

No. 09-5319

In the United States Court of Appeals
District of Columbia Circuit

LINDA SOLOMON,

Plaintiff-Appellant,

v.

THOMAS J. VILSACK,
in his official capacity as SECRETARY OF AGRICULTURE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia (No. 07-1590)
The Honorable John D. Bates

CORRECTED BRIEF OF THE METROPOLITAN WASHINGTON
EMPLOYMENT LAWYERS ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF
APPELLANT LINDA SOLOMON AND URGING REVERSAL

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Certificate as to Parties, Rulings, and Related Cases

(A) **Parties and Amici.** Except for the Metropolitan Washington Employment Lawyers Association, appearing as *amicus curiae* on behalf of Plaintiff-Appellant, all parties appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant.

(B) **Rulings Under Review.** References to the rulings at issue appear in the Briefs for Plaintiff-Appellant.

(C) **Related Cases.** There are no related cases.

Rule 28 (a)(2)(B) Corporate Disclosure Statement

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GLOSSARY OF ABBREVIATIONS

ADA	Americans with Disabilities Act
EEOC	Equal Employment Opportunity Commission
FERS	Federal Employees Retirement System
FMLA	Family and Medical Leave Act
MSPB	Merit Systems Protection Board
MWELA	Metropolitan Washington Employment Lawyers Association
OPM	U.S. Office of Personnel Management
SSDI	Social Security Disability Insurance
SSA	Social Security Administration
USDA	U.S. Department of Agriculture

JURISDICTIONAL STATEMENT

MWELA agrees with the statement of jurisdiction in the Brief for Appellant.

STATEMENT OF THE ISSUE

Whether application for and receipt of federal disability retirement precludes an employee from pursuing a claim for disability discrimination under section 501 of the Rehabilitation Act.

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Appellant.

STATEMENT OF THE FACTS

For a detailed statement of proceedings and statement of facts, we refer to the Appellant's brief. The following facts, pertinent to the argument advanced by *amicus*, bear repeating here.

A. Course of the Proceedings

After exhausting her administrative remedies, Appellant, Linda Solomon, sued Appellee, the Secretary of Agriculture ("the Agency" or "defendant") for discrimination under the Rehabilitation Act alleging that defendant failed to provide reasonable accommodations for her disability and forced her to retire.¹ Prior to filing her discrimination complaint, but

¹ Appellant's complaint also alleged violations of Title VII and the ADEA.

after commencing EEO counseling, Solomon filed an application for disability retirement on August 30, 2004,² which the Office of Personnel Management (“OPM”) approved on December 16, 2004.³

The District Court granted defendant’s motion for summary judgment.⁴ It concluded that because Solomon had checked “No” on her disability retirement application next to the question “Has your agency been able to grant your request [for accommodations]?” that defendant could not reasonably accommodate Solomon’s disability.⁵ FERS disability retirement benefits are only supposed to be available to employees whose disabilities cannot be accommodated. The court reasoned that receipt of FERS benefits precluded Solomon’s Rehabilitation Act claim that defendant failed to accommodate her disability.⁶ It held that the “claims are mutually exclusive, and receipt of the former precludes the latter.”⁷ The court further held that whether a plaintiff has *received* disability retirement benefits is a “threshold

² *Solomon v. Vilsack*, 656 F. Supp. 2d 55, 58 (D.D.C. 2009).

³ *Id.*

⁴ *Id.* at 55.

⁵ *Id.* at 61.

⁶ *Id.* at 59.

⁷ *Id.* at 62.

issue,” making the voluntariness or involuntariness of the retirement “secondary to the preclusive effect of obtaining disability benefits.”⁸ Ms. Solomon filed a timely appeal to this Court.

B. Factual Background

Ms. Solomon, a USDA employee, experienced a worsening of depression in late 2003. She sought and received certain accommodations, such as a privacy screen and flexible work schedule.⁹ In March 2004, she sought additional accommodations, but was unsuccessful, despite support from her physician. On April 23, 2004, USDA imposed a new rule upon Ms. Solomon that she found embarrassing and extremely distressing: she was prohibited from working past 5:30 p.m. Due to her distress, she then missed a substantial amount of time at work. She and her doctor unsuccessfully sought different accommodations, such as permission to telecommute, a part-time schedule, or advanced sick leave. The agency refused.¹⁰

In July 2004, USDA, still not having granted the accommodations Ms. Solomon requested, repeatedly proposed that she apply for disability

⁸ *Id.* at 59, 61 (quoting *Holmes-Martin v. Leavitt*, 569 F. Supp. 2d 184, 195 (D.D.C. 2008)).

