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The Americans with Disabilities Act of 1900: A Road Now Too Narrow

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I. INTRODUCTION

After extensive congressional hearings, President George Bush signed the Americans with Disabilities Act of 1990 (ADA) into law. Hailed by some as the most important civil rights legislation since the Civil Rights Act of 1964, the ADA promised to protect millions of Americans who, on account of past, present, or imagined disability, had been denied equal opportunity in every area of society. Congress recognized, however, that some individuals were too disabled to perform any job. As a result, Congress required individuals with disabilities to be qualified individuals, i.e., able to perform a job with or without reasonable accommodation. Consequently, the successful ADA plaintiff must navigate the path between being disabled and being too disabled. Some judges appointed by Republican presidents have narrowed this path, and the ADA’s promise remains largely unfulfilled today. This article will examine the evolution of select cases interpreting the ADA. At the end of the day, these cases demonstrate the unmitigated hostility many courts hold towards the ADA.

How does one reconcile such a state of affairs? Obviously, the ADA is a remedial statute. Remedial statutes should be construed liberally. Why, then, are appellate courts, including the United States Supreme Court, adopting an increasingly narrow view of a statute Congress obviously intended to be remedial? Unfortunately, Justice Stevens suspects, as does this author, that the courts fear a broad viewing of the ADA “will lead to a tidal wave of lawsuits.” But this author also suspects that there may be other
factors contributing to the narrowing of the ADA, at least within the Eighth Circuit.

Although the *Sutton* Court narrowed the ADA’s reach on an issue squarely at bar, certain panels of the Eighth Circuit have shown much less principle in cases interpreting the ADA, stretching disfavored defenses such as judicial estoppel into complete defenses, and, in some cases, deciding non-jurisdictional issues on appeal that the parties never raised. A review of cases decided within the Eighth Circuit reveals that there is a common denominator in these cases—at least a majority of the judges on these panels were appointed by Republican presidents. Of course, members of the federal judiciary, at least in theory, are supposed to leave their politics behind once appointed to the federal bench. Yet politics are an integral part of the appointment process for federal judges, as was evident in the Bork and Thomas confirmation hearings. Indeed, as of this writing, Republican Senators refuse to confirm some of President Clinton’s minority nominees as federal judges.7

Indeed, some Republicans such as U.S. Rep. Charles Canady of Florida believe, as a matter of politics, laws affording preferences to redress past discrimination are inconsistent with our nation’s most deeply cherished principles.8 Within the judicial arena, this sentiment is embodied in the Eighth Circuit’s refusal to intervene in matters properly within their discretion.9 The cases decided by these Eighth Circuit panels show an undeniable trend toward either narrowing the scope of the ADA or creating so much confusion that no lawyer can reasonably predict the outcome of any ADA case.

During the past term, the United States Supreme Court decided four ADA employment cases.10 While these cases certainly resolved the respective

7. See John Hei Iprin, Hatch Stalls Latino BYU Graduate ’s Ascension to Appellate Bench, SALT LAKE TRIB., Nov. 29, 1999, at A1. available in 1999 WL 29637165. “[T]he nonpartisan Citizens for Independent Courts noted that during the 105th Congress from 1997-98, some 14 percent of the nominations of white candidates failed for lack of Senate action or because the candidates withdrew. But for the nominations of minority candidates, the rate was more than twice that [of white candidates] at 35 percent.” Id.


9. See, e.g., Herrero v. St. Louis Univ. Hosp., 109 F.3d 481. 485 (8th Cir. 1997) (quoting Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995). “[T]he employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgment made by employers, except to the extent that those judgments involve intentional discrimination.”).

disagreements among the circuit courts of appeals, the decisions created more questions than they answered. If the past is any guide, the trend of courts narrowing the scope of the ADA will continue. Thus, any practitioner should enter this field only after careful deliberation.

II. DOES THE CLIENT HAVE AN ACTUAL DISABILITY?

From the beginning, all agreed that the successful ADA plaintiff bringing a failure to accommodate claim must be, on one hand, substantially limited in one or more major life activities. Likewise, on the other hand, all agreed that, in order to succeed on a failure to accommodate claim, an individual must not be too disabled, i.e., unable to work with or without accommodation. Thus, in order to prevail on a failure to accommodate claim, the successful ADA plaintiff, from the very inception of the ADA, must navigate a narrow path between "not disabled" and "too disabled." Of course, this unique threshold requirement is both a necessity and the downfall of the ADA. Although the Supreme Court requires that cases must be examined on a case-by-case basis, this author's review of Eighth Circuit published decisions indicates that few judges appointed by Republican presidents have ever written an opinion in which an ADA plaintiff has prevailed. Indeed, it is sometimes possible to predict the outcome of many cases simply by knowing the identity of the presiding panel. This reality leads to inconsistency in cases interpreting the ADA, within the Eighth Circuit and among other circuits as well.

One of the first disagreements concerning the ADA arose on the issue of whether mitigating measures should be considered. The Equal Employment Opportunity Commission (EEOC) decided that mitigating measures should not be considered and issued interpretive guidelines accordingly.

14. See 29 C.F.R. pt. 1630 app. §1630.2(j) (1998) ("[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices").
15. See, e.g., Bartlett v. New York State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998) (holding self-accommodations cannot be considered when determining a disability), vacated. 119 S. Ct. 2388 (1999); Baert v. Euclid Beverage. Ltd., 149 F.3d 626. 629-30 (7th Cir. 1998) (holding disabilities should be determined without reference to mitigating measures); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (same); Arnold v. United Parcel Serv., Inc., 136 F.3d 854. 859-66 (1st Cir. 1998) (same). See also
Thus, the United States Supreme Court granted certiorari in *Sutton* to resolve the conflict between the circuits. In *Sutton*, the plaintiffs had visual impairments that were correctable to 20/20.16 United Airlines, however, required its pilot applicants to have, at a minimum, uncorrected visual acuity of 20/100 or better.17 The plaintiffs, maintaining that the court should defer to EEOC guidelines for interpretation of the statute, argued that the question of whether a person has a disability must be examined without considering mitigating measures.18 The district court, as well as the Court of Appeals for the Tenth Circuit, rejected this argument.19 In *Sutton*, the Supreme Court affirmed,20 creating far more questions than it answered.21

