Maker, trades that have a high degree of correlation with the overall pattern of trading of each series in the option issues involved; participating in the automatic execution system; actively promoting the Exchange as a marketplace; and responding to competition by offering competitive markets and competitively priced services. Subject to certain exceptions, LMMs receive a guaranteed 50% participation in transactions occurring on their disseminated bids and offers in their appointed issues.

Since its inception, the LMM position at the PCX has been designed to incorporate some of the functions performed by Designated Primary Market Makers (''DPM''s) at the Chicago Board Options Exchange (''CBOE''). Under the original LMM system at PCX, however, an LMM—unlike a DPM—was not authorized to manage the public limit order book (''the Book'') or perform certain Floor Broker functions.[11]

The PCX has in recent years sought to broaden the privileges of its LMMs to make its LMM system more competitive with similar systems at other options exchanges. In October 1996, the Commission approved a PCX pilot program that allowed a number of LMMs to perform the functions of the PCX OBO (*i.e.,* manage the Book) in certain designated options issues.[12] Participating LMMs were required to resolve trading disputes and errors, set rates for Book execution, and disclose Book information to members upon request. The pilot was subsequently extended and expanded to allow all LMMs to participate as OBOs.[13] In October 1998 this facet of the LMM system was permanently approved by the Commission.[14]

The PCX now seeks to further revise PCX Rule 6.82 to permit its LMMs to act as Floor Brokers, in addition to performing OBO and Market Maker functions. Floor Brokers are registered with the Exchange and are permitted to accept and execute options orders received on behalf of members while on the Exchange floor.

The PCX has proposed this rule change for competitive reasons. Specifically, the PCX believes that the proposed changes will afford its LMMs additional flexibility so that they can better compete with DPMs and specialists on other national securities exchanges.[15] the PCX also believes that the proposed changes will allow its LMMs to provide customers with a greater level of service and enable the LMMs to offer more competitive rates for the execution of customer orders.

Under the proposal, an LMM will be permitted, but will not be obligated, to accept non-discretionary orders that are not eligible to be placed in the Book,[16] and will be permitted to represent such orders as a Floor Broker. In handling an order as a Floor Broker, an LMM will be obligated to use due diligence to execute the order at the best available price, in accordance with the rules of the Exchange,[17] and will be further subject to all other obligations of Floor Brokers specified in PCX Rules 6.43 through 6.48.

At the same time, the proposal places restrictions on the types of orders that an LMM may represent as a Floor Broker, consistent with applicable rules of competing exchange.[18] An LMM will not be permitted to represent discretionary orders, whether as a Floor Broker or otherwise. In addition, all orders in the LMM's possession that are eligible to be booked will be required to be booked.

The Commission finds that the proposed rule change is an appropriate expansion of the functions performed by LMMs. The proposal implements a system that has been in place other exchanges, and is likely to enhance trading at the PCX. It provides a further incentive for Market Makers to become LMMs, and thus may add depth and liquidity to PCX-listed issues. The ability of LMMs to serve as Floor Brokers should also afford LMMs greater flexibility in responding to varying market conditions, and enable them to improve service to PCX customers by offering competitive service rates. Finally, by placing LMMs on a similar footing as DPMs and specialists at other options exchanges, the proposal should encourage further competition among the exchange markets.

IV. Conclusion

It is Therefore Ordered, pursuant to Section 19(b)(2)[19] of the Act, that the proposed rule change (SR–PCX–99–25) is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[20]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00–389 Filed 1–6–00; 8:45 am]

BILLING CODE 8010–01–M

[11] These functions were accorded to DPMs at the CBOE from the beginning of the DPM program at that exchange. *See* Securities Exchange Act Release No. 24934 (September 22, 1987), 52 FR 36122 (September 25, 1987) (first approving the CBOE DPM program and depicting the DPM as a position ''akin to a specialist'').

[12] *See* Securities Exchange Act Release No. 37810 (October 11, 1996), 61 FR 54481 (October 18, 1996).

[13] *See* Securities Exchange Act Release Nos. 38462 (April 1, 1997), 62 FR 16886 (April 8, 1997); 39106 (September 22, 1997), 62 FR 51172 (September 30, 1997); 39667 (February 13, 1998), 63 FR 9895 (February 26, 1998); 40020 (May 21, 1998), 63 FR 29286 (May 28, 1998); and 40328 (August 17, 1998), 63 FR 45276 (August 25, 1998).

