

LEGAL BRIEFINGS



Being “Qualified” Under the ADA After Making Previous Contradictory Statements About Disability

To prevail under the ADA, a plaintiff must be a “qualified individual with a disability.”¹ Whether someone is “qualified” under the ADA can be called into question when the individual has claimed in another forum to be totally disabled, such as when completing an application for Social Security benefits. Employers contend the individual is not qualified under the ADA based on the plaintiff’s own statements in another venue that he/she cannot work or is otherwise totally disabled.

The Supreme Court Establishes the Standard

In *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), the U.S. Supreme Court established the standard for analyzing an ADA case when a plaintiff has made inconsistent statements. In *Cleveland*, the plaintiff had previously obtained Social Security benefits by stating that she was unable to work. When

¹ 42 U.S.C. 12112

This analysis was developed by Equip for Equality for Cherry Engineering Support Services, Inc. (CESSI). It is developed for use by the national network of ADA and IT Technical Assistance Centers and is solely advisory in nature. Equip for Equality and CESSI believe the analysis to be current as of the effective date of the document, but make no representation that the discussion remains good law thereafter. The analysis is not intended to be a legal determination of rights or responsibilities in general or in any specific case. Funding for this information brief is provided in part by NIDRR under contract #ED-02-CO-0008 to CESSI. However, the content and analysis in the document do not necessarily represent the opinion of NIDRR or the U.S. Department of Education and you should not assume endorsement by the Federal government.

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she later sued under the ADA and alleged that she was qualified to do the job, the employer argued that the statement on the Social Security application that she could not work should estop her from also claiming she could work for ADA purposes. The Supreme Court held that these two different claims do not inherently conflict because of the differences between how disability is defined under the ADA and under Social Security. Accordingly, the Court held that when a plaintiff has made apparently inconsistent claims, the plaintiff can still be deemed qualified by providing a sufficient explanation.

Following the Supreme Court's decision in *Cleveland*, there have been a number of cases involving the issue of conflicting statements raising the question whether the plaintiff is qualified under the ADA. Because these cases are very fact specific, the following is a description of case decisions by judicial circuit.

First Circuit Court of Appeals²

Sullivan v. Raytheon Co., 262 F.3d 41 (1st Cir. 2001)

a. Facts:

Between 1971 and 1990, Sullivan suffered seven industrial accidents as a security guard at Raytheon. After his seventh accident, Sullivan received a warning about his absenteeism, and Raytheon eventually terminated his employment. Sullivan filed a grievance with his union and was eventually returned to inactive employment

² The First Circuit Court of Appeals covers the following jurisdictions: Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island.

status so that he could receive long-term disability benefits.

b. Legal Analysis:

Sullivan's ADA claim did not survive summary judgment because he offered no explanation of why his representations of total disability in his application for Social Security benefits in the past were consistent with his subsequent claim that he could perform the essential functions of a security guard with reasonable accommodation.

Second Circuit Court of Appeals³

No appellate decisions, but see:
Urmey v. AT&T Corp., 2006 WL 1888553 (S.D.N.Y. July 10, 2006)

a. Facts:

While working at AT&T, John Urmey was diagnosed with a rare form of arthritis that caused his hands and feet to swell. Urmey was able to perform his work duties when lying on his back in bed, and was granted an accommodation to work almost exclusively from home. Urmey complained of harassment from a new supervisor, and failed to timely complete two of his assigned projects. Urmey was terminated on August 2, 2002. He later applied for Social Security benefits, and in his application stated "I became unable to work because of my disabling condition on August 1, 2002." The Social Security Administration found that Urmey's statement was true and that he was entitled to

³ The Second Circuit Court of Appeals covers the following jurisdictions: Connecticut, New York, and Vermont.

benefits. Urmev then brought suit against AT&T under the ADA for discriminatory discharge.

b. Legal Analysis:

Plaintiff's explanation of the apparent contradiction between his SSA application and his ADA claim was that, although he was fully and permanently disabled by August 2002, the reason he became fully and permanently disabled was because of AT&T's lack of accommodation and because of his new supervisor's harassment. He alleged that the stress from his harassment worsened his condition and forced him to seek psychiatric help. The court determined that this explanation was irrelevant to a wrongful termination claim. The court noted that if plaintiff could prove that his total disability was caused by the failure to accommodate or by the supervisor's harassment, this would be evidence of damages for failure to accommodate or harassment claims. However, plaintiff still would not be a "qualified individual with a disability" at the time of his termination, and thus this evidence is not relevant to plaintiff's wrongful termination claim. Therefore, the court granted AT&T's motion for summary judgment.



