discussed where courts are currently undecided. The issue is whether filing for social security disability benefits should preclude a person from accessing the protections of the ADA. The issue arises when an individual loses their job, applies for benefits for financial and medical assistance, and then sues their previous employer under the ADA alleging their termination was discriminatory. The controversy is essentially over definitions. The ADA applies to qualified individuals with a disability. To be qualified an individual must meet the job eligibility requirements, and they must be able to perform the essential functions of a job with or without a reasonable accommodation. In order to qualify for social security disability benefits an individual must show they are unable to engage in substantial gainful activity. Some courts feel these terms are mutually exclusive. In other words, you can't be able to perform the essential functions of a job, and unable to engage in substantial gainful activity at the same time. Other courts have held these definitions are compatible, and although meeting one of them can certainly be used as evidence to show a plaintiff does not meet the other it should not be given preclusive effect. This issue is very important because it is at the core of public policy initiatives aimed at integrating people with disabilities into society.

Historically, people with disabilities have been stigmatized, treated as inferior, and discriminated against in about every way imaginable [1]. Fear, misunderstanding, and prejudice create social barriers that people with disabilities must currently face on a daily basis [2]. These barriers are arguably more disabling than

doi: 10.2190/69YP-QKBT-UGQ0-HVAC
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any physical or mental impairment a person may have. They also place a severe economic burden on our economy by forcing people with disabilities into roles of dependency and nonproductivity [3].

A variety of laws have been passed over time with the intent of helping people with disabilities and eliminating these social barriers. Two of the most important are the Social Security Act [4], part of which provides disability benefits to individuals who cannot work, and the Americans with Disabilities Act (ADA) [5], which, among other things, prohibits discrimination against disabled individuals who can. Recently, conflicting interpretations of these laws have developed that have major implications for people caught in between these two situations.

The Social Security Act provides disability benefits under two programs. Social Security Disability Insurance, or Title II of the act [6], is an income security program. It provides disability benefits irrespective of financial need to individuals who become disabled after they have participated in the workforce for a certain period of time [7]. Supplemental Security Income, or Title XVI of the act [8], is a means-tested program. It provides income to financially needy individuals who are disabled, regardless of their previous work history [9].

Both of these programs are implemented nationally by the Social Security Administration (SSA) and are intended to serve as a safety net providing entitled individuals with financial and medical assistance [10]. To qualify for benefits under these programs an individual must have a medically determinable physical or mental impairment that can be expected to result in death or last for at least twelve months, and a finding by SSA that the impairment causes inability to engage in any substantial gainful activity [11].

Conversely, the ADA represents an effort to integrate people with disabilities into society by assuring equality of opportunity, full participation, independent living, and economic self-sufficiency [12]. It is a plenary civil rights statute designed to halt all practices that segregate persons with disabilities and those that treat them as inferior or different [13]. Some have referred to the ADA as an emancipation proclamation for people with disabilities [14]. Title I of the ADA seeks to fulfill these goals by prohibiting discrimination in the workplace [15]. To make a prima facie case under the ADA a plaintiff must prove s/he is a qualified individual with a disability [16]. To be qualified, an individual must meet the job eligibility requirements and must be able to perform the essential functions of a job with or without a reasonable accommodation [17].

One area of law that is currently unclear is what happens when a person tries to access both of these laws at the same time. Should filing for social security disability benefits (SSDB) [18] preclude a person from accessing the protections of the ADA? Courts are undecided on this issue, which arises when an individual is fired, applies for SSDB for financial and medical assistance, and then sues his/her previous employer under the ADA alleging the termination was discriminatory. The controversy is essentially over definitions. Some courts have held that the qualifying terms of these acts are mutually exclusive. In other words,

you cannot be able to perform the essential functions of a job and be unable to engage in substantial gainful activity at the same time. Other courts have held these terms are compatible, and although meeting one of them certainly can be used as evidence to show that a plaintiff does not meet the other, it should not be given preclusive effect.

THE ESTOPPEL CASES

Many courts that have held the terms of these acts to be mutually exclusive and have employed the doctrine of judicial estoppel to bar plaintiffs from asserting they are qualified under the ADA after they have asserted they are unable to engage in substantial gainful activity in order to obtain disability benefits. This means that a plaintiff is unable to establish a *prima facie* case of discrimination under the ADA.

The genesis for these opinions is in two cases. In *Beauford v. Father Flanagan's Boys' Home* [19], the Eighth Circuit Court of Appeals held that an employee who was no longer able to perform the essential functions of her job was not an otherwise qualified handicapped individual under the federal Rehabilitation Act of 1973 [20]. The plaintiff was hospitalized for physical and emotional ailments and informed her employer she was unable to work because of these ailments [19, at 769-770]. She then filed for disability benefits offered by her employer and later sued her employer for discontinuing them, alleging violation of the Rehabilitation Act [19, at 771].

The district court rejected the claim, holding she was not an otherwise qualified handicapped individual because she had admitted she was no longer able to perform her job [19, at 771]. Affirming the district court ruling, the court of appeals wrote: "Though it may seem undesirable to discriminate against a handicapped employee who is no longer able to do his or her job, this sort of discrimination is simply not within the protection of [the Act]" [19, at 771]. So, *Beauford* stands for the proposition that if a person with a disability is not qualified, then laws such as the ADA simply do not apply to them.

The First Circuit Court of Appeals augmented this reasoning in *August v. Offices Unlimited* [21]. The court held a plaintiff could not establish he was a qualified handicapped person under a Massachusetts law prohibiting discrimination based on disability because he had previously stated he was "totally disabled" when applying for private insurance disability benefits [22]. The court felt this declaration meant he was not able to perform the essential functions of his job and concluded that since he had conceded he was totally disabled he could not now establish that he was a qualified handicapped person [21 at 581-583]. Therefore, he could not make the *prima facie* case required to prevail on his claim [21, at 581-583].

Although these cases do not expressly utilize the doctrine of judicial estoppel, their reasoning has been relied on by courts that do [23]. For example, in

McNemar v. Disney Stores [24], a district court in Pennsylvania held that a plaintiff was estopped from arguing he was qualified under the ADA since he had certified he was disabled on his application for SSDB. McNemar was a manager at a Disney retail store who was terminated shortly after he admitted to his supervisor that he had AIDS [24, at *2]. Following his dismissal, McNemar applied for and received SSDB [24, at *2]. He then sued Disney claiming his termination violated the ADA [24, at *1-*2].