[14] *See* Securities Exchange Act Release No. 40548 (October 14, 1998), 63 FR 56283 (October 21, 1998). Until recently, the Exchange required participating LMMs to use Exchange personnel to assist the LMM in performing the OBO function, for which the Exchange charged the LMM a staffing fee. In July 1999, the Commission approved a rule change allowing qualified LMMs to manage their own employees in operating the Book. *See* Securities Exchange Act Release No. 41595 (July 2, 1999), 64 FR 38064 (July 14, 1999).

[15] The proposed rule change will generally allow LMMs on the PCX to perform the same functions that DPMs on the CBOE may perform. *See* CBOE Rule 8.80(c).

[16] The eligibility of orders to be placed in the Book is determined by reference to PCX Rule 6.52(a), which governs the types of orders that OBOs may accept. Such orders, as indicated in the Rule, ''shall include limit orders . . . and such other orders as may be designated by the Options Floor Trading Committee.'' According to the PCX, the Committee has not designated any additional types of orders that may be accepted by OBOs. Orders not eligible for the Book include, for example, contingency orders, spread orders, straddle orders, and combination orders. Telephone conversation between Robert P. Pacileo, Attorney, PCX, and Ira L. Brandriss, Attorney, Division of Market Regulation, Commission, on August 6, 1999.

[17] The PCX represented that it will provide detailed guidance concerning these responsibilities in a Regulatory Bulletin that will be disseminated to members upon the approval of this proposed rule change. The bulletin will specify, among other things, that in executing transactions for his own account as a Market Maker, an LMM (a) must accord priority to orders he represents as Floor Broker over his activity as Market Maker, and (b) must not initiate a transaction for his own account that would result in putting into effect any stop or stop limit order which may be in the Book or which he represents as Floor Broker, except with the approval of a Floor Official and a guarantee that the stop or stop limit order will be executed at the same price as the electing transaction. Telephone conversation between Robert P. Pacileo, Attorney, PCX, and Ira L. Brandriss, Attorney, Division of Market Regulation, Commission, on November 19, 1999.

[18] *See* CBOE Rule 8.80(c)(8).

[19] 15 U.S.C. 78s(b)(2).

[20] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Social Security Ruling, SSR 00–1c; Disability Insurance Benefits—Claims Filed Under Both the Social Security Act and the Americans With Disabilities Act

AGENCY: Social Security Administration.

ACTION: Notice of Social Security Ruling.

SUMMARY: In accordance with 20 CFR 402.35(b)(1), the Commissioner of Social Security gives notice of Social Security Ruling (SSR) 00–1c. This Ruling, based on the Supreme Court's decision in

Carolyn C. Cleveland v. *Policy Management Systems Corporation et al.*, ____ U.S. ____, 119 S.Ct. 1597 (1999), concerns whether a claim for disability insurance benefits filed under the Social Security Act would preclude the claimant from pursuing relief under the Americans with Disabilities Act.

EFFECTIVE DATE: January 7, 2000.

FOR FURTHER INFORMATION CONTACT: Joanne K. Castello, Office of Program Support, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–1711.

SUPPLEMENTARY INFORMATION: Although we are not required to do so pursuant to 5 U.S.C. 552(a)(1) and (a)(2), we are publishing this Social Security Ruling in accordance with 20 CFR 402.35(b)(1).

Social Security Rulings make available to the public precedential decisions relating to the Federal old-age, survivors, disability, supplemental security income, and black lung benefits programs. Social Security Rulings may be based on case decisions made at all administrative levels of adjudication, Federal court decisions, Commissioner's decisions, opinions of the Office of the General Counsel, and Agency interpretations of the law and regulations.

Although Social Security Rulings do not have the same force and effect as the statute or regulations, they are binding on all components of the Social Security Administration, in accordance with 20 CFR 402.35(b)(1), and are to be relied upon as precedents in adjudicating cases.

If this Social Security Ruling is later superseded, modified, or rescinded, we will publish a notice in the **Federal Register** to that effect.