Third Circuit Court of Appeals⁴

Turner v. Hershey, 440 F.3d 604
(3d Cir. 2006)

a. Facts:

Janet Turner was diagnosed with medical problems, mostly involving her back, while a factory worker at Hershey Chocolate. Turner returned to work after several surgeries, and Hershey accommodated her new restrictions by assigning her to a light duty position as an inspector. Hershey later changed their policy for inspectors and required persons in that job description to rotate between different tables during the day to reduce the risk of repetitive stress injuries. Turner's doctor restricted her from working at all but one of the tables, and thus Turner was not able to rotate positions. Hershey decided that it was not feasible to exempt Turner from the rotation, and did not allow her to continue working as an inspector. Turner applied for short-term disability, and stated in her application that she was unable to work in any position at the plant. At Hershey's suggestions, Turner then applied for long-term disability. In her application she described her back problem as an "ongoing situation." She also indicated that her injury impeded her ability to do her occupational duties "because of pain." Her doctor stated that she was "unable to do her regular job description." Turner was awarded long-term disability benefits, and later that year, the Social Security Administration awarded her total disability benefits. Two years later, Turner filed suit under the ADA

⁴ The Third Circuit Court of Appeals covers the following jurisdictions: Delaware, New Jersey, Pennsylvania, and the Virgin Islands.

alleging that Hershey failed to accommodate her disability, because she could have performed her job duties if she had been exempted from the rotation process.

b. Legal Analysis:

Hershey claimed that the statements Turner made on her long-term disability benefits and SSDI applications estopped her from bringing her ADA claim; because she was unable to work, she was not a qualified individual with a disability. The Court of Appeals evaluated each of the statements that Turner made for both the long-term disability and SSDI applications. The court held that because Turner's statements did not state categorically that she could not work at all nor did they take into account her ability to work with a reasonable accommodation, there was no inconsistency between her statements and her ADA claim, and thus her case was allowed to proceed.

Fourth Circuit Court of Appeals⁵

***Fox v. General Motors Corp.*, 247 F.3d 169 (4th Cir. 2001)**

a. Facts:

Robert Fox worked for General Motors for 12 years before a back injury left him unable to work. Fox went on disability leave, and returned to work eleven years later. He then suffered a series of re-injuries to his back, which caused him to be off and on disability leave for the next several years. The last time that Fox returned to

⁵ The Fourth Circuit Court of Appeals covers the following jurisdictions: Maryland, North Carolina, South Carolina, Virginia, and West Virginia.



work, his doctor restricted him to light duty. Fox alleged that he was subject to a barrage of harassment from his supervisors and coworkers during this time, and that his supervisors continued to assign him work that they knew he could not perform. Because of the harassment, Fox attempted to apply for a different job that met his medical restrictions, but his supervisor refused to allow him to take the prerequisite physical examination. Fox's doctor informed General Motors that Fox was suffering from depression, anxiety, and a worsening of his physical condition because of the harassment; his doctor recommended that Fox be placed on disability leave again. Fox applied for, and received, temporary total disability benefits. In his application, both Fox and his doctor alleged that he was totally disabled and unable to work. Fox then filed a hostile work environment claim against General Motors.

b. Legal Analysis:

The Court of Appeals found in favor of Fox holding that he had provided a sufficient explanation to resolve any possible contradiction between his disability application and his claim under the ADA. Fox offered two explanations as to why he was totally disabled and also qualified to bring suit under the ADA. First, Fox

argued, his two claims did not overlap temporally; Fox alleged he was discriminated against for nine months *before* he became totally disabled. Second, both Fox and his doctor offered evidence that he was fully able to work during that time period, but for the harassment that he suffered. The harassment was what caused his total, but temporary, disability. The court concluded that this explanation was sufficient to resolve any contradiction between Fox's application for disability benefits and his claim for discrimination under the ADA.