The court held McNemar had failed to establish a *prima facie* case of discrimination as he was not a qualified individual as defined by the ADA [24, at *3]. The court felt McNemar had admitted he was not qualified to perform his job when he certified under penalty of perjury that he was "totally and permanently disabled" on his application for disability benefits [24, at *3]. McNemar argued these representations did not render him unqualified under the ADA because AIDS is listed as a presumptive disability [24, at *4]. The court found this to be irrelevant and instead relied on the uncontroverted fact that McNemar received benefits because he claimed he was unable to work [24, at *4]. The court concluded that he could not be simultaneously unable to work and qualified to perform the duties of his position. "Plaintiff in the case sub judice cannot speak out of both sides of [his] mouth with equal vigor and credibility before this court" [25].

A district court in Kansas reached a similar conclusion in *Garcia-Paz v. Swift Textile* [26]. The plaintiff claimed her employer discriminated against her on the basis of a perceived disability [26, at 554]. The defendant argued she was not a qualified individual with a disability because she had represented she was totally disabled and unable to work in order to obtain SSDB after she was terminated [26, at 555]. Therefore, they claimed that as a matter of law, she could not establish a *prima facie* case of discrimination under the ADA [26, at 555]. The court agreed, noting the plaintiff's statements in this case were "fundamentally at odds" with the position she took to obtain disability benefits [26, at 555]. Since she had asserted she was disabled and collected benefits based on these representations, the court felt she should be estopped from claiming she could now perform the essential functions of her position [26, at 555].

ANALYSIS

There have been a number of other cases in various districts where courts have employed the doctrine of judicial estoppel to bar a plaintiff from accessing the ADA after representing they were disabled in order to obtain disability benefits [27]. The doctrine of judicial estoppel is a technical rule designed to meet the needs of broad public policy [28]. Its purpose is to protect the integrity of the judicial process and prevent it from being manipulated by "chameleonic litigants" who attempt to assert positions in subsequent litigation that contradict positions

they have taken in previous litigation [29]. To put it in simpler terms, it is supposed to raise the cost of lying [30].

Most courts apply judicial estoppel only if three criteria are met. 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 [31]. These courts emphasize the purpose of avoiding inconsistent results and reason that absent success in the prior action, the integrity of the court is not threatened by the inconsistency [31]. A minority of courts apply estoppel even though the party was not successful in asserting the earlier inconsistent position [31]. These courts emphasize the purpose of preventing litigants from "playing fast and loose with the judicial system" [32].

Although the purposes for judicial estoppel are certainly valid, applying it to preclude a person with a disability from accessing the ADA because s/he has filed for SSDB would seem inappropriate for three reasons:

1. It denies plaintiffs a fair opportunity to prove they are qualified under the ADA.
2. It forces people with disabilities to choose between applying for necessary financial and medical assistance or accessing the protections of the ADA, thereby frustrating the purposes and goals of the ADA and the Social Security Act.
3. It results in bad public policy.

FAIR OPPORTUNITY

It is particularly important to note that all of the cases employing judicial estoppel in these circumstances are summary judgments. When a court utilizes judicial estoppel, summary judgment is granted for the defendants. Of course, a granting of summary judgment always precludes further development of the facts, but applying judicial estoppel at this stage also precludes a judge from examining all of the facts in the light most favorable to the nonmoving party. If estoppel is applied there is no need for the court to examine any facts beyond that point [33]. So, a court needs only to see whether a plaintiff applied for SSDB, and that could end the inquiry regardless of what else may have occurred. This not only slams the courthouse door on potential plaintiffs, it also keeps them off the front steps, since they do not even get a chance to prove they are qualified under the ADA. Therefore, no matter how egregious an alleged violation may be, a plaintiff cannot seek redress under the ADA because it simply doesn't apply to him/her.

The impact of this can be devastating. For example, in *Kennedy v. Applause* [34], the plaintiff had given contradictory statements during deposition about whether or not she was able to perform her job [34, at *3]. The court noted this testimony and stated it could have created a sufficient issue of triable fact that

would have prevented it from granting summary judgment [34, at *3]. However, because the plaintiff represented on SSDB claim forms that she was disabled, the court held she was prevented from making the argument that she could work and therefore granted the motion of summary judgment [35].

There have been a couple of cases that directly challenge the appropriateness of utilizing judicial estoppel in these circumstances. One case held it was not appropriate because judicial estoppel applied only when a party attempts to put forward a position clearly inconsistent with that undertaken in prior judicial or quasi-judicial proceedings, and this did not include oaths undertaken in administrative filings [36]. This court also noted that the core of judicial estoppel ensures a party will not argue inconsistent positions to gain an unfair advantage over its adversary and reasoned that the receipt of disability benefits in no way provides an unfair advantage to a plaintiff in an ADA case [36, at *6]. One could extend this logic to argue that granting judicial estoppel in these circumstances does provide an unfair advantage to the defendant. Employers should not be allowed to use a doctrine intended to shield the judiciary system as a sword to deprive plaintiffs of their opportunity to seek redress in the courts.

One case is worthy of detailed examination, since the facts are similar to *McNemar*, but because of the reasoning of the court the outcome is drastically different. In *Smith v. Dovenmuehle Mortgage* [37], the plaintiff alleged he was fired by his employer because he had AIDS. After he was fired, Smith applied for SSDB stating that he had AIDS, peripheral neuropathy, and wasting syndrome, and that he stopped working because of these conditions [37, at 1140]. Smith then sued under the ADA, seeking reinstatement to his former position [38]. Dovenmuehle argued that Smith was judicially estopped from proving he was qualified for his former position because he had represented to SSA that he was disabled and could not perform his job [37, at 1140]. However, the court disagreed and felt judicial estoppel was not appropriate in the case [37, at 1143].

The court followed *Overton v. Reilly* [39], where the Seventh Circuit Court of Appeals stated that a finding of disability by the SSA is consistent with a claim that a disabled person is qualified to do his/her job under the Rehabilitation Act and cannot be construed as a judgment that a plaintiff is unable to do the job [39, at 1196]. The court in *Overton* gave two reasons for its conclusions. First, the SSA may award disability benefits on a finding that a claimant meets the criteria for a listed disability without inquiring into his/her ability to find work within the economy [39, at 1196]. (As it turns out, the SSA granted benefits to Overton on this basis.) Second, even if the SSA had looked into Overton's ability to find work in the national economy, its inquiry would necessarily be generalized [39, at 1196]. Therefore, the court concluded the SSA's determination that a claimant is unlikely to find a job does not mean there is no work the claimant can do. "In sum, the determination of disability may be relevant evidence of the severity of Overton's handicap, but it can hardly be construed as a judgment that Overton could not do his job" [39, at 1196].