Dated: December 20, 1999.

(Catalog of Federal Domestic Assistance, Programs 96.001 Social Security—Disability Insurance; 96.005 Special Benefits for Disabled Coal Miners; 96.006 Supplemental Security Income)

Kenneth S. Apfel,

Commissioner of Social Security.

Sections 222(c) and 223(a), (d)(2)(a), and (e)(1) of the Social Security Act (42 U.S.C. 422(c) and 423(a), (d)(2)(A), and (e)(1)) Disability Insurance Benefits—Claims Filed Under Both the Social Security Act and the Americans With Disabilities Act

20 CFR 404.1520(b)–(f), 404.1525, 404.1526, 404.1560(c), 404.1592, and 404.1592a

Carolyn C. Cleveland v. *Policy Management Systems Corporation et al.,* ____U.S.____, 119 S.Ct. 1597 (1999)

This Ruling concerns whether an individual's claim for, or receipt of, disability insurance benefits filed under the Social Security Act (the SSAct) would preclude the individual from pursuing relief under the Americans with Disabilities Act (ADA).

The SSAct and the ADA both help individuals with disabilities but in different ways. The SSAct provides monetary benefits to insured individuals who are under a disability, as defined in the SSAct. The ADA seeks to eliminate unwarranted discrimination against any individual who is considered a ''qualified individual with a disability'' as defined in the ADA.

In January 1994, the claimant filed for Social Security disability insurance benefits. By April 1994, her condition improved and she returned to work. She reported this to the Social Security Administration (SSA) which denied her claim. Her employer subsequently terminated her. She then asked SSA to reconsider its denial of her claim. SSA again denied her claim, but following a hearing, she was awarded benefits. However, before her Social Security award, the claimant brought an ADA lawsuit contending that her employer terminated her employment without reasonably accommodating her disability.

The District Court did not evaluate her ''reasonable accommodation'' claim on the merits, but granted summary judgment to the defendant because, in the court's view, the plaintiff, by applying for and receiving Social Security disability insurance benefits, had conceded that she was totally disabled. This fact, the court concluded, estopped the plaintiff from proving an essential element of her ADA claim, i.e., that she could ''perform the essential functions'' of her job with ''reasonable accommodation.''

The Fifth Circuit Court of Appeals affirmed the District Court's grant of summary judgment on the grounds that the plaintiff's statement on her Social Security application that she was totally disabled and unable to work was sufficient evidence to judicially estop her later ADA claim. In her ADA claim, the plaintiff contended that, for the time in question, with reasonable accommodation, she could perform the essential functions of her job. The Court of Appeals thought that her claims under both Acts would incorporate two directly conflicting propositions; namely, ''I am too disabled to work'' and ''I am not too disabled to work.'' That court, in an effort to prevent two conflicting claims under both Acts, used a special judicial presumption that it believed would prevent the plaintiff from successfully pursuing her ADA claim.

The Supreme Court (the Court) granted certiorari in light of the disagreement among the circuits concerning the legal effect upon an ADA claim of the application for, or receipt of, Social Security disability insurance benefits. The Court held that, despite the appearance of conflict between the two statutes, the two claims do not conflict to the point where courts should apply a special negative presumption as in the Court of Appeals' decision in this case. The Court believed that there are too many situations in which a Social Security claim and an ADA claim can comfortably exist side by side. The Court, therefore, vacated the judgment of the Court of Appeals and remanded the case for further proceedings consistent with the Court's opinion.

BREYER, Supreme Court Justice:

The Social Security Disability Insurance (SSDI) program provides benefits to a person with a disability so severe that she is ''unable to do (her) previous work'' and ''cannot * * * engage in any other kind of substantial gainful work which exists in the national economy.'' § 223(a) of the Social Security Act, as set forth in 42 U.S.C. 423(d)(2)(A). This case asks whether the law erects a special presumption that would significantly inhibit an SSDI recipient from simultaneously pursuing an action for disability discrimination under the Americans with Disabilities Act of 1990 (ADA), claiming that ''with * * * reasonable accommodation'' she could ''perform the essential functions'' of her job. Section 101, 104 Stat. 331, 42 U.S.C. 12111(8).