⁹ Appellant’s Br. 6.

¹⁰ *Id.* at 10-14.

retirement.¹¹ Because of her dwindling financial resources, Ms. Solomon applied for disability retirement in August 2004.¹²

In her FERS disability retirement application, Ms. Solomon stated that she requested a quieter cubicle, a flexible work schedule, advanced sick leave, and entry into the agency's leave donor program.¹³ On the portion of the application requiring the agency's certification, the agency stated that "the medical evidence presented to the agency shows that accommodation is not possible due to severity of the medical condition and the physical requirements of the position." Although prompted to attach medical documentation supporting this assertion, the agency provided none.¹⁴ OPM approved Ms. Solomon's application for FERS disability benefits in December 2004.¹⁵

SUMMARY OF ARGUMENT

Courts must afford a plaintiff an opportunity to explain supposed contradictions between an application for disability benefits and a claim of

¹¹ *Id.* at 16.

¹² *Id.* at 15-17.

¹³ *Id.* at 18.

¹⁴ *Id.*

¹⁵ *Solomon*, 656 F. Supp. 2d at 58.

disability discrimination. The Supreme Court so held in *Cleveland v. Policy Management Systems Corporation*. Cases applying *Cleveland* properly focus on the Court's distinction between factual statements and context-specific legal conclusions, and afford plaintiffs an opportunity to reconcile legal conclusions made on disability benefit applications with the elements of a claim for disability discrimination. Given the opportunity to explain apparent inconsistencies, plaintiffs like Ms. Solomon will be able to show that their receipt of disability benefits is consistent with their disability discrimination claims. Because disability retirement benefits are often granted without judicial oversight and the process does not involve a comprehensive, fact-specific inquiry, benefits may be granted when accommodation is possible but the employer has denied it. Further, responses to key questions on the application for disability retirement leave room for more than one meaning. Moreover, the application does not account for the fact that the employer may have denied the employee an accommodation or otherwise discriminated on the basis of disability before the employee applied for disability retirement.

**STATEMENT OF IDENTITY, INTEREST IN CASE,
AND SOURCE OF AUTHORITY TO FILE**

The Metropolitan Washington Employment Lawyers Association (MWELA) submits the following pursuant to D.C. Cir. R. App. P. 29(b).

MWELA, founded in 1991, is a professional association and is the local chapter of the National Employment Lawyers Association, a national organization of attorneys who specialize in employment law. MWELA conducts continuing legal education programs for its 280 members, including an annual day-long conference which usually features one or more judges as speakers. MWELA also participates as *amicus curiae* in important cases in the three jurisdictions in which its members primarily practice – the District of Columbia, Maryland, and Virginia.

MWELA's members represent employees, including those who need reasonable accommodations on the job and those who also need disability retirement benefits. MWELA's members, and their clients, have an important interest in the clarity and proper interpretation of the relationship between a federal employee's application for disability retirement and the employee's rights under federal anti-disability discrimination statutes.

People with disabilities continue to face barriers to employment and adverse actions within the workplace. The ADA Amendments Act of 2008 reaffirmed the need for a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101 (2006), and the federal government should be a model employer of adults with disabilities, 29 U.S.C. § 791(b) (2006); 29 C.F.R. §

1614.203 (2009). To accomplish these objectives, the Rehabilitation Act's requirement that federal employers reasonably accommodate employees' disabilities must have teeth, and federal agencies must be held accountable when they fail to provide required accommodations. A rule that bars federal employees from bringing discrimination suits under the Rehabilitation Act merely because they apply for and receive retirement disability benefits deprives federal employees of their civil rights and allows federal employers to skirt their obligations under the Rehabilitation Act. A country and government committed to eliminating discrimination against people with disabilities cannot tolerate such a blow to the rights of disabled employees.

On January 12, 2010, this Court granted MWELA's motion for leave to participate as *amicus curiae*.

ARGUMENT

I. A District Court must afford a Rehabilitation Act plaintiff a chance to explain supposed contradictions between her application for disability benefits and her claim of disability discrimination.

A. *Cleveland* and its progeny require that a former employee have an opportunity to explain and harmonize a disability benefits application with a disability discrimination claim.