In the *Sutton* opinion, Justice O'Connor first noted that Congress had not authorized any particular agency to define "disability."22 In affirming the Tenth Circuit, Justice O'Connor's analysis relied heavily upon Congress's finding that 43,000,000 Americans suffered from some type of disability.23 Although Justice O'Connor noted that the exact origin of this number was not clear, she nonetheless concluded that "critically, findings enacted as part of the ADA require the conclusion that Congress did not intend to bring under the statute's protection all those whose uncorrected conditions amount to disabilities."24 While Justice O'Connor wrote that the guidelines approach was also inconsistent with the individualized approach of the ADA, the Congressional finding that *only* 43,000,000 Americans suffer from some type of disability remains the linchpin of her opinion.25 Consequently, Justice Stevens observed that a "statement of congressional findings is a rather thin reed upon which to base" a statutory construction.26

Obviously, the question is "What constitutes a disability after *Sutton*?" Justice Stevens suggested that the majority opinion would necessarily lead to

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16. See *Sutton*, 119 S. Ct. at 2143.
17. See id.
18. See id. at 2146.
19. See id. at 2144.
20. See id.
21. See id.
22. See *Sutton*, 119 S. Ct. at 2145.
23. See id. at 2147.
24. See id. (emphasis added).
25. See id. at 2149.
the exclusion of persons who used prostheses or wheelchairs.\textsuperscript{27} Justice O'Connor responded:

The dissents suggest that viewing individuals in their corrected state will exclude from the definition of "disab[led]" those who use prosthetic limbs or take medicine for epilepsy or high blood pressure. This suggestion is incorrect. The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection A if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity. For example, individuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run. The same may be true of individuals who take medicine to lessen the symptoms of an impairment so that they can function but nevertheless remain substantially limited.\textsuperscript{28}

In the few months since \textit{Sutton} was decided, this author has considered the above passage carefully. The issue of medicine that cures is easily resolved, since disabilities must be long term and severe. Necessarily, then, conditions that are "cured" after a short course of therapy are not disabilities and never have been. The difficulty arises, however, when a condition is not cured, but controlled, by medication. One difficult example is the diabetic who controls the level of his blood sugar with insulin. So long as his blood sugar is controlled, that person is not "disabled." Should his condition deteriorate, however, high blood sugar levels can cause confusion, blurred vision, and even death. Thus, the individual would then be "disabled," since disability, according to Justice O'Connor, is measured in the present tense.\textsuperscript{29} Therefore, an individual's status can change from "protected" to "unprotected" without notice. Where is the black letter rule in this situation? There is none, and, in the end, the bar is left without answers.

What about prostheses? While prostheses have come far since the age of the hook and peg leg, individuals who use these prostheses for arms and hands may still be substantially limited in their ability to pinch, grab, and lift. In many cases, a plaintiff's success will depend upon what major life activity is at issue. If, for example, an individual has an arm prosthesis that does not limit the individual's ability to lift, the competent plaintiff's lawyer will look for and plead a substantial limitation on another major life activity. When wheelchairs are considered, the analysis becomes more difficult. After all, an individual required to use a wheelchair cannot, by definition, walk.

\textsuperscript{27} See \textit{Sutton}, 119 S. Ct. at 2153 (Stevens, J., dissenting).
\textsuperscript{28} Id. at 2149 (internal citations omitted).
\textsuperscript{29} See \textit{id.} at 2146.
Most cases involving the major life activity of walking analyze the
disability by examining the distance a plaintiff is able to travel in comparison
to an average person in the normal population. In Zupardo v. Suffolk County
Vanderbilt Museum, the plaintiff alleged that he was unable to walk more
than one-eighth of a mile without suffering severe pain and needing to rest. Accordingly, the plaintiff asserted that he was substantially limited in a major
life activity, namely walking. On the issue of his purported disability, the
district court held that “while [plaintiff]’s ability to walk may well be
‘affected,’ it was not ‘substantially impaired,’ and he failed to prove he was
‘disabled’ as a matter of law.” But, an individual using a power wheelchair
can travel from point A to point B just as well as the average person. Indeed,
many power wheelchairs can travel several miles. So, under Sutton, some
courts could decide these individuals are not disabled, if one uses distance as
the benchmark.

This prospect apparently troubled Justice O’Connor, as demonstrated by
her response to the dissents. This response is less than clear, however. Given
the Sutton holding, the assertion that “[t]he use or nonuse of a corrective
device does not determine whether an individual is disabled” is spectacularly
obvious. Justice O’Connor’s next statement that the determination of
disability “depends on whether the limitations an individual with an impair-
ment actually faces are in fact substantially limiting” begs the question. If
one follows the distance approach that courts used before Sutton, then the
individual who uses a power wheelchair will not be disabled. Ultimately,
Sutton will force the plaintiff’s bar to frame major life activities hyper-
technically. Indeed, Justice Souter engaged in just this sort of exercise in
Albertsons, Inc. v. Kirkingburg.