We believe that, in context, these two seemingly divergent statutory contentions are often consistent, each with the other. Thus pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. To survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could ''perform the essential functions'' of her previous job, at least with ''reasonable accommodation.''

After suffering a disabling stroke and losing her job, Carolyn Cleveland sought and obtained SSDI benefits from the Social Security Administration (SSA). She has also brought this ADA suit in which she claims that her former

employer, Policy Management Systems Corporation, discriminated against her on account of her disability. The two claims developed in the following way:

August 1993: Cleveland began work at Policy Management Systems. Her job required her to perform background checks on prospective employees of Policy Management System's clients.

January 7, 1994: Cleveland suffered a stroke, which damaged her concentration, memory, and language skills.

January 28, 1994: Cleveland filed an SSDI application in which she stated that she was ''disabled'' and ''unable to work.'' App. 21.

April 11, 1994: Cleveland's condition having improved, she returned to work with Policy Management Systems. She reported that fact to the SSA two weeks later.

July 11, 1994: Noting that Cleveland had returned to work, the SSA denied her SSDI application.

July 15, 1994: Policy Management Systems fired Cleveland.

September 14, 1994: Cleveland asked the SSA to reconsider its July 11th SSDI denial. In doing so, she said, ''I was terminated [by Policy Management Systems] due to my condition and I have not been able to work since. I continue to be disabled.'' *Id.*, at 46. She later added that she had ''attempted to return to work in mid April,'' that she had ''worked for three months,'' and that Policy Management Systems terminated her because she ''could no longer do the job'' in light of her ''condition.'' *Id.*, at 47.

November 1994: The SSA denied Cleveland's request for reconsideration. Cleveland sought an SSA hearing, reiterating that ''I am unable to work due to my disability,'' and presenting new evidence about the extent of her injuries. *Id.*, at 79.

September 29, 1995: The SSA awarded Cleveland SSDI benefits retroactive to the day of her stroke, January 7, 1994.

On September 22, 1995, the week before her SSDI award, Cleveland brought this ADA lawsuit. She contended that Policy Management Systems had ''terminat[ed]'' her employment without reasonably ''accommodat(ing) her disability.'' *Id.*, at 7. She alleged that she requested, but was denied, accommodations such as training and additional time to complete her work. *Id.*, at 96. And she submitted a supporting affidavit from her treating physician. *Id.*, at 101. The District Court did not evaluate her reasonable accommodation claim on the merits, but granted summary judgment to the defendant because, in that court's view, Cleveland, by applying for and receiving SSDI benefits, had conceded that she was totally disabled. And that fact, the court concluded, now estopped Cleveland from proving an essential element of her ADA claim, namely that she could ''perform the essential functions'' of her job, at least with ''reasonable accommodation.'' 42 U.S.C. 12111(8).

The Fifth Circuit affirmed the District Court's grant of summary judgment. 120 F.3d 513 (1997). The court wrote:

''[T]he application for or the receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient of such benefits is judicially estopped from asserting that he is a 'qualified individual with a disability.' '' *Id.*, at 518.

The Circuit Court noted that it was ''at least theoretically conceivable that under some limited and highly unusual set of circumstances the two claims would not necessarily be mutually exclusive.'' *Id.*, at 517. But it concluded that, because

''Cleveland consistently represented to the SSA that she was totally disabled, she has failed to raise a genuine issue of material fact rebutting the presumption that she is judicially estopped from now asserting that for the time in question she was nevertheless a 'qualified individual with a disability' for purposes of her ADA claim.'' *Id.*, at 518–519.

We granted certiorari in light of disagreement among the Circuits about the legal effect upon an ADA suit of the application for, or receipt of, disability benefits. Compare, *e.g., Rascon* v. *U S West Communications, Inc.*, 143 F.3d 1324, 1332 (C.A.10 1998) (application for, and receipt of, SSDI benefits is relevant to, but does not estop plaintiff from bringing, an ADA claim); *Griffith* v. *Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 (C.A.6 1998) (same), cert. pending, No. 97–1991; *Swanks* v. *Washington Metropolitan Area Transit Authority*, 116 F.3d 582, 586 (C.A.D.C. 1997) (same), with *McNemar* v. *Disney Store, Inc.*, 91 F.3d 610, 618–620 (C.A.3 1996) (applying judicial estoppel to bar plaintiff who applied for disability benefits from bringing suit under the ADA), cert. denied, 519 U.S. 1115, 117 S.Ct. 958, 136 L.Ed.2d 845 (1997), and *Kennedy* v. *Applause, Inc.*, 90 F.3d 1477, 1481–1482 (C.A.9 1996) (declining to apply judicial estoppel but holding that claimant who declared total disability in a benefits application failed to raise a genuine issue of material fact as to whether she was a qualified individual with a disability).