Following this reasoning allowed the *Dovenmuehle* court to examine all the facts of the case and note that Smith and his doctors all stated that although he was disabled and unable to work following his termination, he had since recovered sufficiently to enable him to perform the essential functions of his job [40]. This led the court to conclude there was no inconsistency present, thus making judicial estoppel inappropriate and, since there were genuine issues of material fact in dispute, the motion for summary judgment was denied [37, at 1143].

The analysis in *Dovenmuehle* would seem to be a much fairer way of determining whether a plaintiff is in fact qualified under the ADA. The reasoning displayed in *McNemar* places great weight and finality on statements made during the disability determination process. As demonstrated in *Dovenmuehle*, those conditions can often improve. But under the *McNemar* reasoning plaintiffs may be precluded from making this point and therefore not given a fair opportunity to prove they are qualified.

There have been cases, with different circumstances, where courts have rejected the use of judicial estoppel because it would have unfair results. In *Parkinson v. California Co.* [41], the Tenth Circuit was asked to apply judicial estoppel to a plaintiff who had pending complaints in both state and federal courts arising from the same incident against separate defendants [41, at 434-435]. Both complaints alleged the same negligent behavior, but claimed different parties were at fault [41, at 434-435]. The defendants in the federal court action argued that the statements made in the state court petition should estop the plaintiff from arguing they were at fault [41, at 437]. The court refused to apply judicial estoppel because it felt its application would "discourage the determination of cases on the basis of the true facts as they might be established ultimately" [41, at 438]. The court stated that even in a case where false statements were made "public policy could be vindicated by more practical and fairer means that would allow each lawsuit to attempt to reach the truth" [41, at 438]. Other courts have relied on *Parkinson* to sustain similar holdings [42]. Even courts that have applied judicial estoppel have noted it must be done with caution to avoid impinging on the truth-seeking function of the court [43].

Similar arguments can be made for individuals caught between applying for SSDB and suing their employer for discrimination. Since truth is an essential objective of our judicial system [44], public policy would be more fairly vindicated by giving plaintiffs an opportunity to prove they are qualified under the ADA.

HOBSON'S CHOICE

As the court in *Dovenmuehle* noted, precluding plaintiffs from proving they are qualified under the ADA because they filed for SSDB would place them in "the untenable position of choosing between [their] right to seek disability benefits and [their] right to seek redress for an alleged violation of the ADA" [37, at 1142]. The

court also noted it would conflict with one of the stated purposes of the ADA, which is to combat "the continuing existence of unfair and unnecessary discrimination and prejudice [which] denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous" [37, at 1142]. Interestingly, in *McNemar* the court specifically rejected the *Dovenmuehle* court's reasoning [24, at *4]. *McNemar* stated that although it appeared to be unfair to force individuals to choose between seeking benefits or suing under the ADA there was no indication Congress intended to provide disability benefits to persons capable of obtaining gainful employment [24, at *4]. The court also stated that applying judicial estoppel would not thwart the ADA's goals because "a disabled person who believes he has been the victim of discrimination retains the option of filing suit pursuant to the ADA" [24, at *4].

The court's statements in *McNemar* overlook some vital facts. Both the *Dovenmuehle* and *Overton* cases provide good evidence that Congress does want to provide disability benefits to individuals capable of working. In both of those cases the plaintiffs were working and were still receiving SSDB during a nine-month trial work period [39, at 1139; 39, at 1192]. Congress and the SSA also provide other work incentives, such as allowing beneficiaries to work as long as they don't earn over $500 per month [45]; providing extended eligibility periods for individuals participating in successful trial work periods; and extending Medicare coverage for beneficiaries even after they are engaged in substantial gainful activity [46]. Additionally, there are several programs that waive certain SSA requirements to encourage greater work activity among disability beneficiaries [47]. These programs and incentives are a good indication that Congress and the SSA want to encourage people to work by providing them necessary assistance and helping them through transitional periods. This is exactly what many of the plaintiffs seem to be seeking in these cases. They merely want disability benefits to help them until they are able to go back to work.

Second, judicial estoppel in these circumstances *does* thwart the goals of the ADA because, as the court noted in *Dovenmuehle*, it forces a potential plaintiff to make a Hobson's choice between applying for disability benefits or accessing the protections Congress has provided under the ADA. This conflicts with the stated purposes of the ADA: to provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities, and to provide enforceable standards addressing discrimination [48]. Making people choose between benefits and suing under the ADA in effect denies benefits to people who choose to seek redress under the ADA. This may very well make many people unable to seek redress, as they will not have the financial ability to do so. It would seem difficult to eliminate discrimination when plaintiffs with legitimate claims are unable to bring suit for financial or medical reasons.

Judicial estoppel also denies people with disabilities access to enforceable standards. For example, one of the most touted parts of the ADA is its reasonable

accommodation provisions. These provisions are intended to help people with disabilities overcome unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities [49]. An employer must provide an accommodation as long as it is reasonable and does not impose and undue hardship on it [50]. So, in essence, not providing an accommodation when it is reasonable is discrimination [51]. However, by using judicial estoppel to preclude plaintiffs from proving they are qualified, employers ensure that plaintiffs are unable to access these provisions and are therefore left with unenforceable standards. The result is that plaintiffs are unable to prove they were in fact discriminated against.

Additionally, one of the main purposes of the ADA was to get people off SSDB and into the workplace, thereby helping to integrate them into society [52]. The irony of judicial estoppel is that it precludes people from doing this and may force them to remain on SSDB. Persons who are unable to return to their former job may very likely continue to receive benefits until they find another one. Given the difficulty many people with disabilities have finding employment, this is not always an easy task [53]. Moreover, the reasoning of judicial estoppel could presumably be used for hiring situations at subsequent jobs. So persons experiencing discrimination in their new job search would be precluded from seeking redress under the ADA because they had applied for SSDB. This could keep someone on SSDB forever. It may also leave some people without a job or benefits. Some of the cases seem to indicate it is the person's assertion of disability on SSA forms that has the preclusive effect [54]. Following this logic, a person could be forever barred from suing under the ADA even if s/he were denied SSDB. Indeed, in *Kennedy*, the court held a plaintiff's representations to SSA as to her disability prevented her from arguing under the ADA that she was unable to return to work—even though SSA denied the application [55].