In Albertsons, Kirkingburg drove a truck for Albertsons, Inc. In 1990,
Kirkingburg was erroneously certified as meeting the Department of Transpor-
tation’s (DOT) basic vision standards for commercial truck drivers, which
require corrected distant visual acuity of at least 20/40 in each eye and distant

31. See id. at 53.
32. See id. at 55.
33. Id. at 56. See also Banks v. Hit or Miss, Inc., 996 F. Supp. 802, 807 (N.D. Ill. 1998)
(finding plaintiff not “disabled” as a matter of law where she could only walk short distances
and could not stand for extended periods of time); Horth v. Gen. Dynamics Land Sys., Inc., 960
F. Supp. 873, 878 (M.D. Pa. 1997) (holding that a plaintiff who could not sit or stand for more
than two hours without difficulty and had trouble walking could not show limitations were more
than moderate restrictions and thus, was not disabled).
34. See Sutton, 119 S. Ct. at 2149.
35. Id.
binocular acuity of at least 20/40. When the error was discovered, Kirkingburg was instructed to get a waiver of the DOT standards under a waiver program begun that year. Albertsons, however, fired him for failing to meet the basic DOT vision standards. After Kirkingburg received a waiver, Albertsons refused to rehire him. Kirkingburg subsequently sued Albertsons, claiming that Albertsons violated the Americans with Disabilities Act of 1990. In granting summary judgment for Albertsons, the district court found that Kirkingburg was not qualified without an accommodation because he could not meet the basic DOT standards and that the waiver program did not alter those standards. The Ninth Circuit reversed the district court.

In reversing the Ninth Circuit, Justice Souter observed that the question of whether Kirkingburg suffered from a disability need not be decided. Justice Souter, however, addressed the issue anyway. In his analysis, Justice Souter apparently recognized the questions the Sutton opinion raised. The first glance of hyper-technicality is Justice Souter's description of the Ninth Circuit's mis-step:

First, although the EEOC definition of "substantially limits" cited by the Ninth Circuit requires a "significant restriction" in an individual's manner of performing a major life activity, the court appeared willing to settle for a mere difference. By transforming "significant restriction" into "difference," the court undercut the fundamental statutory requirement that only impairments causing "substantial limitations" in individuals' ability to perform major life activities constitute disabilities.

At first blush, Justice Souter seems to have driven the final nail, since a person who uses a wheelchair merely travels from point A to point B in a different manner from those who can use their legs. If this were the end, then ADA plaintiffs would surely be in trouble, but Justice Souter continues:

This is not to suggest that monocular individuals have an onerous burden in trying to show that they are disabled. On the contrary, our brief examination of some of the medical literature leaves us sharing the Government's judgment that people with monocular vision "ordinarily" will meet the Act's definition of disability, and we suppose that defendant

37. See id. at 2166.
38. See id.
39. See id.
40. See id.
41. See id.
42. See Albertsons, 119 S. Ct. at 2166.
43. See id. at 2167.
44. See id. at 2168.
45. Id. (internal citations omitted).
companies will often not contest the issue. We simply hold that the Act requires monocular individuals, like others claiming the Act's protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial.\(^{46}\)

Kirkingburg could "see" well enough to drive a truck. Thus, mere differences in perception are apparently not enough to constitute a disability. Accordingly, it will not be enough for persons who have a visual impairment to simply allege a substantial limitation in the ability to see. Rather, an ADA plaintiff will have to allege that her depth perception and visual field are substantially limited. This is exactly the type of legal jargon for which lawyers are notorious.\(^{47}\)

Finally, perhaps the most attractive alternative available to the plaintiff's bar will be to frame the issue of disability, in appropriate situations, with respect to areas that require persons with disabilities to use human attendants. For example, a person who uses a power wheelchair is frequently unable to lift himself without assistance. Thus, the creative plaintiff's lawyer will plead the major life activities of caring for one's self, bathing, and the like. While this author would not be surprised by such a holding from some conservative jurists, it is highly unlikely that an impartial court would consider a human attendant a mitigating measure. The success of such a strategy will by no means be assured—few in the plaintiff's bar will risk a lawsuit on this basis.

### III. Judicial Estoppel

Judicial estoppel, sometimes called the doctrine against the assertion of inconsistent positions or estoppel by oath, "prevents a litigant from attempting to assert a position inconsistent with one that he has asserted in a previous judicial proceeding."\(^{48}\) Judicial estoppel began to develop in the mid-1800s in order to protect the integrity of the judicial system and uphold the sanctity of the oath.\(^{49}\) Its aim was to prevent a litigant from "playing fast and loose with the courts" by speaking out of both sides of his mouth, and to prevent a

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46. \textit{Id.} at 2169 (internal citations omitted).

47. Obviously, Justice Souter's opinion does have favorable implications. Justice Souter's observation that the burden of showing a disability is not onerous does toss a bone to those seeking protection under the ADA.


49. \textit{See id.} at 1713.
litigant from obtaining inconsistent results by winning before one court on one assertion and before another court on a contradictory assertion.  

The application of judicial estoppel in the context of disability is commonly thought to have originated in *Beauford v. Father Flanagan's Boys' Home*. A close reading of *Beauford*, however, shows the court never even used the term “judicial estoppel,” much less established the doctrine of judicial estoppel. In *Beauford*, the court only decided that the plaintiff lacked standing under the Rehabilitation Act. The facts reported in the *Beauford* opinion do not reflect an inconsistent position. Ms. Beauford merely admitted, before the district court below, that she was unable to perform her job. Ironically, the *Beauford* court reached its decision only after expressing some regret.

In 1994, the defense bar began asserting judicial estoppel as a complete defense to ADA claims, but many courts addressing this issue disagreed. In *Swanks v. Washington Metropolitan Area Transit Authority*, the D.C. Circuit held that the receipt of disability benefits did not preclude subsequent ADA relief and rejected the doctrine of judicial estoppel, but allowed the consideration of prior sworn statements by the parties as a material factor, albeit without the heightened standard of proof. The Sixth and Eleventh Circuit Courts of Appeals rejected judicial estoppel and joined the District of Columbia Circuit’s opinion in *Swanks*, holding that the Social Security Application (SSA) was merely one factor among many.

After an extensive discussion of the holdings of other courts of appeals presented with this question, the Eleventh Circuit also determined that a certification of total disability on a disability benefits application is not inherently inconsistent with being “qualified” under the ADA. The Eleventh Circuit reasoned that the SSA, in determining whether an individual is entitled to disability benefits, does not take account of the effect of reasonable

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50. *Id.* at 1728 (quoting Patriot Cinemas, Inc. v. General Cinema Corp. 834 F.2d 208, 213 (1st Cir. 1987)).
51. 831 F.2d 768 (8th Cir. 1987).
52. *See id.* at 771.
53. *See id.*
54. *See id.*
56. 116 F.3d 582 (D.C. Cir. 1997).
57. *See id.* at 586-87.
accommodation on an individual’s ability to work. Thus, the representation of “total disability” to the SSA, while relevant, was not determinative.