The Social Security Act and the ADA both help individuals with disabilities, but in different ways. The Social Security Act provides monetary benefits to every insured individual who ''is under a disability.'' 42 U.S.C. 423(a)(1). The Act defines ''disability'' as an

> ''inability to engage in any substantial gainful activity by reason of any * * * 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 12 months.'' Section 423(d)(1)(A).

The individual's impairment, as we have said, supra, at 1599, must be

> ''of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy * * *.'' Section 423(d)(2)(A).

The ADA seeks to eliminate unwarranted discrimination against disabled individuals in order both to guarantee those individuals equal opportunity and to provide the Nation with the benefit of their consequently increased productivity. See, *e.g.,* 42 U.S.C. 12101(a)(8), (9). The Act prohibits covered employers from discriminating ''against a qualified individual with a disability because of the disability of such individual.'' Section 12112(a). The Act defines a ''qualified individual with a disability'' as a disabled person ''who * * * can perform the essential functions'' of her job, including those who can do so only ''with * * * reasonable accommodation.'' Section 12111(8).

We here consider but one of the many ways in which these two statutes might interact. This case does not involve, for example, the interaction of either of the statutes before us with other statutes, such as the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq*. Nor does it involve directly conflicting statements about purely factual matters, such as ''The light was red/green,'' or ''I can/cannot raise my arm above my head.'' An SSA representation of total disability differs from a purely factual statement in that it often implies a context-related legal conclusion, namely ''I am disabled for purposes of the Social Security Act.'' And our consideration of this latter kind of statement consequently leaves the law related to the former, purely factual, kind of conflict where we found it.

The case before us concerns an ADA plaintiff who both applied for, and received, SSDI benefits. It requires us to review a Court of Appeals decision upholding the grant of summary judgment on the ground that an ADA plaintiff's ''represent(ation) to the SSA that she was totally disabled'' created a

''rebuttable presumption'' sufficient to ''judicially esto[p]'' her later representation that, ''for the time in question,'' with reasonable accommodation, she could perform the essential functions of her job. 120 F.3d, at 518–519. The Court of Appeals thought, in essence, that claims under both Acts would incorporate two directly conflicting propositions, namely ''I am too disabled to work'' and ''I am not too disabled to work.'' And in an effort to prevent two claims that would embody that kind of factual conflict, the court used a special judicial presumption, which it believed would ordinarily prevent a plaintiff like Cleveland from successfully asserting an ADA claim.

In our view, however, despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict to the point where courts should apply a special negative presumption like the one applied by the Court of Appeals here. That is because there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side.

For one thing, as we have noted, the ADA defines a ''qualified individual'' to include a disabled person ''who * * * can perform the essential functions'' of her job ''with reasonable accommodation.'' Reasonable accommodations may include:

> ''job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.'' 42 U.S.C. 12111(9)(B).

By way of contrast, when the SSA determines whether an individual is disabled for SSDI purposes, it does not take the possibility of ''reasonable accommodation'' into account, nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI. See Memorandum from Daniel L. Skoler, Associate Comm'r for Hearings and Appeals, SSA, to Administrative Appeals Judges, reprinted in 2 Social Security Practice Guide, App. Section 15C[9], pp. 15–401 to 15–402 (1998). The omission reflects the facts that the SSA receives more than 2.5 million claims for disability benefits each year; its administrative resources are limited; the matter of ''reasonable accommodation'' may turn on highly disputed workplace-specific matters; and an SSA misjudgment about that detailed, and often fact-specific matter would deprive a seriously disabled person of the critical financial support the statute seeks to provide. See Brief for *United States et al. as Amici Curiae* 10–11, and n. 2, 13. The result is that an ADA suit claiming that the plaintiff can perform her job with reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) without it.