The District Court below incorrectly found that the Supreme Court in *Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795 (1999) merely held that Social Security Disability Insurance (SSDI) claims

do not always estop ADA discrimination claims because the two laws treat reasonable accommodation differently.¹⁶ But *Cleveland* actually held that a court must allow plaintiffs to explain and draw distinctions between their statements under two different Acts. The different way the two statutes addressed “reasonable accommodation” is one example of a way to distinguish between the statements, but it is not the only way the courts will recognize.¹⁷

Carolyn Cleveland suffered a stroke and was fired.¹⁸ Ms. Cleveland sought and received SSDI benefits based on her sworn statement to the Social Security Administration (SSA) that she was unable to work due to her disability.¹⁹ Cleveland also sued her former employer under the ADA because she could have continued to work if the employer had accommodated her.²⁰

In reviewing the apparent tension between her application for SSDI benefits and her ADA claim, which required a showing that she was

¹⁶ *Solomon*, 656 F. Supp. 2d at 60.

¹⁷ *Cleveland*, 526 U.S. at 802-03.

¹⁸ *Id.* at 798-99.

¹⁹ *Id.*

²⁰ *Id.* at 799.

qualified to work, the Fifth Circuit erected a rebuttable presumption against the plaintiff's recovery, reasoning that her representation to SSDI that she was "unable to work" was inconsistent with her concurrent ADA claim that she could do her job.²¹

The Supreme Court reversed, holding that (1) a representation of "total disability" does not estop a plaintiff from taking a seemingly different position because such a representation is not a purely factual statement;²² (2) a quasi-legal assertion of this kind does not foreclose the possibility that an individual is nonetheless "qualified" to work for purposes of the ADA or the Rehabilitation Act;²³ and (3) a plaintiff deserves a chance to reconcile the apparent inconsistency of her claims by proffering a sufficient explanation.²⁴

Thus, an ADA plaintiff who has obtained SSDI benefits by making a sworn statement to the effect that she is completely disabled and thus unable to work must confront and reconcile the apparent inconsistency between that assertion and her ADA claim, which is premised on her ability to work, at

²¹ *Id.* at 800.

²² *Id.* at 802.

²³ *Id.* at 803-04.

²⁴ *Id.* at 806-07.

least with accommodations.²⁵

The Supreme Court observed that to make a *prima facie* case of disability discrimination under the ADA, a plaintiff must first demonstrate she is qualified for the position in question; and to receive SSDI benefits, a claimant must make a showing that she cannot work.²⁶ The Court concluded these two statuses may co-exist.²⁷ In an ADA case in which the plaintiff has made an earlier claim for SSDI, the court must undertake a fact-specific analysis of whether the claims made in the SSDI application directly contradict the allegations made in the ADA case.²⁸ The Court noted that “[t]here are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side.”²⁹ One reason the ADA and SSDI claims may co-exist is that the SSA does not determine whether the applicant could have performed her job with “reasonable accommodation,” a major factor under the ADA.³⁰

²⁵ *Id.* at 806-07.

²⁶ *Id.* at 806.

²⁷ *Id.* at 797-98.

²⁸ *Id.* at 804-05.

²⁹ *Id.* at 802-03.

³⁰ *Id.* at 803.

But the Court also noted that where an earlier SSDI claim may conflict with an ADA claim, the plaintiff must proffer a sufficient explanation for the inconsistency of her claims.³¹ Otherwise, she is estopped from maintaining the inconsistent position.³² The Court accordingly remanded Ms. Cleveland's case to give her the opportunity to explain the apparent discrepancy between her SSDI statement and her ADA assertion.³³

The *Cleveland* Court did not disturb the law dealing with "purely factual contradictions" in summary judgment proceedings.³⁴ Where the SSDI claim and the ADA suit "involve directly conflicting statements about purely factual matters," summary judgment is appropriate.³⁵

The district court, in this case, erred in identifying the essential holding in *Cleveland*. It wrongly focused on the fact that the ADA takes reasonable accommodation into account while the SSA does not. The "reasonable accommodation" distinction can be an important distinguishing

³¹ *Id.* at 805-06.

³² *Id.* at 798.

³³ *Id.* at 807.

³⁴ *Id.* at 802, 807.

³⁵ *Id.* at 801 (contrasting plaintiff's statements with contradictory assertions such as "The light was red/green").

point, but it is not the only distinguishing point.³⁶ *Cleveland* established that a court must analyze the contradictions between a representation of “total disability,” made in SSDI, FERS, or some similar context, and an ADA claim, and must afford a plaintiff an opportunity to reconcile the apparent contradictions. A court cannot deprive a plaintiff of that chance to explain simply because the contradiction is not explained by different consideration of reasonable accommodations. That deprivation would violate the holding in *Cleveland*.