Of course, the Seventh Circuit had long recognized that the “determination of disability may be relevant evidence of the severity of [a plaintiff’s] handicap, but it can hardly be construed as a judgement that [a plaintiff] could not do his job ...." The Ninth Circuit, while not deciding the issue of judicial estoppel, considered the Social Security Application as just one factor among many as well.

Finally, the Tenth Circuit rejected the doctrine of judicial estoppel outright because it precluded the search for the truth, which is the goal of the modern Federal Rules of Civil Procedure. Accordingly, the Tenth Circuit did not raise the standard of proof, instead treating the Social Security Act applications as simply one factor to be considered.

There were, however, a few conservative courts that raised the standard of proof for the ADA plaintiff who had previously applied for SSA benefits. Yet the decisions of those courts using the label “judicial estoppel” tracked an uncertain course. The most draconian decision was McNemar v. Disney Store, Inc. The McNemar court held that a plaintiff with AIDS who claimed an inability to work for purposes of collecting disability benefits was estopped from arguing that he was a “qualified individual with disability” under the ADA. A subsequent Third Circuit panel noted that “McNemar has been the object of considerable criticism” because of its failure to take into consideration the differing purposes of the Social Security Act and the ADA.

The division within the Third Circuit itself, and among those courts using the label “judicial estoppel,” apparently did not escape notice. The Eighth

60. See id.
61. See id. This refusal to establish a per se rule of judicial estoppel is in accord with the ADA mandate that disability determinations be made on a case by case basis. See Sutton v. United Air Lines, 119 S. Ct. 2139, 2147 (1999); 42 U.S.C. § 12102(2). The Court did hold, however, that an ADA plaintiff cannot deny the truth of statements made on a disability application. See Talavera, 129 F.3d at 1220.
63. See Kennedy v. Applause, Inc., 90 F.3d 1477, 1480-81 (9th Cir. 1996).
64. See Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956).
65. See Rascon v. US West Communications, Inc., 143 F.3d 1324, 1332 (10th Cir. 1998); see also Swanks, 116 F.3d at 586-87.
66. 91 F.3d 610 (3d Cir. 1996).
67. See McNemar, 91 F.3d at 617-20.
68. See Krouse v. American Sterilizer Co., 126 F.3d 494, 502 & n.3 (3d Cir. 1997).
69. The circuits also split over the issue of whether settlement in the prior proceeding constitutes “success” and allows for the application of judicial estoppel. See Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 604-05, 605 n.6 (9th Cir. 1996) (holding “a favorable settlement constitutes the success required,” but noting the contrary view of the Court of Appeals for the Sixth Circuit in Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1983).
Circuit subsequently applied a similar standard of proof, while appearing to reject the doctrine of judicial estoppel. At the district court level in Moore v. Payless Shoe Source, Inc. the employer argued for a strict application of judicial estoppel. The district court agreed and granted the employer’s motion for summary judgment. On appeal, Moore’s counsel argued, among other things, that the Eighth Circuit had never recognized judicial estoppel. The employer characterized this argument as “ludicrous.” In the end, the Eighth Circuit—apparently recognizing the doctrine’s flawed application in this context—rejected the doctrine of judicial estoppel but affirmed on the basis of an argument the employer never raised.

Specifically, the Eighth Circuit held that “the ADA plaintiff is estopped to deny the truth of ongoing sworn statements made in the SSA disability evaluation.”

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1982). See also Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980) (holding settlement does not provide the prior approval of a court that judicial estoppel requires). And in a further splintering of the circuit court decisions, some of the courts of appeals have stated judicial estoppel requires reliance and detriment (or prejudice) to the opposing party. See Young v. DOJ, 882 F.2d 633, 639-40 (2d Cir. 1989); Jackson Jordan, Inc. v. Plasser Am. Corp., 747 F.2d 1567, 1578-80 (Fed. Cir. 1984); Maitland v. University of Minnesota, 43 F.3d 357, 363-64 (8th Cir. 1994). In enacting the ADA, Congress sought to establish “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(2) (1994). Application of judicial estoppel obviously did not serve these interests.

70. 139 F.3d 1210 (8th Cir. 1998), vacated, 119 S. Ct. 2017 (1999), on remand to 187 F.3d 845 (8th Cir. 1999).
73. In the interest of disclosure, the author served as Moore’s counsel.
76. See Moore, 139 F. 3d at 1210. In reaching this decision, in addition to creating an argument the employer never made, Judge Loken also ignored other clearly established maxims of appellate procedure. See Davidson & Schaaff, Inc. v. Liberty Nat’l Fire Ins. Co., 69 F.3d 868, 869 (8th Cir. 1995) (“The rule that [the Eighth Circuit] will not address arguments raised for the first time on appeal . . . applies even more forcefully when the appellant took the opposite position in the district court”); Browning v. President Riverboat Casino-Missouri, Inc., 139 F.3d 631, 637 (8th Cir. 1998) (finding arguments not raised after the close of plaintiff’s case are waived). In the district court below, Payless Shoe Source relied solely upon judicial estoppel on the issue of whether Moore was a qualified individual with a disability. The district court applied the doctrine of judicial estoppel and granted Payless Shoe Source summary judgment. Ironically, the Eighth Circuit appeared to agree with Moore and rejected the doctrine of judicial estoppel. The Eighth Circuit, however, created a doppleganger and affirmed the grant of summary judgment. The United States Supreme Court granted certiorari and reversed. Even though Payless Shoe Source maintained that Moore was not disabled in the District Court below, the Eighth Circuit “reinstated” its previous opinion.
proceeding, but may attempt to prove that he or she is nonetheless a ‘qualified individual with a disability’ for ADA purposes.” The Eighth Circuit then created a new evidentiary standard for unsuccessful Social Security applicants who bring ADA suits, and held that any prior representations of total disability are sufficient to support a grant of summary judgment against such an ADA plaintiff unless the plaintiff presents “strong countervailing evidence that the employee is in fact qualified.” Thus, the Eighth Circuit, while ostensibly agreeing with Moore on the issue on appeal—judicial estoppel—created a standard that nonetheless walked and talked like judicial estoppel.