Judicial estoppel also thwarts the goals of the Social Security Act. In recent times, SSA has made a concerted effort to help beneficiaries view disability benefits "as a bridge, and not the end of the road" [56]. Helping beneficiaries with disabilities take advantage of employment opportunities has become one of SSA's highest priorities [46]. As discussed previously, SSA provides beneficiaries with a variety of programs and incentives that encourage employment. One of the reasons why the ADA was necessary was because people with disabilities were not being employed even though they had completed some type of vocational rehabilitation program or were otherwise able and willing to work [57]. The ADA was the next step. It helps SSA programs function by ensuring that individuals in these programs are given a fair opportunity to be employed. With judicial estoppel you are preventing plaintiffs who are able to work from going into the workforce and thereby frustrating the very purpose of all of these programs.

Finally, precluding someone from the protections of the ADA because s/he filed for SSDB is just plain unfair. Even the *McNemar* court recognized this fact. When persons are fired, they not only lose their income, they often lose their medical

insurance as well. For individuals with disabilities this can be critical [58]. People should not be forced to choose between obtaining necessary financial and medical assistance or enforcing their rights, especially when it can take years before there is any relief through litigation. Allowing this will just perpetuate the discrimination against people with disabilities that has existed for years.

PUBLIC POLICY

Employing the doctrine of judicial estoppel in these cases also leads to bad public policy. One of the justifications for integrating people with disabilities into society is economic. Getting people off disability benefits and into the workforce saves taxpayers money and expands the productivity of our economy. The costs of the Social Security disability programs are projected to rise to nearly $60 billion by 1997, not including Medicare and Medicaid expenditures [59]. In 1993, a total of 6.7 million adults under sixty-five were receiving benefits from Social Security based on disability [58], and the overall number of beneficiaries is steadily increasing [60]. An ongoing concern of Congress and SSA is that SSDB encourages people to retire from the workforce and receive benefits when they are capable of working again [61]. Once beneficiaries are on the rolls they rarely return to work. It is estimated that fewer than 3.0 percent of all beneficiaries terminate from Social Security disability due to a work recovery [62]. In the cases discussed in this article the plaintiffs want to work. There would seem to be a strong public policy argument to let them try and prove they are able to.

Courts have refused to apply judicial estoppel because of countervailing public policy reasons in the past. In *City of Alma v. U.S.* [63], the court refused to apply judicial estoppel to preclude the EPA from changing its position in subsequent litigation on whether or not a project should be approved. The court stated that in the interests of public policy it was very reluctant to apply estoppel to an agency [63]. The court reasoned it would undermine the interests of the citizenry as a whole in obedience to the rule of law [63]. The counterprevailing public policy reasons of encouraging people with disabilities to work would also seem to justify a court's rejecting the application of judicial estoppel.

BASED-ON-THE-EVIDENCE CASES

For the courts that do not apply judicial estoppel in these cases, the issue often becomes one of reasonable accommodation. Although plaintiffs are not precluded from trying to prove they are qualified under the ADA, the fact that they applied for disability benefits is given great weight by some courts in deciding whether a reasonable factfinder could find them qualified [64]. A good example is *Smith v. Midland Brake* [65], where it seemed that regardless of the strength of Smith's arguments he could not overcome the statements he had made on his SSDB forms and SSA's determination that he was disabled. Smith was removed from work by

his physician because of severe dermatitis of the hands, and he later applied for SSDB [65, at *1]. Smith admitted he could not perform his previous job but maintained there were numerous other vacant positions at the defendant's plant that he was able to perform, but the defendant refused to place him in any of these positions [65, at *2]. The court noted that reassignment to a vacant position is a potential reasonable accommodation, but concluded Smith had not produced sufficient evidence to show he could have been accommodated by means of a transfer to a different job [65, at *2]. In making this determination, the court placed great weight on the fact that Smith certified in his Social Security disability application that he "became unable to work because of [his] disabling condition," and he was "still disabled" [65, at *2].

Smith argued his statements only meant he could not perform his old job and did not mean he couldn't perform other jobs, so his claims were not inconsistent [65, at *4]. The court was not persuaded, stating, "Mr. Smith's statements on his application represent unconditional assertions as to his disability, and [he] cannot now seek to qualify those statements where the application itself was unequivocal" [65, at *4]. Smith also argued SSA's determination that he was disabled did not mean he was not a qualified individual under the ADA, because such a determination does not mean a person cannot perform the essential functions of any job [65, at *6]. The court disagreed, taking seriously the administrative law judge's statements that "there are no jobs existing in significant numbers the claimant is capable of performing," and "the claimant is under a disability as defined by the Social Security Act" [65, at *6]. Also, the court felt, regardless of how SSA determined that Smith was disabled, he had "unqualifiedly stated he was unable to work" [65, at *6]. The court concluded in light of the plaintiff's representations to the SSA that he was totally disabled and unable to work, and because he had never provided Midland Brake with a medical release for his return to work, no reasonable jury could find he was a qualified individual with a disability under the ADA [65, at *10].

The rejection of Smith's arguments is certainly contrary to *Overton*, where the court held the finding of disability by the SSA is consistent with being qualified under the Rehabilitation Act [39, at 1196]. *Overton* and other cases that have followed its reasoning often conclude there is a genuine issue of fact about whether a plaintiff is qualified [66]. This may be because the reasoning of *Overton* allows a court to fairly weigh the facts and consider issues such as reasonable accommodation. For example, in *Overton* the plaintiff was fired because he could not effectively communicate with the public [39, at 1192]. Overton argued he had mental impairments that restricted his ability to communicate effectively with the public, but he could continue to do his job with a reasonable accommodation [39, at 1194-1195]. The court examined all of the facts and felt there was a genuine question about whether Overton was otherwise qualified for his position because it was not clear whether communicating with the public was an essential function of his job [39, at 1195]. The court also concluded that even if it was an

essential function of his position there was evidence to suggest a reasonable accommodation could have been provided [67]. Therefore, the court reversed the district court's granting of summary judgment and remanded the case to decide these issues [39, at 1195].

The *Overton* line of reasoning seems to make the most sense in light of the SSA regulations and process. The court in *Midland Brake* seemed to misunderstand the nature and focus of the SSA disability determination process. The court placed great importance on the fact that the plaintiff was determined to be disabled, and therefore unable to work, by the SSA [65, at *6]. However, the SSA places its focus on medical considerations to determine the severity of an individual's impairment, not his/her ability to work [68]. If the medical conditions indicate a person's impairment is of sufficient severity, it is presumed that s/he cannot work [68, at *2]. For example, the SSA regulations provide for a five-step sequential analysis to determine whether a person is disabled and eligible for benefits [69]. As the *Overton* court noted, the third step of this process allows for persons to be awarded benefits without regard to their age, education, or previous work experience if they meet or equal a listed impairment [70]. This means a claimant could be found unable to work based on medical considerations alone [68, at *1-2]. By contrast, the ADA focuses on employees' experience, education, and skills, to see whether they are able to perform the essential functions of a job [71]. Given these distinctions, it would seem unjust for a court to decide that a person cannot work for purposes of the ADA, based on an SSA determination that s/he is eligible for benefits.