Fifth Circuit Court of Appeals⁶

Tullos v. City of Nassau Bay, 137 Fed.Appx. 638 (5th Cir. 2005)

a. Facts:

Kim Tullos, a former police officer for the City of Nassau Bay, had Post Traumatic Stress Disorder resulting from service in Vietnam. After several years of serving as a police officer, Tullos assisted with a suicide case that exacerbated his condition. Tullos sought psychiatric help and, on the recommendation of his psychiatrist, was placed on administrative leave. The psychiatrist eventually determined that Tullos was not currently, nor would he ever be, fit to serve as a police officer. The City terminated Tullos' employment, and Tullos applied for Social Security Disability and VA benefits. Tullos then filed suit against the City of Nassau Bay, alleging that his employment was terminated in violation of the ADA.

⁶ The Fifth Circuit Court of Appeals covers the following jurisdictions: Louisiana, Mississippi, and Texas.

b. Legal Analysis:

The jury determined that Tullos was a qualified individual for purposes of the ADA, and found in his favor. On appeal, the City argued, among other things, that Tullos' application for SSDI and VA benefits preclude him from asserting that he is a qualified individual for purposes of the ADA. The Fifth Circuit noted that the pursuit, and receipt, of Social Security benefits does not automatically estop the recipient from pursuing an ADA claim. In order to determine whether Tullos' receipt of benefits rendered him unqualified for purposes of an ADA claim, the court would need to evaluate specific assertions that Tullos made in his applications and his explanation for any inconsistencies. However there was no evidence in the record concerning any specific representations that Tullos made. The court held that, without evidence of specific representations, it could not conclude Tullos was unqualified for purposes of the ADA.

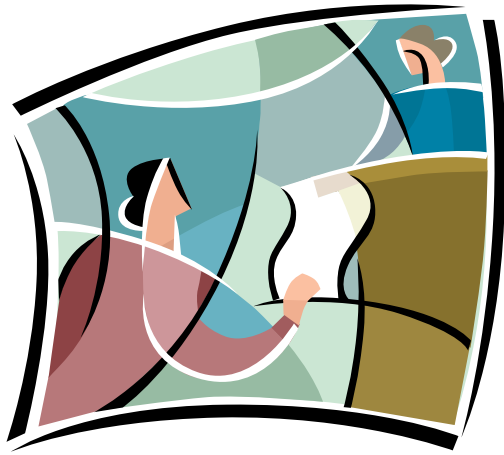
Sixth Circuit Court of Appeals⁷

Justice v. Pike County Bd. of Educ., 348 F.3d 554 (6th Cir. 2003)

a. Facts:

Anna Lea Justice worked as a teacher for many years, and eventually became Grants Department Director for the Pike County Board of Education. After becoming Grants Director, Justice was involved in a serious car accident that

⁷ The Sixth Circuit Court of Appeals covers the following jurisdictions: Kentucky, Michigan, Ohio, and Tennessee.



left her with post-traumatic arthritis. The arthritis made it difficult for her to stand or walk for extended periods of time, climb stairs, or run. She also had chronic depression, which she alleged made her unable to handle classroom stress. When a new Superintendent was elected, Justice was reassigned to the classroom. Instead of taking the position, she received a pension based on her physical inability to perform some classroom duties. She then filed a discrimination claim under the ADA.

b. Legal Analysis:

The Court of Appeals determined that Justice proffered a sufficient explanation for any apparent contradiction in her receipt of pension benefits and her ADA claim. The board argued that *Cleveland* did not apply in this case because SSDI depends on a finding that the applicant is unable to find employment in the economy in general, and a teacher's pension depends on a finding that the applicant cannot perform as a teacher. The court pointed out that the *Cleveland* decision relied upon the fact that the ability to perform a job with accommodation and the ability to perform without accommodation are not mutually exclusive. The court concluded, therefore, that as a matter of law, Justice was not estopped from bringing an ADA claim.

Seventh Circuit Court of Appeals⁸

Johnson v. Exxon Mobil Corp.,
426 F.3d 887 (7th Cir. 2005)

a. Facts:

Gordon Johnson was employed as a supervisor at Exxon for 28 years. Johnson had epilepsy and continued to have frequent seizures despite taking medication. Johnson alleged that his supervisor consistently harassed him because of his disability, and his job responsibilities were diverted to other employees. Johnson further alleged that his supervisor refused to send him to training that was necessary both for his job responsibilities and for advancement within his work group. Johnson complained to the Human Resources department that he was being discriminated against because of his age and his disability. Shortly thereafter, Exxon representatives requested that Johnson voluntarily resign. When Johnson refused to resign, his employment was terminated; he was one and a half years away from retirement. Johnson filed a discrimination suit under the ADA a few months later. One year after his termination, Johnson applied for SSDI benefits, claiming that he became unable to work because of his disabling condition on the same day that he was terminated.

