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INSIDE

Medicare Managed
Care

Assisted Living

Including Elders in
Family Court

Mediation of Disputes in
Adult Guardianship
Cases

Americans with
Disabilities Act and
Social Security Act

Exclusion from Services

Tobacco

Legal Services Delivery



Elder Law

Are Claims Under the Americans with Disabilities Act and the Social Security Act Inconsistent?

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I. Introduction

Richard Doe had been working for American Enterprises for approximately four years before he was discharged in October 1995. He received favorable performance reviews throughout his employment. While on vacation during September 1995, he became ill and was hospitalized. Tests disclosed that he had Acquired Immunodeficiency Syndrome (AIDS). He shared this information with close friends and coworkers. When he returned to the office, his supervisor called him into her office and asked him, "Are you HIV-positive?" Fearing for his job, Doe answered no. A week after his return, he was terminated for allegedly stealing \$2 from petty cash.

What should Doe do? File a claim against his employer under the Americans with Disabilities Act (ADA)? /1/ Apply for social security disability benefits? Do both? Recently, many courts have held that a claimant who files for disability benefits under the Social Security Act is estopped from pursuing a claim under the ADA. This article discusses the different definitions of disability under both the ADA and the Social Security Act and some of the cases on both sides of this issue, including probably the most important case, a recent decision by the Third Circuit in *McNemar v. The Disney Store, Inc.* /2/ A subsequent article will discuss in greater detail the *McNemar* decision and the extent to which claims can still be pursued under both the ADA and the Social Security Act in light of the court of appeals' holding.

II. The Definition of Disability

A. *Americans with Disabilities Act*

In order to have a claim under the ADA, a litigant must be a qualified individual with a disability. An individual with a disability is defined as a person who

- has a physical or mental impairment that substantially limits one or more major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment. /3/

To be protected under the ADA, a person not only must be an individual with a disability but also must be qualified. The regulations define a qualified individual with a disability as a person who

satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. /4/

A reasonable accommodation may include

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- restructuring the job; making part-time or modified work schedules available; reassigning the employee to a vacant position; acquiring or modifying equipment or devices; making appropriate adjustment or modification to examinations, training materials, or policies; providing qualified readers or interpreters; and making other similar accommodations for individuals with disabilities. /5/

B. Social Security Act

The concept of disability is handled differently under the Social Security Act. The focus is not on the employer, as it is under the ADA, but rather on the individual applying for benefits. /6/ Social security disability claimants must prove that they are unable to work because of a severe impairment. Under the Social Security Act, disability is defined as "[a]n inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months." /7/

In applying this disability standard, the Social Security Administration (SSA) uses a five-step sequential evaluation process. /8/

- (1) Is the claimant currently engaged in substantial gainful activity (i.e., is the claimant still working)?
- (2) Does the claimant have a severe impairment?
- (3) Does the claimant's impairment meet or equal a listed impairment (e.g., for AIDS or a cardiovascular impairment)?

(4) Does the impairment prevent the claimant from returning to the type of work claimant performed in the past?

(5) Can the claimant perform other forms of substantial gainful activity that exists in significant numbers in the national economy?

Finally, even if a claimant meets the disability standard, the claimant may continue to work for a period of time. A claimant can engage in a nine-month trial work period to test the ability to work and continue to receive benefits during that period. /9/ In addition, sporadic work or work for minimal wages does not constitute substantial gainful activity. /10/

III. Case Law

Individuals pursuing both social security disability and ADA claims have had mixed success. Generally, their ADA claims have been barred after applying for social security benefits. Most courts have held that an application for social security disability benefits amounts to an admission that the individual can no longer work. /11/ Thus, the individual is no longer a qualified individual with a disability.

Most courts that have ruled this way have applied the principle of judicial estoppel. In applying judicial estoppel, courts generally look to see whether the litigant is playing "fast and loose" with the court by taking inconsistent positions in separate judicial proceedings. /12/ Alternatively, courts have held that a plaintiff's claim for social security benefits demonstrates that no genuine issue of material fact is in dispute (i.e., the plaintiff is not a qualified individual with a disability) and that no reasonable fact finder could find for the plaintiff. These courts seem concerned that, by allowing the ADA claim, the court will permit the litigant to "speak out of both sides of his mouth" with impunity. /13/

The courts that have allowed the pursuit of both an ADA claim and a social security claim have generally ruled that whether an individual receiving disability benefits can still perform the essential job duties of his or her job, with or without reasonable accommodation, is a question of fact that cannot be dismissed summarily.