B. Cases applying *Cleveland* properly focus on the distinction between factual descriptions and statements that can be construed as legal conclusions, and afford plaintiffs a chance to reconcile legal conclusions in contexts not involving SSDI representations.

It is well established that the *Cleveland* analysis is applies to a range of cases where a disability-related claim apparently contradicts a later-asserted claim.³⁷ For example, a district court in the Second Circuit relied on *Cleveland*, and denied the Defendant’s motion for summary judgment, where the plaintiff applying for non-SSDI long-term disability, responded

³⁶ *Id.* at 802-03.

³⁷ *See, e.g., Verhoff v. Time Warner Cable, Inc.*, 299 Fed. Appx. 488, 497-98 (6th Cir. 2008) (applying *Cleveland* to FMLA claim); *McClaren v. Morrison Mgmt. Specialists, Inc.*, 420 F.3d 457, 463 (5th Cir. 2005) (applying *Cleveland* to a state law age discrimination claim).

“No” to the question, “Would job modification enable patient to work with impairment?”³⁸

Cases in other circuits applying *Cleveland* consistently focus on the distinction the Supreme Court drew between factual assertions and legal conclusions and these courts have held that judicial estoppel properly applies only where the plaintiff’s factual descriptions supporting disability retirement preclude any possibility of qualification as of a certain date.³⁹

Under *Cleveland* a court must afford a plaintiff the chance to reconcile even “seemingly ruinous statements”⁴⁰ if they are legal conclusions. Courts have consistently followed that rule. Thus, *amicus*

³⁸ *Nodelman v. Gruner & Jahr USA Publ’g*, No. 98 Civ. 1231(LMM), 2000 WL 502858, at *8-9 (S.D.N.Y. Apr. 26, 2000).

³⁹ *See, e.g., McClaren*, 420 F.3d at 463 (finding plaintiff cannot disavow his specific factual representations to the SSA that his disability was characterized by multiple, broad symptoms of impairment); *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 7-9 (2d Cir. 1999) (affirming summary judgment where the plaintiff stated to the SSA that he was unable to stand or walk, but then claimed in his subsequent ADA action that he was capable of both standing and walking); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 333-34 (2d Cir. 2000) (reversing summary judgment where plaintiff’s benefits application included factual “physical descriptions” that, read in context, could be reconciled with his ADA action); *Kalskett v. Larson Mfg. Co. of Iowa, Inc.*, 146 F. Supp. 2d 961, 974 n.2 (N.D. Iowa 2001) (applying *Cleveland* where plaintiff’s “prior sworn statements are most accurately characterized as legal conclusions”).

⁴⁰ *Johnson v. Hoechst Celanese Corp.*, 127 S.W.3d 875, 881 (Tex. App. 2004).

submits that the district court erred in preventing Ms. Solomon from explaining her disability retirement application to a jury.

C. Ms. Solomon made a statement about the possibility of accommodation that can, and should, be construed as a legal conclusion; and the District Court should have permitted her to proffer a sufficient explanation.

As Appellant's brief, explains Ms. Solomon never said she would have been unable to work if she had been provided with the accommodations she sought. Her application only responded in the negative to the question of whether the Agency had "been able to grant" her request for accommodation. She never conceded that the Agency acted lawfully in denying her requests, or that her request would have imposed a hardship for the Agency. Thus, she never made any false factual statements, but she made a statement that can, and should, be construed as a legal conclusion.

More precisely, her statement that the Agency had not "been able to grant" her accommodation request constitutes a statement about the Agency's inaction, not about her disability. In this regard, her statement is similar to those made in another recent case, where a former employee stated in his SSDI application that he had "become a liability to the company" and that doing his job "is impossible now."⁴¹ He later testified that he was

⁴¹ *EEOC v. Burlington N. and Santa Fe Rwy. Co.*, 621 F. Supp. 2d 587, 600 (W.D. Tenn. 2009).

referring to the reasons his employer provided to him.⁴² On his behalf, the EEOC argued that these statements, when taken in context, were not statements about his inability to work. Rather, these statements reflected how his employer perceived his condition and capabilities.⁴³ The court held that this explanation of the seemingly contradictory statements defeated summary judgment because the “explanation is more than a mere denial or renunciation of his previous assertions; it attempts to reconcile the disparity in the conflicting statements.”⁴⁴

Had the district court here properly afforded Ms. Solomon the same opportunity to explain her statement, her explanation would have reflected that her agency found, over her objection, that it could not accommodate her. That would defeat summary judgment because it is more than a mere denial or renunciation of statements in her disability retirement application.