b. Legal Analysis:

The Court of Appeals determined that Johnson did not offer a sufficient explanation to warrant a reasonable

⁸ The Seventh Circuit Court of Appeals covers the following jurisdictions: Illinois, Indiana, and Wisconsin.

juror's concluding that Johnson could have performed his job duties with or without a reasonable accommodation. The court stated that, unlike *Cleveland*, where the plaintiff claimed that her statements to SSDI were consistent with the allegations in her ADA suit, here, Johnson merely claimed that he made a mistake on his SSDI application. The court held that assertion of a mistake on an SSDI application is not a sufficient explanation to prevent estoppel; a person who applied for disability benefits must live with the factual representations made to obtain them, and if these show inability to do the job then an ADA claim may be rejected without further inquiry.

Eighth Circuit Court of Appeals⁹

Voeltz v. Arctic Cat, Inc., 406
F.3d 1047 (8th Cir. 2005)

a. Facts:

Marvin Voeltz worked in Arctic Cat's assembly plant for 5 years before he was diagnosed with multiple sclerosis. Voeltz made his supervisors aware of his condition, and multiple accommodations were made for him. When operations were discontinued in Voeltz's department, he was transferred to a new job in a different department, which was his first choice. Soon after he started his new job his supervisor reprimanded him for safety violations, carelessness and incorrect inventory. Arctic Cat contacted

Voeltz' neurologist about transferring him to another department. Voeltz' doctor suggested making changes to his current position or contacting an occupational therapist, so that Voeltz would not have to change positions. Arctic transferred Voeltz to another department, where he was given some accommodation, but still had performance problems. Voeltz was seasonally laid off with his coworkers, and eventually received a letter indicating that Arctic Cat would not be recalling him because the company was unable to find a position that met his work restrictions. Before he was terminated, Voeltz applied for SSDI benefits, alleging that he became totally disabled and unable to work at the time he was laid off. Almost a year after his termination, Voeltz filed suit against Arctic Cat alleging failure to accommodate and discrimination under the ADA.

b. Legal Analysis:

Arctic Cat alleged that it was entitled to judgment as a matter of law, because Voeltz' statements to SSDI indicated that he was not qualified to perform his job duties at the time of this termination. Voeltz claimed that he was instructed to apply for Social Security benefits by an Arctic Cat human resources employee, who indicated that he might not be recalled after he was laid off. Voeltz also testified that, although he told SSDI he was unable to work, he would have been able to work with accommodation. The court concluded that the evidence in the record was sufficient for a reasonable jury to conclude that Voeltz' ADA claim was not inconsistent with his application for disability benefits.

⁹ The Eighth Circuit Court of Appeals covers the following jurisdictions: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

Ninth Circuit Court of Appeals¹⁰

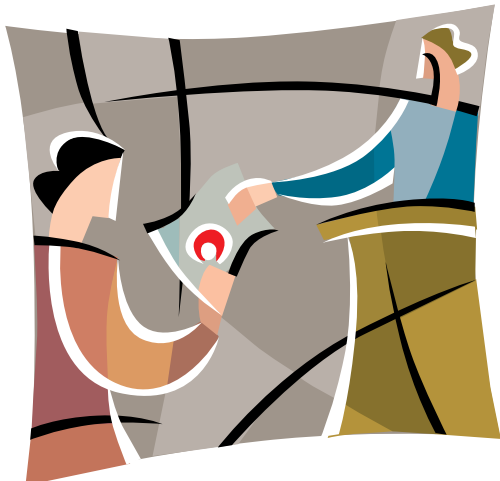
Wells v. District Lodge 751, Intern. Ass'n of Machinists and Aerospace Workers AFL-CIO, 5 Fed.Appx. 605, (9th Cir. 2001)

a. Facts:

Donald Wells was a former union employee who had cancer. Wells went on leave to complete an experimental cancer treatment program, and his supervisor informed him that he would be able to return to work after. Wells requested an extension of his sick leave, and one week later, his employment was terminated. In his application for SSDI, Wells represented himself as totally disabled. Wells filed suit under the ADA.

b. Legal Analysis:

The Court of Appeals ruled that Wells' application for SSDI did not preclude him from filing suit under the ADA. The court



¹⁰ The Ninth Circuit Court of Appeals covers the following jurisdictions: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.

determined that the testimony of Wells' doctor that he was able to perform the essential duties of his job on the day of his termination, and evidence of the marked improvement of Wells' condition due to the experimental treatment, constituted a sufficient explanation of any apparent contradiction between his SSDI application and his claim under the ADA.