Against this background, the Fifth Circuit in Cleveland v. Policy Management Systems Corp. joined McNemar in all but the smallest detail. Using the label “judicial estoppel,” the Fifth Circuit created a “rebuttable presumption” that persons who merely apply for Social Security benefits are not protected by the ADA. A close examination of the Cleveland opinion revealed that the “rebuttable presumption” operated in the same manner as the Eighth Circuit’s “strong, countervailing evidence” standard. The Eighth Circuit, however, was surely reluctant to engage in the contortions required to invoke “judicial estoppel.” Indeed, in previous opinions, the Eighth Circuit had recognized that it is “significantly more difficult to hold that judicial estoppel will, as a per se rule, prevent a person who has claimed to be totally disabled from subsequently proving that she is a qualified individual with a

77. Moore, 139 F.3d at 1213 (emphasis added).
78. Id. (quoting Dush v. Appleton Elec. Co., 124 F.3d 957, 963 (8th Cir. 1997)).
80. See Cleveland, 120 F.3d at 513-16.
81. Cleveland v. Policy Management Sys. Corp., 120 F.3d 513 (5th Cir. 1997). Both cases appear to stand for the proposition that more than the plaintiff’s own testimony of her ability to work is needed to rebut statements made to the Social Security Administration. The Fifth Circuit notes that an ADA plaintiff may be able:

to present credible, admissible evidence—such as [her] social security disability benefits application, other sworn documentation, and [her] allegations relevant to [the] ADA claim—sufficient to show that, even though [she] may be disabled for purposes of social security, [she] is otherwise qualified to perform the essential functions of [her] job with a reasonable accommodation . . . .

Id. at 518. In Cleveland, the plaintiff could not raise a genuine issue of material fact to rebut the presumption that she was not protected by the ADA after she “continuously and unequivocally” told the SSA that she was “totally and completely unable to work” by merely stating she could perform her job with a reasonable accommodation. Id. In Moore, the court ruled the plaintiff fell short of the strong, countervailing evidence standard by only offering her own affidavit stating she could perform her job with a reasonable accommodation when both the ALJ and her personal physician concluded she could not perform the duties of her former job. See Moore, 139 F.3d at 1213.
disability. Thus, the Eighth Circuit raised the standard of proof and created a doppelganger.

Consequently, by "rejecting" judicial estoppel, in Moore the Eighth Circuit joined the Fifth Circuit in all but name by creating a standard of proof that was virtually unattainable. Whether called judicial estoppel or by some other name, a rose is still a rose. Thus, the result was the same—persons with disabilities who simply apply for Social Security Disability benefits were faced with a heightened standard of proof to proceed on an ADA claim, and at most, would face an outright bar, unparalleled in the history of civil rights. Against this backdrop, the United States Supreme Court granted the Cleveland Petition for Certiorari.

On February 24, 1999, the United States Supreme Court heard oral argument in the Cleveland case, while holding petitions for certiorari in the Moore and Griffith cases. At oral argument, Justice Scalia was unconvinced. Justice Scalia continued to be concerned about inconsistent statements. The other justices, however, focused upon the differing purposes between the ADA and the SSA. Perhaps the most telling point was the SSA's trial work program. Under this program, a SSA recipient was allowed a period of trial work, while remaining eligible for SSA benefits. How, then, could a heightened standard of proof be justified? Ultimately, the Supreme Court rejected the Fifth Circuit's "rebuttable" presumption.

Writing for a unanimous Court, Justice Breyer stated that an ADA plaintiff's application for SSA benefits was not entitled to greater weight than any other piece of evidence. The Supreme Court vacated and remanded

82. Dush v. Appleton Elec. Co., 124 F.3d 957, 962 n.8 (8th Cir. 1997) (citing Robinson v. Neodata Servs., Inc., 94 F.3d 499, 501-02 (8th Cir. 1996); Eback v. Chater, 94 F.3d 410 (8th Cir. 1996)). In Robinson, the court observed that "Social Security determinations . . . are not synonymous with a determination of whether a plaintiff is a "qualified person" for purposes of the ADA. At best, the Social Security determination was evidence for the trial court to consider in making its own independent determination." Robinson, 94 F.3d at 502 n.2 (citations omitted). In Eback, the court quoted the Associate Commissioner of Social Security's declaration that "the ADA and the disability provisions of the Social Security Act have different purposes and have no direct relationship to each other." Eback, 94 F.3d at 412.

83. See Moore, 139 F.3d at 1213.

84. See 67 U.S.L.W. 3583. For a transcript of oral arguments before the Supreme Court see 1999 WL 115176.

85. See 67 U.S.L.W. 3535. Justice Scalia suggested that it is reasonable to require a plaintiff to show a prior assertion of "total disability" on a benefits application is irrelevant to the ADA claim, was made before the plaintiff's condition improved, or did not take a reasonable accommodation into account. See id.

86. The Social Security Administration trial work period allows beneficiaries to work for up to nine months while not affecting their entitlement to benefits or payment levels. See 20 C.F.R. § 404.1592(a) (1999).


88. See id. at 1602.
Cleveland to the district court for further proceedings. Specifically, Justice Breyer observed that "the two claims [did] not inherently conflict to the point where courts should apply a special negative presumption like the one applied" by the Fifth Circuit. Justice Breyer's opinion expressed that "[t]he parties should have the opportunity in the trial court to present, or to contest, these explanations, in sworn form where appropriate."