Even when SSA does consider work-related factors, the determination process is much different from an ADA analysis. The closest the sequential analysis gets to literally meaning a person could not work is in the fourth step, where an impairment must prevent a claimant from doing past relevant work [72]. But even here SSA does not consider whether the claimant could do past work with a reasonable accommodation [73]. As mentioned before, many of the disputes in these cases are over reasonable accommodations. For example, in *Overton* the plaintiff claimed he could have continued doing his job if his employer would have accommodated him [39, at 1195]. Similarly, in *Midland Brake*, the plaintiff said that although he could not perform his old job he could perform other jobs at the plant [65, at *2]. In these situations SSA awarded benefits even though they arguably could have worked with these accommodations.

In the fifth step of the analysis, SSA does check to see whether a claimant's impairment prevents him/her from performing any other work [72]. But, as the *Overton* court noted, this is necessarily a generalized inquiry [39, at 1196]. SSA uses its infamous grids, or vocational guidelines, to do this analysis. The grids take administrative notice of jobs that exist in significant numbers in the national economy [74]. So, by definition it does not include a variety of jobs that exist in smaller numbers. As a practical matter it would be impossible for SSA to determine a person is incapable of performing every conceivable job. Indeed, there are

indications that people who would be classified as per se disabled under the SSA's regulations are nevertheless at work [75]. Evidence of this can be found in both *Overton* and *Dovenmuehle*, where the plaintiffs were awarded benefits and then found jobs [37, at 1139; 39, at 1192].

Additionally, it must be remembered that the SSA processes over three million claims for benefits each year [76]. This has led courts and commentators to label the SSA as "the Mount Everest of bureaucratic structures" [77]. Although the ultimate goal of the disability determination process is the rational and fair determination of whether a claimant meets the underlying statutory test for disability, the sequential analysis was adopted in part to serve the interests of administrative efficiency [78]. For this reason, the sequential analysis is full of presumptive mechanisms such as the listing of impairments and vocational guidelines mentioned above. If claimants meet the criteria for these mechanisms they are eligible for benefits. This one-size-fits-all method of evaluating disability may be good for efficiency purposes, but because all claimants' situations are different it also grants benefits to some people who could in fact work and denies benefits to others who cannot.

Given the focus and presumptive nature of the process, an SSA determination that a plaintiff is disabled should be taken with a grain of salt by courts when deciding whether s/he is qualified under the ADA—especially when the plaintiff is requesting a reasonable accommodation. Since this is one of the key features of the ADA and essential for many people prove they have been discriminated against, plaintiffs should not be penalized by an SSA determination that they are disabled when SSA does not consider this issue in their determination.

CONCLUSION

Although there are no statistics on the number of people who may find themselves in the dilemma discussed in this article, based on the number of SSA applications for disability, and the number of ADA claims in the past couple of years it is fair to say that this issue could affect a substantial number of people. Because of this, it is worth thinking of ways to help address the problem some of these cases present. Many of the cases reviewed in this article gave great weight to a claimant's statements during the disability determination process [54; 55, at *6]. In some cases the claimant's statements alone were used to estop them from claiming they were qualified under the ADA [55, at *3 n6]. Several of the cases relied on the fact that a claimant signed an application with the preprinted words "totally and permanently disabled" [24, at *4; 55, at *5]. To these courts the fact that the words were not the plaintiff's was irrelevant because they were still certifying under penalty of perjury they were unable to work.

In light of this, one suggestion for advocates with clients in this situation is to be very specific about what they say during the process and to try and make the

claimants' statements work in their favor. For example, in a recent district court case in Massachusetts, *Ward v. Westvaco* [79], the court rejected a motion for summary judgment because the plaintiff had specifically stated on his disability applications that he would have been able to perform his job had his employer made reasonable accommodations [79, at 615]. The court felt these statements took the case outside of the *August* framework and held there were disputed issues of fact about whether or not the plaintiff was qualified under Massachusetts law [80]. To the extent that clients seek an attorney's assistance early in the determination process, advising them to make similar statements when appropriate could preserve their bite at the apple.

However, because claimants usually do not seek legal help until late in this process, some type of public education on this issue would seem imperative. Perhaps the most effective way to do this would be to use current technology. Disseminating information on the Internet is inexpensive, and more importantly it provides an accessible and visible forum for interested parties. People with disabilities seem to have a well-organized presence on the Internet, and advocates and interest groups that provide services for people with disabilities often use the Internet to send and receive information. Therefore, providing information about this issue via the Internet would seem to reach the most people by using the least resources.

Unless Congress decides to fix this dilemma by clarifying its position on this issue, it seems people with disabilities will be left to the mercy of the courts in their circuit. As this article shows, there is no uniformity in dealing with this issue among courts in different circuits. Often, the cases that use judicial estoppel do not mention the cases where courts hold differently and make no attempts to distinguish the *Overton* line of reasoning [81]. Any *Overton* type arguments are just flatly and inexplicably rejected. For example, in *Garcia-Paz* the plaintiff argued that allowing an employer to discriminate and then defend that action after the fact by asserting the person was disabled would subvert the meaning and intent of the ADA [26, at 556]. The court addressed this argument by stating that it was "unconvinced" [26, at 556]. However, it failed to say why. Given these results, it is unlikely courts will be changing their opinions on this issue without further guidance.

It is often said that the wheels of justice turn very slowly. It is unfortunate that after decades of waiting for these wheels to turn in their favor the laws that were enacted to help people with disabilities are being used to harm them.

* * *

Scott Johnson is currently a 3rd year law student at Franklin Pierce Law Center in Concord, New Hampshire. This article was presented at the First Annual Academic Convocation for Law Students at Suffolk University Law School and Awarded Scholars' Paper.