For another thing, in order to process the large number of SSDI claims, the SSA administers SSDI with the help of a five-step procedure that embodies a set of presumptions about disabilities, job availability, and their interrelation. The SSA asks:

Step One: Are you presently working? (If so, you are ineligible.) See 20 CFR 404.1520(b) (1998).

Step Two: Do you have a ''severe impairment,'' *i.e.,* one that ''significantly limits'' your ability to do basic work activities? (If not, you are ineligible.) See § 404.1520(c).

Step Three: Does your impairment ''mee[t] or equa[l]'' an impairment on a specific (and fairly lengthy) SSA list? (If so, you are eligible without more.) See §§ 404.1520(d), 404.1525, 404.1526.

Step Four: If your impairment does not meet or equal a listed impairment, can you perform your ''past relevant work?'' (If so, you are ineligible.) See § 404.1520(e).

Step Five: If your impairment does not meet or equal a listed impairment and you cannot perform your ''past relevant work,'' then can you perform other jobs that exist in significant numbers in the national economy? (If not, you are eligible.) See §§ 404.1520(f), 404.1560(c).

The presumptions embodied in these questions—particularly those necessary to produce Step Three's list, which, the Government tells us, accounts for approximately 60 percent of all awards, see Tr. of Oral Arg. 20—grow out of the need to administer a large benefits system efficiently. But they inevitably simplify, eliminating consideration of many differences potentially relevant to an individual's ability to perform a particular job. Hence, an individual might qualify for SSDI under the SSA's administrative rules and yet, due to special individual circumstances, remain capable of ''perform[ing] the essential functions'' of her job.

Further, the SSA sometimes grants SSDI benefits to individuals who not only can work, but are working. For example, to facilitate a disabled person's reentry into the workforce, the SSA authorizes a 9-month trial-work period during which SSDI recipients may receive full benefits. See 42 U.S.C. 422(c), 423(e)(1); 20 CFR 404.1592 (1998). See also § 404.1592a (benefits available for an additional 15-month [1] period depending upon earnings). Improvement in a totally disabled person's physical condition, while permitting that person to work, will not necessarily or immediately lead the SSA to terminate SSDI benefits. And the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision.

Finally, if an individual has merely applied for, but has not been awarded, SSDI benefits, any inconsistency in the theory of the claims is of the sort normally tolerated by our legal system. Our ordinary rules recognize that a person may not be sure in advance upon which legal theory she will succeed, and so permit parties to ''set forth two or more statements of a claim or defense alternatively or hypothetically,'' and to ''state as many separate claims or defenses as the party has regardless of consistency.'' Fed. Rule Civ. Proc. 8(e)(2). We do not see why the law in respect to the assertion of SSDI and ADA claims should differ. (And, as we said, we leave the law in respect to purely factual contradictions where we found it.)

In light of these examples, we would not apply a special legal presumption permitting someone who has applied for, or received, SSDI benefits to bring an ADA suit only in ''some limited and highly unusual set of circumstances.'' 120 F.3d, at 517.

Nonetheless, in some cases an earlier SSDI claim may turn out genuinely to conflict with an ADA claim. Summary judgment for a defendant is appropriate when the plaintiff ''fails to make a showing sufficient to establish the existence of an element essential to (her) case, and on which (she) will bear the burden of proof at trial.'' *Celotex Corp.* v. *Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). An ADA plaintiff bears the burden of proving that she is a ''qualified individual with a disability''—that is, a person ''who, with or without reasonable accommodation, can perform the essential functions'' of her job. 42 U.S.C. 12111(8). And a plaintiff's sworn assertion in an application for disability benefits that she is, for example, ''unable to work'' will appear to negate an essential element of her ADA case—

[1] Effective January 1, 1988, the law was amended to lengthen the reentitlement period to SSDI benefits from 15 months to 36 months. See section 223(a)(1) of the SSAct. [Ed. note]

at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation.