As set out below, there are also differences between the purpose and procedures of FERS disability retirement benefits and Rehabilitation Act rights. These differences make it equally likely that a plaintiff could claim both FERS benefits and disability discrimination under the Rehabilitation

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

Act without contradicting a prior factual statement.

II. Given an opportunity to explain, former employees like Ms. Solomon will be able to show that their receipt of disability benefits is consistent with their disability discrimination claims.

In *Cleveland*, the Court pursued its reasoning beyond the principle of allowing an explanation for quasi-legal conclusions, as opposed to flat factual statements. The Court held that because of differences in the purpose and procedures of SSDI and the ADA, it was likely that a plaintiff could claim both disability benefits and disability discrimination without stating a fatal contradiction. The Court emphasized that the Social Security Administration processes more than 2.5 million disability claims per year, and has a five-step procedure to administer claims “that embodies a set of presumptions about disabilities, job availability, and their interrelation.”⁴⁵ In *Cleveland*, the United States, as *amicus curiae*, explained the nature of the SSDI process.⁴⁶ The Court was persuaded and noted that the procedural presumptions allow administrative efficiency but “inevitably simplify, eliminating consideration of many differences potentially relevant to an

⁴⁵ *Cleveland*, 526 U.S. at 802, 804.

⁴⁶ *Id.* at 802-03.

individual's ability to perform a particular job.”⁴⁷

As set out below, the same is equally true of the FERS disability retirement benefits process.

A. Current and former federal employees must have an opportunity to explain their disability retirement applications because the different statutory purposes and administrative schemes of FERS disability retirement and the Rehabilitation Act create situations in which receipt of benefits should not preclude a civil rights claim.

Section 501 of the Rehabilitation Act is a robust civil rights provision that aims to make the federal government a model employer of people with disabilities.⁴⁸ It places an affirmative obligation on federal agencies to “take reasonable affirmative steps” to accommodate the known disabilities of their employees.⁴⁹ It provides federal employees harmed by their employer’s failure to comply with this obligation a private cause of action against the agency, and entitles these employees to compensatory and equitable relief, which could include reinstatement.⁵⁰ An employer discriminates under

⁴⁷ *Id.* at 804.

⁴⁸ *See Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994); 29 C.F.R. § 1614.203(b).

⁴⁹ 29 U.S.C. § 791(b) (2006); *Southeastern Cmty. College v. Davis*, 442 U.S. 397, 410 (1979) (interpreting § 791(b) as requiring federal agencies to make “affirmative efforts to overcome the disabilities caused by handicaps”); *Taylor v. Rice*, 451 F.3d 898, 905 (D.C. Cir. 2006).

⁵⁰ 29 U.S.C. § 794a(a)(1) (2006); 42 U.S.C. § 2000e-16 (2006).

Section 501 of the Rehabilitation Act if (1) a disabled employee can perform the essential functions of her job with reasonable accommodation, (2) the employer knows about the employee's disability, and (3) the employer fails to provide the reasonable accommodation.⁵¹

Conversely, FERS disability retirement is solely a financial benefit available to qualified federal employees when they separate from their job due to illness, injury, or disease.⁵² Benefits are disbursed as monthly annuities and intended to provide partial income support.⁵³ The first year maximum benefit is 60% of the employee's average-high-three salary; it drops to 40% of salary thereafter.⁵⁴ If the employee regains earning power, the Office of Personnel Management ("OPM") will discontinue the benefit.⁵⁵

⁵¹ See *Stewart v. St. Elizabeths Hosp.*, 589 F.3d 1305, 1308 (D.C. Cir. 2010). Americans with Disabilities Act ("ADA") standards apply to a claim for disability discrimination under section 501 of the Rehabilitation Act. 29 U.S.C. § 791(g) (2006); *Taylor*, 451 F.3d at 905.

⁵² 5 U.S.C. § 8451 (2006).

⁵³ *Id.*; U.S. Office of Personnel Management, *Federal Employee Retirement System: An Overview of Your Benefits* 10 (1998), available at <http://www.opm.gov/forms/pdfimage/RI90-1.pdf>.

⁵⁴ The FERS annuity is reduced by the entire amount of the SSDI benefit received in the first year and 60% of the SSDI benefit in subsequent years. *Federal Employee Retirement System: An Overview of Your Benefits* at 10.