Subsequent decisions indicate that some judges appointed by Republican presidents will continue to narrow the ADA, irrespective of the content of the record. In the wake of Cleveland, the United States Supreme Court affirmed Griffith and remanded Moore to the Eighth Circuit. On remand, Judge Loken "reinstated" his decision, without any further briefing from the parties. In so doing, Judge Loken quoted selectively from the record, appearing to reach the result before considering the evidence. For example, even though Moore had received satisfactory evaluations operating under the same accommodations she requested, Judge Loken decided that past performance was not enough. Although Moore was performing a similar store clerk job for another retailer, Judge Loken indicated that the record, in its present state, was not sufficient to create a genuine issue of material fact as to whether she could perform the "essential functions" of the Payless store manager position with reasonable accommodation. Thus, even though Payless Shoe Source had given Moore satisfactory evaluations, Judge Loken ignored Payless Shoe Source's evaluations and substituted his own.

89. See id. at 1604.
90. Id. at 1602.
91. Id. at 1604.
93. See Moore. 187 F.3d at 845.
94. As discussed below, Judge Beam, with whom Judge Loken voted, decided that an ADA plaintiff must prove that an accommodation will succeed. See Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043, 1048 (8th Cir. 1999). Judge Beam, again with Judge Loken, held that the ADA does not abrogate the immunity granted states under the Eleventh Amendment to the United States Constitution. See Alsbrook v. City of Maumelle, 184 F.3d 999, 1007 (8th Cir. 1999).
95. Moore. 187 F.3d at 848. The court noted that each time Moore returned to her position at Payless in 1991 and 1993. with the accommodation she requested in her lawsuit, she reinjured herself and took an extended leave of absence. See id.
96. In stating that there was no material issue of fact as to whether Moore was not a qualified individual. Judge Loken addressed an argument that Payless never raised. On the contrary, Payless simply argued that Moore was estopped from claiming she was a qualified individual with a disability. Accordingly, Payless's alternative argument that Moore was not disabled was consistent. Had Payless argued that Moore was not actually qualified, i.e., too disabled, then Moore's argument on the threshold issue of disability undoubtedly would have been strengthened. Further, Moore may have used any argument that Moore was too disabled to establish a "regarded as" claim. One wonders, however, if courts would have estopped
Consequently, it appears that the *Cleveland* decision will change little. Unfortunately, the trend continues in other areas of the ADA as well.

IV. THE FUTURE

Without the involvement of private lawyers, laws guaranteeing equal access are nothing more than words written in a hard-to-read book. Unfortunately, few new graduates are choosing to enter this field in Arkansas, at least on the plaintiff's side. Indeed, this author sometimes wonders what role the ADA will play in the future of his practice. Recent decisions indicate that some courts will continue to construe the ADA narrowly. Thus, absent further intervention by the United States Supreme Court, the future is not bright.

As of this writing, Judge Beam, writing for the six-to-four majority in an Eighth Circuit *en banc* opinion, held that the ADA does not abrogate the immunity granted to the states by the Eleventh Amendment to the United States Constitution. Interestingly (predictably?), the six to four split was generally along ideological lines. The split demonstrated in *Alsbrook* confirms the past and bodes ill for the future.

As explained above, in *Moore*, Judge Loken, on the first appeal, adopted an argument that Payless Shoe Source had never presented. On remand from the United States Supreme Court, Judge Loken reinstated his decision and refused to remand to the district court so that Moore could address the facts of her case in light of *Cleveland*. Indeed, Payless never argued that Moore was too disabled. Rather, Payless argued that Moore was estopped. On the contrary, Payless argued in the district court that Moore was not disabled. Of course, Judge Loken ultimately determined that Moore was too disabled, the exact opposite of Payless Shoe Source's argument.

Lest one imagine that Judge Loken's opinion in *Moore* was an aberration, one need only look to *Browning v. Liberty Mutual Life Insurance Co.* Relying upon a non-jurisdictional argument that neither party raised below or on appeal, the *Browning* panel reversed a jury verdict of over $250,000 in favor of Winifred Browning and against Liberty Mutual Insurance Company
on June 2, 1999. The opinion recognized, "[B]oth parties spent great time and effort arguing over whether Browning's impairment was a disability under the ADA, and whether she was terminated because of her disability," but the panel did not address this issue. Instead, the panel decided that, "We need not reach these issues because we find that Browning failed to establish that she was a qualified individual under the ADA at the time of her termination." The panel reversed the jury's verdict on this basis.

At the district court level, Liberty Mutual never contended that Browning could not "perform the essential functions of her job as it existed before her surgery." On the contrary, Liberty Mutual argued that she was not a person with a disability at all. Accordingly, Liberty Mutual's own medical witness, Dewayne Bowen, a registered nurse working for the worker's compensation carrier, stated:

Q. And in communicating your recommendations to Dr. Hixson, what were Ms. Browning's restrictions when she returned to work?

A. The office visit note that I had and the release that Dr. Hixson gave stated that she could use her right arm minimally and left arm, full use of the left arm, and that she could work four hours a day for two weeks and six hours a day for two weeks and then go back to full duty.

Dr. Hixson, Browning's treating physician, testified that Browning could have done her job:

100. See Browning, 178 F.3d at 1050.
101. Id. at 1047.
102. Id. at 1048. The ADA defines a qualified individual as a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds ...." 42 U.S.C. § 12111(8) (1994). The court determined the plaintiff was not a qualified individual because her best case scenario only allowed her to work four hours a day at a job that required a full-time employee. See Browning, 178 F.3d at 1048.
103. See Browning, 178 F.3d at 1047. The Court reversed the denial of judgment as a matter of law.
104. Id. at 1048.
Q. Were these accommodations, based on your understanding of the job description that was attached and your conversations with Ms. Browning, going to be able for her to perform the job that she had at Liberty Mutual?

A. I thought so.107

Further, Browning’s expert, Pat Hames, an occupational therapist, also proposed accommodations such as a left-handed keyboard. Pat Hames testified:

Q. Now, are you familiar with Winifred Browning’s job restrictions as they existed in May and June of 1995?

A. Yes.

Q. Are there any—were there available any accommodations that could have accommodated the keyboarding aspect of her job?

A. Since she was restricted from using her right arm, there are keyboards that can be used solely by one hand. They require a little training and the person may not be quite as fast as they are with two hands but they are easily learned and they come close to their former speed.