A. Favorable Cases

The leading favorable court of appeals decision is *Overton v. Reilly*. /14/ In *Overton*, the plaintiff applied for social security disability benefits before accepting a position with the Environmental Protection Agency (EPA). SSA awarded benefits on a trial basis. When the EPA discharged the plaintiff, his disability benefits became permanent. The court ruled that, while the disability determination may be relevant evidence of the severity of the plaintiff's disability, it did not establish that he was incapable of performing any particular job. Thus, the court held that a genuine issue of material fact existed as to whether the plaintiff was a qualified individual with a disability within the meaning of the Rehabilitation Act. /15/

Similarly, the district court in *Smith v. Dovenmuehle Mortgage, Inc.* held that the discharged employee's receipt of social security disability benefits after his termination did not bar his ADA claim that he was discharged because he had AIDS. /16/ The court refused to give plaintiff a Hobson's choice of pursuing either his ADA claim or his disability claim but not both. It is noteworthy that, by the time plaintiff filed his ADA claim, both plaintiff and his doctor testified that his health had improved sufficiently to allow him to return to work.

B. Unfavorable Cases

A leading unfavorable decision is *August v. Offices Unlimited, Inc.* /17/ The First Circuit ruled that plaintiff was precluded from claiming he was a qualified individual entitled to protection under Massachusetts' disability discrimination statute because, in applying for long-term disability benefits, he asserted he was totally and continuously disabled. The Ninth Circuit recently ruled in *Kennedy v. Applause* that disability applications demonstrated plaintiff's failure to make out a prima facie case. /18/ Affirming the district court's summary judgment in favor of the employer, the court held that plaintiff's failed to present a genuine issue of material fact on the question of whether she was a qualified person with a disability under the ADA.

Similarly, in *Garcia-Paz v. Swift Textiles*, /19/ *Harden v. Delta Airlines*, /20/ and *Reigel v. Kaiser Foundation Health Plan*, /21/ district courts barred plaintiffs' ADA claims because of plaintiffs' assertions in their respective applications for long-term disability benefits that they were totally and permanently disabled. The courts found that these assertions were inconsistent with the notion that plaintiffs could perform the essential functions of their particular jobs.

IV. The McNemar Case

The Third Circuit's decision in *McNemar v. The Disney Stores* promises to be the most significant case on this issue to date. The basic facts of this case were described at the outset of this article. The appellate oral argument on June 11, 1996, shed considerable light on the practical issues that lurk beneath the surface of the debate over the meaning of disability in the ADA and social security contexts and the proper reach of the judicial estoppel doctrine.

During oral argument, the panel focused initially on whether the plaintiff ever notified SSA that he "was no longer disabled." /22/ One judge seemed particularly concerned that a holding for the plaintiff would radically change how the court approached social security disability cases. Apparently this judge believed that, allowing the plaintiff's claim in *McNemar* would compel courts to rule in favor of claimants on their disability claims even if the claimants could or were working. /23/ One judge pursued this reasoning and asked rhetorically how the plaintiff could obtain disability benefits when, in his mind, he was not really disabled. /24/

Interestingly, the court indicated it would be less concerned with dual claims if the subsequent ADA award was offset by the amount of disability benefits received during the period the plaintiff claimed he was a qualified person with a disability. /25/ Finally, the court seemed more concerned

about the plaintiff's receipt of disability benefits than about the completion of the SSA disability application. /26/

On July 31, 1996, the court of appeals affirmed the district court's judgment in favor of defendant. Relying on *Ryan Operations G.P. v. Santium-Midwest Lumber Co.*, /27/ the court agreed that the two-part threshold inquiry for equitable estoppel was met in this case: (1) plaintiff's present position was inconsistent with a position formerly asserted (i.e., on his social security disability, state disability, and state loan applications); /28/ and (2) these assertions were made in bad faith (i.e., "with the intent to play fast and loose with the court"). /29/

V. Conclusion

The Third Circuit's decision in *McNemar* is more sweeping than were the panel's expressed concerns during the oral argument. In the Third Circuit, as well as in other courts that follow *McNemar's* rationale, is it possible to pursue simultaneous claims under the ADA and the Social Security Act? If so, under what circumstances? Will the mere filing of an application for disability benefits, even if benefits are not ultimately awarded, estop an individual from pursuing an ADA claim? /30/ In a forthcoming article we will answer these and other related questions.

Footnotes

/1/ Americans with Disabilities Act (ADA), 42 U.S.C. Secs. 12101 et seq.

/2/ *McNemar v. The Disney Store, Inc.*, 1996 WL 426805 (3d Cir. 1996).

/3/ 42 U.S.C. Sec.12102(2).

/4/ *Id.* Sec. 12111(8) (emphasis added).