The lower courts, in somewhat comparable circumstances, have found a similar need for explanation. They have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity. See, e.g., *Colantuoni* v. *Alfred Calcagni & Sons, Inc.,* 44 F.3d 1, 5 (C.A.1 1994); *Rule* v. *Brine, Inc.,* 85 F.3d 1002, 1011 (C.A.2 1996); *Hackman* v. *Valley Fair,* 932 F.2d 239, 241 (C.A.3 1991); *Barwick* v. *Celotex Corp.,* 736 F.2d 946, 960 (C.A.4 1984); *Albertson* v. *T.J. Stevenson & Co.,* 749 F.2d 223, 228 (C.A.5 1984); *Davidson & Jones Development Co.* v. *Elmore Development Co.,* 921 F.2d 1343, 1352 (C.A.6 1991); *Slowiak* v. *Land O'Lakes, Inc.,* 987 F.2d 1293, 1297 (C.A.7 1993); *Camfield Tires, Inc.* v. *Michelin Tire Corp.,* 719 F.2d 1361, 1365–1366 (C.A.8 1983); *Kennedy* v. *Allied Mutual Ins. Co.,* 952 F.2d 262, 266 (C.A.9 1991); *Franks* v. *Nimmo,* 796 F.2d 1230, 1237 (C.A.10 1986); *Tippens* v. *Celotex Corp.,* 805 F.2d 949, 953–954 (C.A.11 1986); *Pyramid Securities Ltd.* v. *IB Resolution, Inc.,* 924 F.2d 1114, 1123 (C.A.D.C.), cert. denied, 502 U.S. 822, 112 S.Ct. 85, 116 L.Ed.2d 57 (1991); *Sinskey* v. *Pharmacia Ophthalmics, Inc.,* 982 F.2d 494, 498 (C.A.Fed. 1992), cert. denied, 508 U.S. 912, 113 S.Ct. 2346, 124 L.Ed.2d 256 (1993). Although these cases for the most part involve purely factual contradictions (as to which we do not necessarily endorse these cases, but leave the law as we found it), we believe that a similar insistence upon explanation is warranted here, where the conflict involves a legal conclusion. When faced with a plaintiff's previous sworn statement asserting ''total disability'' or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless ''perform the essential functions'' of her job, with or without ''reasonable accommodation.''

III

In her brief in this Court, Cleveland explains the discrepancy between her SSDI statements that she was ''totally disabled'' and her ADA claim that she could ''perform the essential functions'' of her job. The first statements, she says, ''were made in a forum which does not consider the effect that reasonable workplace accommodations would have on the ability to work.'' Brief for Petitioner 43. Moreover, she claims the SSDI statements were ''accurate statements'' if examined ''in the time period in which they were made.'' *Ibid.* The parties should have the opportunity in the trial court to present, or to contest, these explanations, in sworn form where appropriate. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Breyer delivered the opinion for a unanimous Court.

[FR Doc. 00–411 Filed 1–6–00; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 3196]

Culturally Significant Objects Imported for Exhibition; Determinations: ''Ancient Faces: Mummy Portraits from Roman Egypt''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority of October 19, 1999, I hereby determine that the objects to be included in the exhibition ''Ancient Faces: Mummy Portraits from Roman Egypt'' imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to loan agreements with foreign lenders. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York City, from on or about February 14, to on or about May 7, 2000, is in the national interest. Public notice of these determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/619–6981). The address is U.S. Department of State, SA–44; 301 4th Street, S.W., Room 700, Washington, D.C. 20547–0001.

Dated: December 22, 1999.

William B. Bader,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 00–406 Filed 1–6–00; 8:45 am]

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DEPARTMENT OF STATE

[Public Notice 3197]

Culturally Significant Objects Imported for Exhibition; Determinations: ''Masterpieces of Korean Ceramics from the Museum of Oriental Ceramics, Osaka''

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority of October 19, 1999, I hereby determine that the objects to be included in the exhibition ''Masterpieces of Korean Ceramics from the Museum of Oriental Ceramics, Osaka'' imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to loan agreements with foreign lenders. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York City, from on or about January 25, to on or about June 4, 2000, is in the national interest. Public notice of these determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of exhibit objects, contact Carol B. Epstein, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202/619–6981). The address is U.S. Department of State, SA–44; 301 4th Street, SW, Room 700, Washington, D.C. 20547–0001.