Q. All right. Now, what is the length of training?

A. Oh, of course, it would depend on the individual, but a week or so for training and practice. They could actually learn the thing within probably four or five hours, and then they would need practice to develop their speed.108

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The *Browning* panel failed to recognize this evidence. Further, Liberty Mutual argued, "Most importantly, Dr. Hixson stated that Browning could perform her job at Liberty Mutual as modified." In the end, Judge Beam decided that Browning, at the time she was fired, was too disabled to work.

The *Browning* holding created a totally new evidentiary burden that directly conflicts with prior Eighth Circuit decisions. Previously, an employee seeking accommodation needed only to make a facial showing that an accommodation was possible. In *Browning*, while conceding that the opinion at least appeared harsh, Judge Beam created a classic Catch-22. Judge Beam wrote:

Employers are not qualified to predict the degree of success of an employee's recovery from an illness or injury. To afford Browning the protections of the ADA during the early stages of her recuperation from surgery, based on her eventual degree of future recovery, would be to burden Liberty Mutual with the duty to see into the future.

Browning never asked Liberty Mutual to see into the future. Browning simply was unable to return to work full-duty for four weeks. If the *Browning* opinion were to stand alone, employers could simply fire employees recently injured and raise *Browning* as a defense. Consider, for example, the individual who learns he is HIV positive during a serious illness. Under *Browning*, employers could fire these individuals claiming uncertainty as to the employees' future ability to perform.

In the *Browning* opinion, the Court appeared to recognize that leave might be an accommodation: "This is not to say that a medical leave of absence cannot be a reasonable accommodation under the appropriate circumstances. However, the duty to accommodate does not arise unless the employee will be presently qualified if afforded the accommodation." Earlier in the opinion, however, the panel stated:

109. In footnote 2, the Eighth Circuit stated, "Browning did testify that she felt she could have performed the essential functions of her job at the end of June, when she was scheduled to be back to full-time, if she had accommodations—though she did not suggest what accommodations may have been needed." *Browning*, 178 F.3d at 1048 n.2. Given Hames's testimony, it is suggested that the *Browning* opinion illustrates the value of an adversarial process in avoiding such myopic opinions.


111. See *Browning*, 178 F.3d at 1049.

112. See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) ("once the plaintiff makes 'a facial showing that reasonable accommodation is possible,' the burden of production shifts to the employer to show that it is unable to accommodate the employee").

113. *Browning*, 178 F.3d at 1049.

114. Id. at 1049 n.3 (emphasis added) (internal citations omitted).
Further, it is axiomatic that in order for Browning to show that she could perform the essential functions of her job, she must show that she is at least able to show up for work. Browning testified that she was unable to report to work the entire week of June 5. Even if she could have reported to work, Browning was limited to only four hours per day and she made no showing that the essential functions of her full-time job could be performed in four hours.\(^{115}\)

Obviously, an individual who needs leave, by definition, is unable to show up for work, \textit{i.e.}, perform the essential functions of her job. Consequently, the individual who needs leave, however, is never "presently qualified." Thus, while giving lip service to the availability of leave as an accommodation, the \textit{Browning} decision created a situation where no ADA plaintiff who requires leave can prevail.

The \textit{Browning} decision's unfortunate "myopia" has apparently arisen in other cases as well. In \textit{Mole v. Buckhorn Rubber},\(^{116}\) the plaintiff Mole suffered from multiple sclerosis but claimed that even without accommodation she was able to carry on her job at a satisfactory level.\(^{117}\) Judge Loken, with Judge Beam voting for majority, held that an ADA plaintiff's failure to advise an employer she "need[s] additional accommodation, much less what accommodation specific to her position and workplace" is needed is fatal to an ADA claim.\(^{118}\) Mole produced affidavits from co-workers and customers who dealt with her and found her work satisfactory.\(^{119}\) Where this evidence was favorable to the employee, Judge Loken rejected Mole's claim by observing: "[s]upporting affidavits from fellow employees who did not deal with Mole on a systematic basis are insufficient to counter Buckhorn's proof she was discharged because she did not meet its legitimate expectations."\(^{120}\)

Where Judge Loken found no accommodation, Judge Lay characterized the record as "replete with additional accommodations Mole contends Buckhorn could have made."\(^{121}\) Furthermore, Mole's physician also listed several possible accommodations such as medical leaves, limiting work hours,

\(^{115}\) \textit{Id.} at 1048 (internal citations omitted).
\(^{116}\) 165 F.3d 1212, 1220 (8th Cir. 1999).
\(^{117}\) \textit{See Mole}, 165 F.3d at 1220 n.5 (Lay. J., dissenting).
\(^{118}\) \textit{Id.} at 1217.
\(^{119}\) \textit{See id.} at 1220 n.5 (Lay. J., dissenting). In \textit{Browning}, of course, Judge Beam relied on just such evidence as support for reversing the jury's verdict. \textit{See Browning}, 178 F.3d at 1048.
\(^{120}\) \textit{Mole}, 165 F.3d at 1218. Judge Lay, citing an opinion written by Judge Beam in \textit{Arneson v. Heckler}, 879 F.2d 393 (8th Cir.1989), argued, "Under the present record, the reasonableness of the extent of Buckhorn's accommodation should be a question for the trier of fact." \textit{Mole}, 165 F.3d at 1220 (Lay. J., dissenting).
\(^{121}\) \textit{Mole}, 165 F.3d at 1220 (Lay. J., dissenting).
allowing breaks during the day, and providing an air-conditioned workplace.\textsuperscript{122} Faced with this evidence, Judge Loken decided that the defendant's motion for summary judgment should be granted because Mole failed to make requests for accommodations in a timely manner.\textsuperscript{123} Judge Lay, dissenting, rejected this argument, saying, "Such a defense does not logically or factually exist upon a fair review of the record."\textsuperscript{124} The record apparently reflected that:

Mole made requests for accommodation during a meeting held on July 14, 1994, the effective date of her termination. Mole requested rest breaks, some days off, time for her doctors to determine the proper prescriptions and dosages to manage her illness, and fully staffing the customer service department. She also submitted a note to Buckhorn from Dr. Asher stating that her MS was causing her work problems.\textsuperscript{125}

Considering the above, Judge Lay believed it "difficult to accept the majority opinion's myopic view of the record."\textsuperscript{126}

Thankfully, the \textit{Browning} case does not stand alone. The \textit{Browning} opinion, in fact, apparently represents the minority view in the Eighth Circuit.\textsuperscript{127} Indeed, the \textit{Arneson} and \textit{Benson} cases have recently been reaffirmed.