/5/ *Id.* Sec. 12111(9).

/6/ See Memorandum from Social Security Administration (SSA) Associate Commissioner Daniel L. Skoler to Headquarters Executive Staff et al. (June 2, 1993) ("The ADA and the disability provisions of the [Social Security Act] have different purposes, and have no direct application to one another.").

/7/ 42 U.S.C. Secs. 423(d)(1)(A), 1382c(a)(3)(A).

/8/ 20 C.F.R. Secs. 404.1520, 416.920 (1996).

/9/ *Id.* Secs. 404.1592, 416.992 (1996).

/10/ *Id.* Secs. 404.1572 -- .1574, 416.972 -- .974 (1996).

/11/ The court of appeals in McNemar relied heavily on the appellant's sworn statements in his multiple applications in determining that judicial estoppel applied. E.g., it set forth the inconsistent statements in two footnotes: "I became unable to work because of my disabling condition on October 01, 1993. . . . I am still disabled. . . . I agree to notify the Social Security Administration if: My medical condition improves so that I would be able to work, even though I have not yet returned to work. . . . I know that anyone who makes or causes to be made a false statement or misrepresentation of a material fact in an application or for use in determining a right to payment under the [Social Security Act] commits a crime punishable under federal law by fine, imprisonment or both. I affirm that all information I have given in connection with this claim is true. . . . Signature/ Leonard C. McNeMar/ Date: 12-2-93." McNemar, 1996 WL 426805, at nn.2 - 3.

/12/ See *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996). Cf. *Dockery v. North Shore Medical Center*, 909 F. Supp. 1550, 1558 (S.D. Fla. 1995) (undertaking an oath in an administrative filing and later taking an inconsistent position in a court proceeding do not threaten the integrity of the judicial system).

/13/ See, e.g., *Miller v. U.S. Bancorp.*, 926 F. Supp. 994 (D. Or. 1996).

/14/ *Overton v. Reilly*, 977 F.2d 1190 (7th Cir. 1992).

/15/ Some of the other district courts that have not barred ADA or Rehabilitation Act claims include *Kupferschmidt v. Runyon*, 827 F. Supp. 570 (E.D. Wis. 1993) (receipt of social security disability benefits did not automatically preclude plaintiff from pursuing Rehabilitation Act claim); *Dockery*, 909 F. Supp. 1550 (judicial estoppel did not bar discharged employee, who had applied for and apparently received disability on the basis of her alleged total disability, from arguing that she was qualified individual under the ADA); *Wood v. Westvasco Corp.*, 859 F. Supp. 608, 614 -- 15 (D. Mass. 1994) (employee who stated in his disability benefits application that he could have continued working if his employer had been willing to make reasonable accommodations was not barred from pursuing his ADA claim).

/16/ *Smith v. Dovenmuehle Mortgage, Inc.*, 859 F. Supp. 1138 (N.D. Ill. 1994).

/17/ *August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992).

/18/ *Kennedy v. Applause*, 1996 WL 426853 (9th Cir. 1996).

/19/ *Garcia-Paz v. Swift Textiles*, 873 F. Supp. 547 (D. Kan. 1995).

/20/ *Harden v. Delta Airlines*, 900 F. Supp. 493, 493 (S.D. Ga. 1995).

/21/ *Reigel v. Kaiser Found. Health Plan*, 859 F. Supp. 963 (E.D.N.C. 1994).

/22/ McNemar, 1996 WL 426805, oral argument transcript at 10, 23 -- 24.

/23/ Id. at 26 -- 25 ("It's a bizarre situation"), 38.

/24/ Id. at 33 -- 34.

/25/ Id. at 46.

/26/ Id. at 47 -- 48.

/27/ Ryan Operations G.P., 81 F.3d 355 (3d Cir. 1996).

/28/ See note 11, supra.

/29/ The court articulated the twin concepts behind equitable estoppel: "(1) to preserve the integrity of the judicial system by preventing parties from playing fast and loose with the courts in assuming inconsistent positions, and (2) with a recognition that each case must be decided upon its own particular facts and circumstances." McNemar, 1996 WL 426805 at 6.

/30/ Coincidentally, on the same day the Third Circuit issued the McNemar opinion, the Ninth Circuit issued its opinion in Kennedy, 1996 WL 426853, holding that plaintiff failed to demonstrate that she was a qualified individual with a disability because of statements by her doctor, and by her on social security and state disability applications, that she was totally disabled. SSA ultimately denied her disability claim. Because the court resolved the case by finding no genuine issue of material fact, it found it unnecessary to rely on the doctrine of judicial estoppel.