ENDNOTES

1. For some history on the treatment of people with disabilities see Jonathan C. Drimmer, Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, *40 UCLA L. Rev. 1341*; and Timothy M. Cook, The Americans with Disabilities Act: The Move to Integration, *64 Temp. L. Rev. 393* (1991).
2. The congressional hearings on the Americans with Disabilities Act (ADA) are full of horror stories from individuals who have disabilities. A couple of examples are a New Jersey zookeeper refusing to admit children with Down's syndrome because he feared they would upset the chimpanzees; a child with cerebral palsy being excluded from public school, because his teacher claimed his physical appearance produced a nauseating effect on his classmates; an applicant with cerebral palsy described being told she was not qualified for a job in a metropolitan hospital because fellow employees would not be comfortable working with her; a theater owner prohibiting a person with cerebral palsy from attending movies; a police officer pointing his gun at a person's head, cocking it, and pulling the trigger on an empty barrel because he thought it would be funny since the person had quadraparesis and couldn't flee or fight; and an airline employee who threw a double-amputee on the baggage dolly instead of helping him onto the airplane. See S.Rep. No. 116, 101st Cong., 1st Sess. 7 (1989); H.R.Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 30, *U.S. Code Cong. & Admin. News 1990*, pp. 267, 311 (1990) 135 Cong. Rec. S10720; Senate Comm. on Labor and Human Resources, Rep. on the Americans with Disabilities Act, S.Rep. No. 116, 101st Cong., 1st Sess. 7 (1989); House Comm. on Education and Labor, Rep. on the Americans with Disabilities Act, H.R.Rep. No. 485, 101st Cong., 2d Sess., at 42, reprinted in *1990 U.S. Code Cong. & Admin. News, pp. 267, 303, 324* (1990); Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing Before the Subcomm. on Select Education of the Comm. on Education and Labor, 100th Cong., 2d Sess. 39 (1988).
3. See ADA, 42 U.S.C.A. § 12101(a)(9).
4. See 42 U.S.C.A. § 301, et seq.
5. 42 U.S.C.A. § 12101, et seq.
6. 42 U.S.C.A. §§ 401-433.
7. See 42 U.S.C.A. § 423(d).
8. 42 U.S.C.A. §§ 1381-1386.
9. 42 U.S.C.A. § 1382(a).
10. For a detailed history and overview of social security disability programs see Social Security Programs in the United States, 12/22/93, *Soc. Sec. Bull. 382*, 1993 WL 3035560.
11. 42 U.S.C.A. § 423(d)(1)(a).
12. 42 U.S.C.A. § 12101(a)(8).
13. See 136 Cong. Rec. H2599 (daily ed. May 22, 1990) (statement of Rep. Dellums).
14. See 135 Cong. Rec. S10 (daily ed. Sept. 7, 1989) (statement of Senator Edward M. Kennedy).
15. 42 U.S.C.A. § 12112(a).
16. 42 U.S.C.A. § 12111(8).
17. [16]. See also 29 C.F.R. § 1630.4; 29 C.F.R. § 1630.2(m); 29 C.F.R. Pt. 1630, App.

18. For purposes of this article I use SSDB to include supplemental security income (SSI) and social security disability insurance (SSDI). Although most of the cases I discuss involve SSDI, some involve SSI. As the definition of disability and the process for applying for benefits is the same for both, I have combined them.
19. *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987), *cert. denied*, 485 U.S. 938 (1988).
20. [19, at 771]. The Rehabilitation Act of 1973 was the precursor to the ADA. Section 12117(b) of the ADA requires consistency between the two acts.
21. *August v. Offices Unlimited*, 981 F.2d 576 (1st Cir. 1992).
22. [26, at 581]. The Massachusetts statute at issue in the case states that it is an unlawful practice "for any employer personally or through an agent, to dismiss from employment . . . because of his handicap, any person alleging to be a qualified handicapped person, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the employer's business" Mass. Gen. L. ch. 151B, § 4(16).
23. Also, these cases deal with private disability insurance, rather than SSDB, but future courts have applied the same reasoning to cases where SSDB is involved.
24. No. 94-6997, 1995 WL 390051 at *3 (E.D.PA. June 30, 1995).
25. [24, at *4, *quoting Reigel v. Kaiser Found. Health Plan*, 859 F.Supp. 963, 970 (E.D.N.C. 1994)].
26. *Garcia-Paz v. Swift Textiles*, 873 F.Supp 547 (D.Kan. 1995).
27. See *Ricks v. Xerox Corp.*, 877 F.Supp 1468 (D.Kan. 1995) (absent evidence that he misrepresented his condition in his pursuit of long-term disability benefits, plaintiff was arguably estopped from claiming he was a qualified individual under the ADA); *Peoples v. City of Salina, Kan.*, No. 88-4280-S, 1990 WL 47436 (D.Kan. March 20, 1990) (plaintiff who contended he was completely disabled in order to receive disability retirement benefits estopped from later claiming he was qualified for his job); *Cheatwood v. Roanoke Industries*, 891 F.Supp. 1528 (N.D.Ala. 1995) (holding that plaintiff who had previously testified at workmen's compensation hearing that he was totally disabled was now judicially estopped from bringing an ADA suit); *Nguyen v. IBP, Inc.*, No. 94-4046, 1995 WL 646576 (D.Kan. Sept. 22, 1995) (plaintiff who represents on a disability form that he is totally disabled is thereafter judicially estopped from litigating that issue at trial); *Berry v. Norfolk Southern Corp.*, No. 94-0075-R, 1995 WL 465819 (W.D.Va. June 23, 1995) (plaintiff's representations of total and permanent disability estop him from asserting ADA claim); *Lamury v. Boeing Co.*, No. 94-1225-PFK, 1995 WL 643835 (D.Kan. Oct. 5, 1995) (elements of estoppel present where employee previously obtained workers compensation on the grounds that she was unable to perform her job); *Fussell v. Georgia Ports Authority*, No. 494-318, 1995 WL 643109 (S.D.Ga. Sept. 27, 1995) (agreeing with rationale that application and approval of disability benefits judicially estops an individual from being qualified under the ADA). Note that some of these cases involve private disability benefits, and some involve other forms such as workers' compensation.
28. *Johnson Serv. Co. v. Transamerica Ins. Co.*, 485 F.2d 164, 175 (5th Cir. 1973).
29. *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 505 (1992).

30. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427-1428 (7th Cir. 1993).
31. [29, at 264]. See also 18 Charles A. Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 4477, West Publishing, St. Paul, Minnesota (1995).
32. *Scarano v. Centra. R.R. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953).
33. Of course, this is implicit in the nature of judicial estoppel. As plaintiffs are barred from arguing they are qualified, there is no reason for a court to examine any facts a plaintiff may present toward that argument. One case that rejected the use of judicial estoppel described it explicitly: "An acceptance of this argument by the Court would obviate the need for determining whether [the defendant] failed to provide reasonable accommodations, and whether [the plaintiff], with these accommodations could have continued to work." *Dockery v. North Shore Medical Center*, No. 94-2748, 1995 WL 728172, at *4 (S.D.Fla. Dec. 4, 1995).
34. *Kennedy v. Applause*, No. CV 94-5344, 1994 WL 740765 (C.D.Cal. Dec. 6, 1994).
35. [34, at *3]. Plaintiffs are also often precluded from bringing other causes of action because of this same reasoning. See *Berry* 1995 WL 465819 at *2 (representation of disability to a retirement board not only estopped plaintiff from asserting a disability act claim, it also estopped him from asserting age discrimination); *McNemar*, 1995 WL 390051 at *5 (Plaintiff failed to establish a prima facie case under ERISA because he admitted he is not qualified for the position).
36. [33 at *5]. The court made a point to note that there had not been an administrative hearing concerning the disability benefits, and it may have made a difference if there was [at *6 n17].
37. *Smith v. Dovenmuehle Mortgage*, 859 F.Supp. 1138 (N.D.Ill. 1994).
38. [37, at 1140]. Smith also sought back pay, attorneys' fees, costs, punitive damages, and an injunction enjoining Dovenmuehle from engaging in any discriminatory practices against employees with AIDS.
39. *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992).
40. [37, at 1141]. The reasoning of *Overton* was particularly applicable to this case because Smith had obtained a different full-time job after he received benefits. He informed SSA of his employment status and at the time of the case was continuing to receive social security benefits as part of a nine-month trial period. [37, at 1139].
41. *Parkinson v. California Co.*, 233 F.2d 432 (10th Cir. 1956).
42. See *Konstandinidis v. Chen*, 626 F.2d 933, 938 (D.C.Cir. 1980); *Keebler Co. v. Rovira Biscuit Corp.*, 624 F.2d 366, 373 n7 (1st Cir. 1980).
43. *Teledyne Indus. v. NLRB*, 911 F.2d 1214, 1217-1220 (6th Cir. 1990).
44. *United States v. Beechum*, 582 F.2d 898, 908 (5th Cir. 1978) (en banc) *cert. denied*, 440 U.S. 920 (1979).
45. 42 U.S.C.A. § 423(d)(4); 20 C.F.R. § 404.1574(b)(2).
46. See Social Security Administration's *Red Book on Work Incentives: A Summary Guide to Social Security and Supplemental Security Income Work Incentives for People with Disabilities*, Social Security Admin., Washington, DC, August 1994.
47. For example, Section 505 of P.L. 96-265, "The Social Security Disability Amendments of 1980," authorized SSA to waive certain provisions of SSDI programs to encourage greater work activity among disability beneficiaries. Numerous projects have been funded under this provision. The most recent is Project NetWork, which among other things provides enhanced work incentives to persons with severe disabilities, in an

effort to increase participation in vocational rehabilitation (VR) programs. For a comprehensive review of work incentive programs, see L. Scott Muller, Disability Beneficiaries Who Work and Their Experience Under Program work incentives, *Soc. Sec. Bull., Vol. 55, No. 2* (Summer) 1992).

48. 42 U.S.C.A. §§ 12101(b)(1)-(2).
49. See the Americans with Disabilities Act Title I Technical Assistance Manual § I 3.2 *The Reasonable Accommodation Obligation*, Equal Employment Opportunity Comm., Washington, DC.
50. 29 C.F.R. § 1630.2(o); 29 C.F.R. § 1630.2(p).
51. 29 C.F.R. § 1630.9; 29 C.F.R. Pt. 1630, App.
52. Statements to this effect are present throughout the testimony of individuals before congressional committees, and reflected in the reports of committees of both houses. For example, James S. Brady, Vice Chairman, National Organization on Disability, and former secretary of the interior to President Reagan stated:

    > Many years earlier, in the Fifties, another Republican President, Dwight Eisenhower, alerted this nation to the staggering costs to society of Federal government disability benefits and programs. Eisenhower warned us that such programs increase the dependency of disabled people. He urged, instead, that it would be far better if people with disabilities became taxpayers and consumers and thus reduce the terrible costs to society. That conservative point of view is embodied in the purposes of the Americans with Disabilities Act today.

    Committee Print, Vol. III, 101st Cong., 2nd Sess. 1990 Committee on Education and Labor.

    Similarly, Attorney General Thornburgh stated:

    > We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangible benefits for our country . . . Certainly, the elimination of employment discrimination and the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increasing earnings, in less dependence on the social security system for financial support, in increased spending on consumer goods, and increased tax revenues.

    Testimony before House Subcommittee on Civil and Constitutional Rights, Ser. No. 101-58, October 11, 1989, p. 811. Committee Print, Vol. I, 101st Cong., 2d Sess. 1990 Committee on Education and Labor. Both of these statements were also relied on in the Senate report of the Committee on Labor and Human Resources submitted by Senator Edward Kennedy (D.MA). S.Rep. No. 101-116 August 30, 1989.
53. Louis Harris and Associates polls have shown that as many as two-thirds of working-age individuals with disabilities are unemployed. See [57] for more about these polls.
54. See *Lamury*, 1995 WL 643835, at *6; *Nguyen*, 1995 WL 646576, at *11; *Ricks*, 877 F.Supp. at 1477 n9.
55. *Kennedy*, 1994 WL 740765 at *3 n6.
56. See *Working While Disabled—How Social Security Can Help*, Social Security Administration Publication No. 05-10095. Social Security Comm., Washington, DC.
57. In debating the ADA Congress recognized there were widespread employment difficulties for people with disabilities. The rate of employment for people with disabilities

was high, and the wages of those that were employed were lower than others in the labor force. They relied heavily on a poll performed in 1986 by Louis Harris and Associates. That survey, entitled the International Center for the Disabled Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream (ICD Survey), found that two-thirds of working age individuals with disabilities are unemployed, while two-thirds of nonworking disabled individuals want to work. The results of the survey were summarized to Congress by the president of Louis Harris and Associates during hearings on the ADA. See Joint Hearing [14, at 9] noted in S.Rep. No. 116, 101st Cong., 1st Sess. 8 (1989) and H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 31 (1990); see also H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 25 (1990).

Additionally, a 1989 report from the United States Census Bureau showed that only 23.4% of men with disabilities worked full time, earning only 64% of what all workers earned in 1988, and only 13.1% of women with disabilities worked full time, earning 62% of what all workers made in 1988. See Study on Disabled and Jobs Finds Work and Good Pay Are Scarce, *N.Y. Times*, Aug. 16, 1989, at A22.