⁵⁵ U.S. Office of Personnel Management, *CSRS and FERS Handbook for Personnel and Payroll Offices: Disability Retirement* 37 (1998), available at <http://www.opm.gov/retire/pubs/handbook/C060.pdf>.

OPM has promulgated eligibility rules for disability retirement: an employee must have a “disabling medical condition” that (1) results in a “deficiency in performance, conduct, or attendance,” or that is “incompatible with either useful and efficient service or retention in the position;” and (2) “accommodation of the disabling medical condition in the position held must be unreasonable.”⁵⁶ Although the Rehabilitation Act and qualification for disability retirement both address reasonable accommodation, their different administrative schemes allow for situations in which receipt of disability retirement benefits does not preclude a discrimination claim.

Like the Social Security Administration, OPM must process a high volume of retirement applications to provide individuals separated from employment with critical financial support. This process embodies procedures that are aimed at expediency rather than at determination of whether an employee has suffered discrimination.

OPM reviews over 100,000 retirement applications annually and aims to process each application within eight weeks.⁵⁷ To review so many

⁵⁶ 5 C.F.R. § 844.103(a)(2), (4) (2009).

⁵⁷ See U.S. Office of Personnel Management, *The Fact Book: Federal Civilian Workforce Statistics* 94 (2007) available at <http://www.opm.gov/feddata/factbook/2007/2007FACTBOOK.pdf>; U.S. Office of Personnel Management, *Applying for Retirement*, <http://www.opm.gov/retire/faq/pre/faq8.asp> (last visited June 25, 2010).

applications, OPM's review of each application is necessarily limited. On disability retirement applications, OPM bases its determination of whether an employee qualifies solely on select evidence provided in response to questions on its application.⁵⁸ Further, as shown by those questions, OPM presumes that the applicant's retirement is voluntary and that the employer has complied with its obligation under the Rehabilitation Act to engage in accommodation efforts.⁵⁹

OPM does not consider whether the employer has made similar accommodations for other employees, or the extent to which the accommodation would affect the employer's workplace.⁶⁰ Instead it focuses

⁵⁸ See 5 C.F.R. § 844.203(c)(1) (2009).

⁵⁹ *Shoaf v. Dep't of Agric.*, 260 F.3d 1336, 1340 (Fed. Cir. 2001); see U.S. Office of Personnel Management, *CSRS and FERS Handbook for Personnel and Payroll Offices: Disability Retirement* 1, 16 (1998) ("Disability retirement should be a last resort and is appropriate only when reasonable efforts to preserve the person's employment have failed.... [T]he agency must exhaust all reasonable efforts to alleviate any service deficiencies through accommodation before it counsels an employee to seek disability retirement or supports an employee's request for disability retirement.").

⁶⁰ In contrast, the Court recognized in *Cleveland* "the matter of 'reasonable accommodation' may turn on highly disputed workplace-specific matters." 526 U.S. at 803; see also 42 U.S.C. § 12111(8)–(10); *U.S. Airways, Inc., v. Barnett*, 535 U.S. 391, 402 (2002) (employer must "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances" in suit for disability discrimination); *Breen v. Dep't of Transp.*, 282 F.3d 839, 842 (D.C. Cir. 2002) (concluding that a genuine issue of material fact existed as to whether an accommodation is

only on the severity of the employee's medical condition and the physical requirements of the job.⁶¹ Like the SSA process that the Court reviewed in *Cleveland*, OPM's limited review of applications for disability retirement grows out of "the need to administer a large benefits system efficiently," and therefore inevitably simplifies and eliminates consideration of evidence potentially relevant to whether an agency can reasonably accommodate an employee's disability.⁶²

OPM's review of whether an employee's disability can be accommodated is further limited by its lack of authority to implement the reasonable accommodation mandate of the Rehabilitation Act.⁶³ Thus, if an employer recommends that an employee apply for disability retirement because it unlawfully refuses to accommodate her, as Defendant did, OPM

reasonable where employer allowed other employees to take advantage of the accommodation but denied it to plaintiff); 29 C.F.R. § 1630.2(o)-(p) (2009).

⁶¹ See U.S. Office of Personnel Management, *Standard Form 3112A: Agency Certification of Reassignment and Accommodation Efforts* (1995), available at http://www.opm.gov/forms/pdf_fill/sf3112.pdf (allowing employer to certify that reasonable accommodation efforts have not been made because medical evidence shows that accommodation is not possible due to physical requirements of the position).

⁶² See *Cleveland*, 526 U.S. at 804.