Tenth Circuit Court of Appeals¹¹

No appellate court decisions, but see: *Rando v. Texaco Refining and Marketing, Inc*, 165 F. Supp. 2d 1209 (D. Kan. 2001)

a. Facts:

Plaintiff filed a claim against his former employer alleging that employer's failure to allow him to return to work from disability leave violated the ADA. Plaintiff also applied for SSDI, and made statements in his application that he was unable to work because of his disabling condition. He specifically stated that he had headaches that lasted many days, numbness in his hands, herniated disks, depression, and rotator cuff problems. Plaintiff made no attempt to explain the discrepancy between his statements to the Social Security Administration and his ADA claim.

b. Legal Analysis:

The Court of Appeals held that Rando was precluded from asserting under the ADA that he was qualified to return to position

¹¹ The Tenth Circuit Court of Appeals covers the following jurisdictions: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

of mechanical specialist because he had stated he was unable to work when he applied for Social Security Disability Insurance. Rando made no attempt to explain discrepancies between statements made to Social Security Administration and his allegations under the ADA that he was qualified and able to perform the essential functions of the job. Accordingly, the court found in favor of the employer.

Eleventh Circuit Court of Appeals¹²

No appellate decisions, but see; Vasquez-Ortiz v. PHC Partners, Inc. 2005 WL 3477553 (M.D. Fla. December 19, 2005)

a. Facts:

Catherine Vasquez-Ortiz was a customer service representative for PHC Partners. One and a half years after she began working for PHC, she notified her supervisor that she had Freidreich's Ataxia, a neurological disability. She requested leave under the Family and Medical Leave Act. When she returned to work, Catherine was informed that her position was being eliminated and that she was being laid off. Catherine applied for SSDI benefits, representing that she was totally disabled from the date that she was laid off. She then filed a discrimination claim against PHC under the ADA. PHC claimed that her statement of total disability precluded her from being a qualified individual with a disability under the ADA, because she was not capable of performing her job duties.

¹² The Eleventh Circuit Court of Appeals covers the following jurisdictions: Alabama, Florida, and Georgia.

b. Legal Analysis:

The court concluded that Catherine's deposition testimony indicated that she believed she was physically capable of performing her job. Furthermore, the court noted that circumstances suggested that a reasonable jury could determine that Catherine would have been able to perform her job had she been granted reasonable accommodations. Therefore, the court concluded that plaintiff should be permitted to proceed with her ADA case.

D.C. Circuit Court of Appeals¹³

No appellate decision, but see: Smith v. District of Columbia, 295 F.Supp.2d 53 (D.D.C. 2003)

a. Facts:

Gwendolyn Smith worked as a mental health specialist for the Department of Mental Health. Smith had diabetes, hypertension and back and shoulder injuries. She was assigned to make visits to her clients' homes, and she complained that this duty was outside of her job description. Smith then filed a complaint with the EEOC that she was being discriminated against. Smith's complaint was dismissed and she was ultimately terminated. Smith then submitted a loan cancellation request based on permanent and total disability to the Federal Family Education Loan Program. The employer argued that Smith's request contradicted her claim under the ADA, and ultimately established that she was not a qualified individual with a disability.

¹³ The D.C. Circuit Court of Appeals covers the District of Columbia.

b. Legal Analysis:

The court determined that the fact that Smith never received the benefits that she had requested altered the light in which any potential contradiction should be examined. The court stated that because a party must be allowed to plead in the alternative, Smith would not be estopped unless plaintiff benefits from one of the inconsistent statements. Therefore, the court noted, it is not considered bad faith to assert contrary positions in different proceedings if the initial position was not adopted. If a party does not actually receive the disability benefits in question, there is no contradiction with respect to the ADA claim.

Conclusion

Cases involving contradictory statements are very fact specific. Clearly after the Supreme Court's decision in *Cleveland*, plaintiffs are not automatically deemed unqualified for ADA purposes after stating an inability to work in another forum. However, people with disabilities and their advocates should remember that they are required to provide an explanation for the apparent contradiction. Failure to provide a sufficient explanation will likely lead to the dismissal of the ADA case.