For a good overview of vocational rehabilitation programs and the employment of people with disabilities see John C. Hennessey and L. Scott Muller, The effect of vocational rehabilitation and work incentives on helping the disabled-worker beneficiary back to work. 3/1/95, *Soc. Sec. Bull.*, 1995 WL 9578870.

58. See The Disability Policy Panel of the National Academy of Social Insurance Preliminary Status Report published in the Social Security Bulletin emphasizing the importance of health care benefits for people with disabilities. 6/22/94, *Soc. Sec. Bull.*, 1994 WL 2870725.
59. Congressional Research Service, Status of Disability Programs of the Social Security Program, Tables 40-41, n15 September 8, 1992.
60. See Hennessey and Muller [57, at *4-*6].
61. The following statements made by Senator Tom Harkin during congressional debate on the ADA are indicative of this concern:

    > One of the prime goals of legislation affecting disabled Americans has been the effort to incorporate them into the mainstream. While the Americans with Disabilities Act would remove the barriers to participation in the workforce, efforts must also be made to ensure that participation is possible. The present system of disability insurance encourages retirement from the workforce. This approach is wrong. Americans with disabilities should have every encouragement to take advantage of the options opened up by the Americans with Disabilities Act.

    135 Cong.Rec. S4984 (A&P) 101st Congress, First Session Proceedings and Debates of the 101st Congress, First Session May 9, 1989.
62. John C. Hennessey and L. Scott Muller, Work efforts of disabled-worker beneficiaries: preliminary findings from the New Beneficiary Followup Survey 9/1/94, *Soc. Sec. Bull.* 1994 WL 2870740.
63. *City of Alma v. U.S.*, 744 F.Supp. 1546, 1555-1557 (D.C.Ga. 1990).
64. See [33, at *7], where the court stated the fact that "a plaintiff has made sworn statements that she is disabled will, most surely, hamper her ability to survive any motion for summary judgment." See also *Reigel*, 859 F.Supp at 969, where the court rejected the plaintiff's assertion that she could perform the essential functions of her job with a reasonable accommodation, in light of the many disability insurance claim

forms and letters she signed certifying her permanent disability and inability to work. On that evidence, the court granted summary judgment in favor of the employer on the plaintiff's ADA claim. *Id.* at 977. The court gave the following statement that has been cited in many of the cases reviewed in this article:

> Plaintiff in the case sub judice cannot speak out of both sides of her mouth with equal vigor and credibility before this court. Plaintiff now seeks money damages from [her employer] on her assertion that she was physically willing and able to work during the same period that she was regularly collecting disability payments on her assertion that she was physically unable to work. *Id.* at 970.

65. *Smith v. Midland Brake*, No. Civ. A. 94-4165, 1995 WL 746963 (D.Kan. Dec. 13, 1995).
66. See *Heise v. Genuine Parts Company*, 900 F.Supp. 1137 (D.Minn. 1995) (court concluded that a question of fact exists as to the extent of plaintiff's disability because qualification for Social Security disability benefits cannot be construed as a judgment that he could not perform his job); *Kupferschmidt v. Runyon*, 827 F.Supp. 570 (E.D.Wisconsin, 1993) (court refused to grant summary judgment on basis that plaintiff was not qualified because he received Social Security disability benefits); *Lawrence v. United States* ICC, 629 F.Supp. 819 (E.D.Pa. 1985) (court rejected argument that representations on disability retirement application judicially estopped plaintiff from asserting that he was now able to work).

    It is worth noting that the *Overton* reasoning works both ways. In *Palmer v. Circuit Court of Cook County*, No. 94 C 3508, 1995 WL 642824 (D.Ill. Oct. 30, 1995), the plaintiff asserted that the court should find her disabled under the ADA because the SSA determined she was unable to perform substantial gainful activity for at least six months. The court relying on *Overton* stated that determinations made by SSA concerning disability are not dispositive findings for claims arising under the ADA, *Id.* at *12 n10.
67. [39, at 1195]. The court suggested Overton could mail correspondence or have someone else call as an interpreter would for a deaf person.
68. See Social Security Ruling(SSR) 86-8 1986 WL 68636 at *1.
69. 20 C.F.R. § 404.1520.
70. 20 C.F.R. § 404.1520(d).
71. 29 C.F.R. Pt. 1630, App. Section 1630.2(m).
72. 20 C.F.R. § 404.1520(e).
73. A June 2, 1993 memorandum from SSA Associate Commissioner Daniel Skoler stated: "The fact that an individual may be able to return to a past relevant job, provided the employer makes accommodations, is not relevant to the issue(s) to be resolved at the fourth step of the sequential evaluation process."

    The original SSA Reengineering Proposal suggested that this be changed and that the accommodations employers might make in accordance with ADA should be considered, both in determining whether impairments were disabling, and in considering whether jobs exist in the national economy that could be performed by disabled claimants. However, these references to the ADA were omitted from the revised Reengineering Plan, because many felt it would shift the burden of complying with the ADA, to disability claimants, the persons the ADA was intended to protect. See, e.g., Testimony of Prof. Matthew Diller, Fordham University School of Law, before the

House of Representatives Subcommittee on Social Security at 43 (Apr. 14, 1995); Testimony of Martha E. Ford, *Id.* at 48.

74. *See* 20 C.F.R. § 404 Subpt. P, app. 2.
75. Although there are no data directly measuring the extent of work by this group, surveys have indicated that of persons reporting severe work limitations about 12% are currently in the workforce. U.S. Dep't. of Educ., NDRR, Disability Abstract #4, at 2 (May 1992).
76. See *Disability Redesign Plan*, Social Security Administration, Washington, DC, September 1994.
77. See *Kane v. Heckler*, 731 F.2d 1216, 1219 (5th Cir. 1984) (quoting Paul R. Verkuil, The Self-Legitimating Bureaucracy, *93 Yale L.J. 780, 781* (1984).
78. *Farris v. Secretary of Health and Human Services*, 773 F.2D 85, 89 (6th Cir. 1985).
79. *Ward v. Westvaco*, 859 F.Supp. 608 (D.Mass. 1994).
80. [79, at 615]. The Massachusetts law at issue was the same one at issue in *August* see note 26.
81. The exception is *McNemar*, where the court directly rejected the *Overton* reasoning put forth in *Dovenmuehle*. See [24, at *4].

Direct reprint requests to:

Scott Johnson
One Barberry Lane
P.O. Box 2159
Concord, NH 03301