⁶³ See Exec. Order 13164, 65 Fed. Reg. 46565, 46566 (July 26, 2000); Exec. Order 12106, 44 Fed. Reg. 1053, 1053 (Dec. 28, 1978) (providing that the EEOC has authority to enforce Section 501 of the Rehabilitation Act).

will not order the employer to accommodate. Yet, obtaining review of a denial of accommodations through the courts or EEOC can take a long time. Given that an employee only has one year to apply for disability benefits,⁶⁴ forcing her to choose between applying for disability benefits and pursuing a discrimination claim will deprive an employee of necessary financial resources and a federal benefit to which she is entitled.⁶⁵

B. The reasonable accommodations process can be lengthy and pursuing a claim for denial of reasonable accommodation can take even more time.

Neither the Rehabilitation Act nor its implementing regulations establish a formal process for agencies to follow in considering employee requests for reasonable accommodations.⁶⁶ Rather, each agency is authorized to develop its own process.⁶⁷ Agencies, such as the employer in

⁶⁴ 5 C.F.R. § 844.201(a)(1) (2009).

⁶⁵ *See* 5 U.S.C. § 8451 (2006).

⁶⁶ The EEOC's interpretive guidance for the ADA, which also applies to the Rehabilitation Act, provides that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified employee with a disability." 29 C.F.R. § 1630 app. § 1630.9 (2009).

⁶⁷ *See* Exec. Order No. 13164, 65 Fed. Reg. 146 (July 28, 2000) (providing that "[e]ach Federal agency shall establish effective written procedures for processing requests for reasonable accommodations by employees . . . with disabilities"); Equal Employment Opportunity Commission, *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate*

this case, may set up a series of deadlines for rendering decisions on accommodations.⁶⁸ Despite these guidelines, it can take an employer months or years to deliver an accommodation or to clearly refuse to make one.⁶⁹ Moreover, the reasonable accommodations process in many cases is subject to mistakes and incorrect determinations.⁷⁰

the Provision of Reasonable Accommodation (Oct. 20, 2000) available at http://www.eeoc.gov/policy/docs/accommodation_procedures.html.

⁶⁸ U.S. Dep't of Agric., DM-4300-002, *Reasonable Accommodation Procedures* 5 (2002), available at www.ocio.usda.gov/directives/doc/DM4300-002.pdf.

⁶⁹ See, e.g., *Breen*, 282 F.3d at 844 n.7 (noting that a one-year delay in communicating about the need for medical documentation created an issue of material fact precluding summary judgment in favor of the defendant agency); *Pantazes v. Jackson*, 366 F. Supp. 2d 57 (D.D.C. 2005) (denying summary judgment where a jury could view the defendant agency as the party responsible for a nine-month delay in communicating to the plaintiff about the need for paperwork, as well as for additional delays later in the accommodation process); *Armstrong v. Reno*, 172 F. Supp. 2d 11, 23 (D.D.C. 2001) (denying summary judgment where the Drug Enforcement Agency delayed for over a year in providing reasonable accommodation); *James v. Frank*, 772 F. Supp. 984, 991-92 (S.D. Ohio 1991) (holding that the Postal Service's "inexcusable" delay of seven months to reasonably accommodate plaintiff was itself a violation of the Rehabilitation Act).

⁷⁰ See, e.g., *Breen*, 282 F.3d at 842-44 (finding that defendant agency's proffered reasons for denying plaintiff's reasonable accommodation claim were genuine issues of material fact precluding summary judgment); *Pantazes*, 366 F. Supp. 2d at 70 (noting that a defendant agency's failure to act in good faith in the accommodation process can serve as evidence of an ADA or Rehabilitation Act violation); *James*, 772 F. Supp. at 991 (holding that the Postal Service's denial of a straight-back chair to a disabled employee sorting mail was a failure to make a reasonable accommodation actionable under the Rehabilitation Act).

If the employee is unable to secure a reasonable accommodation through her agency's internal process, and she wishes to continue to press for accommodations that will enable her to work, she must start an administrative process to enforce the Rehabilitation Act.⁷¹ The EEO process takes substantial time. Because of the mandatory thirty days of informal counseling,⁷² the mandatory 180-day investigation period,⁷³ and the sixty days the agency has to issue a final decision,⁷⁴ the law provides up to 270 days for the EEO process to result in a final decision. If the decision is not favorable, the employee may go to court, which takes even more time.