In \textit{Fjellestad v. Pizza Hut of America, Inc.},\textsuperscript{128} a panel of the Eighth Circuit held that an employer can be held liable for failing to engage in an interactive process designed to reach reasonable accommodation.\textsuperscript{129} Fjellestad became a manager of the Yankton, South Dakota Pizza Hut restaurant in September of 1978.\textsuperscript{130} As part of his management duties, Fjellestad supervised employees, managed bank deposits, trained and hired employees, and

\textsuperscript{122} See id. at 1220 n.8 (Lay. J., dissenting).
\textsuperscript{123} See id. at 1218.
\textsuperscript{124} Id. at 1221 (Lay. J., dissenting).
\textsuperscript{125} See id.
\textsuperscript{126} See id. (Lay. J., dissenting).
\textsuperscript{127} See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) (stating that "once the plaintiff makes a 'facial showing that reasonable accommodation is possible,' the burden of production shifts to the employer to show that it is unable to accommodate the employee") (internal citations omitted); Wood v. Omaha Sch. Dist., 985 F.2d 437, 439 (8th Cir. 1993) (stating that under the Rehabilitation Act a plaintiff need only make a facial showing that reasonable accommodation is possible and finding that the plaintiff met that burden by proposing certain accommodations); Arneson v. Heckler, 879 F.2d 393, 396 (8th Cir. 1989) (reversing dismissal of Rehabilitation Act claim because the plaintiff was "only required to provide evidence sufficient to make 'at least a facial showing that reasonable accommodation is possible'" before the burden shifts to the employer to prove it is unable to make the accommodation) (internal citation omitted).
\textsuperscript{128} 188 F.3d 944 (8th Cir. 1999).
\textsuperscript{129} See id. at 952.
\textsuperscript{130} See id. at 947.
made sure the restaurant was clean. As a Pizza Hut unit manager, Fjellestad was required to work fifty hours per week if she was unable to accomplish her duties in less time.

On December 14, 1994, Fjellestad was injured in a car accident. Fjellestad was hospitalized, and she was unable to return to work until April 28, 1995. On April 28, 1995, Fjellestad returned to work for two hours every other day. Obviously, Fjellestad was unable to work fifty hours per week. Like Browning, Fjellestad was slated to return to work gradually. Browning, however, was slated to return in one month. Fjellestad returned to thirty-five to forty hours per week by December 29, 1995. Because Fjellestad was unable to perform the essential functions of her job from April of 1995 until December of 1995, Pizza Hut could have, under Browning, fired Fjellestad.

Pizza Hut did not fire Fjellestad until February 8, 1996. To the contrary, "[o]n December 12, 1995, a representative from Pizza Hut's human resources department called Fjellestad about the grievance and told her that she would be allowed to retain her position as unit manager because her doctor had released her to work a sufficient number of hours to perform her duties." Pizza Hut did, however, place Fjellstad on a sixty-day performance plan. On January 16, 1996, Fjellestad's doctor concluded that she had reached her maximum recovery. Pizza Hut fired Fjellestad on February 8, 1996. Fjellestad then filed grievances asking for accommodation. After those requests were apparently denied, Fjellestad sued, alleging violations of the Americans with Disabilities Act of 1990.

In *Fjellestad*, the Eighth Circuit held that "the failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith." Notably, the *Fjellestad* panel did not require the employee to

131. See id.
132. See id.
133. See id.
134. See *Fjellestad*, 188 F.3d at 947.
135. See id.
136. See *Browning*, 178 F.3d at 1046.
137. See *Fjellestad*, 188 F.3d at 947.
138. See id. at 948.
139. Id.
140. See id.
141. Id.
142. See id.
143. See *Fjellestad*, 188 F.3d at 948.
144. See id.
145. See id. at 952.
prove the accommodation, as the *Browning* panel did.\textsuperscript{146} Further, the *Fjellestad* panel, unlike the *Browning* panel, required Pizza Hut to "extend the protections of the ADA during the early stages of her recuperation from surgery."\textsuperscript{147} Thus, the *Fjellestad* panel did not see the search for accommodation, "based on [*Fjellestad’s*] eventual degree of future recovery, would be to burden [Pizza Hut] with the duty to see into the future."\textsuperscript{148} On the contrary, the *Fjellestad* panel ruled Pizza Hut’s failure to engage in just such a process might be prima facie evidence of bad faith.\textsuperscript{149}

Thus, the Eighth Circuit appears to have split itself. On one side stands the *Browning*, *Mole*, and *Moore* opinions, and on the other is *Benson*, *Wood*, and *Fjellestad*. One would be hard-pressed to distinguish *Browning* and *Fjellestad*. At some point, the Eighth Circuit must reconcile these decisions and establish a principled rule of law, grounded in stare decisis rather than political philosophy. Until then, the road for ADA plaintiffs is not only too narrow, but also contains an indefensible split.

\textsuperscript{146} Browning petitioned for rehearing, citing the *Fjellestad* case, but her petition was denied.
\textsuperscript{147} Cf. *Browning*, 178 F.3d at 1049.
\textsuperscript{148} *Browning*, 178 F.3d at 1049.
\textsuperscript{149} See *Fjellestad*, 188 F.3d at 952.