Statistics compiled and published by agencies pursuant to the No FEAR Act,⁷⁵ however, show that the actual time agencies take to process an EEO complaint often exceeds the regulatory deadlines. The average time it took to complete an investigation for pending complaints in five of the

⁷¹ See 29 U.S.C. §794a(a)(1) (2006); Exec. Order No. 12106, 44 Fed. Reg. 1053 (Dec. 28, 1978).

⁷² See 29 C.F.R. §1614.105 (2009).

⁷³ *Id.* §1614.108(f).

⁷⁴ See *id.* §1614.401(d).

⁷⁵ Pub. L. No. 107-74, 116 Stat. 566 (2002).

largest federal civilian agencies in 2009 ranged from 161 days to 248 days.⁷⁶

The average number of days spent completing the final action stage for pending cases in 2009 ranged from 76 days to 678 days.⁷⁷ None of the five agencies' average processing times fell within the administratively mandated timelines for both investigation (180 days) and final action (60 days).

If the district court's holding stands, federal employees who are denied accommodations unfairly will accept benefits to avoid financial hardship, drop their efforts to press for reasonable accommodation, and leave the workforce, which violates the express intent behind the Rehabilitation Act.

Moreover, *Cleveland* recognized that an individual who applies for Social Security Disability Insurance can simultaneously pursue an ADA

⁷⁶ The five federal agencies are the Department of Agriculture, *available at* <http://www.usda.gov/nofear/allusda/index.html> (average in 2009: 160.7 days for investigation; 677.81 days for final action); the Department of Transportation, *available at* <http://www.dotcr.ost.dot.gov/Documents/NoFear/DOTNoFEAR-All.htm> (average in 2009: 162.66 days for investigation; 76.27 days for final action); the Department of Homeland Security, *available at* http://www.dhs.gov/xutil/editorial_0478.shtm (average in 2009: 248 days for investigation; 310 days for final action); the Department of Veterans Affairs, *available at* http://www4.va.gov/orm/NOFEAR_Select.asp (average in 2009: 101 days for investigation; 449 days for final action); and the Department of the Treasury, *available at* <http://www.ustreas.gov/nofearact/> (2009 average: 160.91 days for investigation; 145.15 days for final action).

⁷⁷ *Id.*

claim on different legal theories because our legal system allows a party to state inconsistent claims or defenses.⁷⁸ However, as the foregoing demonstrates, OPM's review process takes months and pursuing a claim for failure to grant a reasonable accommodation may take years, as in this case. The District Court's holding, which bars an individual who has *received* disability retirement benefits from pursuing a claim for disability discrimination, would prevent employees from taking advantage of alternative avenues of relief merely because OPM's administrative process is faster than the EEO administrative process and litigation.

C. Individuals must have an opportunity to explain their representations on their applications for disability retirement because there will be situations in which an employee is entitled to both disability retirement benefits and a disability discrimination claim.

A rule that prevents an employee from reconciling representations on her application for disability retirement with allegations that her employer violated the Rehabilitation Act would shield employer conduct from judicial scrutiny. OPM does not hold evidentiary or legal proceedings to determine whether an applicant qualifies for disability retirement.⁷⁹ An unsuccessful applicant can appeal the determination to the Merit Systems Protection

⁷⁸ See 526 U.S. at 805.

⁷⁹ 5 C.F.R. § 844.203(c)(1).

Board (“MSPB”) for an evidentiary hearing,⁸⁰ but if the application is granted, there will be no appeal, meaning no consideration of whether an accommodation should have been granted. Thus, if the District Court ruling is affirmed, federal employers will be able to shirk their obligation to provide reasonable accommodation to disabled employees by pushing those individuals towards disability retirement.

The incentive to steer disabled employees to retire is troubling because it contradicts the purpose of the Rehabilitation Act, which is to bring and keep people with disabilities into the federal workforce. To that end, Congress established a private right of action to enforce Section 501.⁸¹ These claims under the Rehabilitation Act require “extensive fact finding,”⁸² because they involve two highly-fact specific questions: (1) is the accommodation reasonable? (2) what are the job’s essential functions?⁸³ Further, in a Section 501 suit, an employer’s representations about whether the accommodation is reasonable, or whether a duty is an essential function

⁸⁰ 5 U.S.C. § 7701 (2006); 5 U.S.C. § 8451(c) (2006).

⁸¹ 29 U.S.C. § 794a(a)(1) (2006); 42 U.S.C. § 2000e-5 (2006).

⁸² *Carr v. Reno*, 23 F.3d 525, 531 (D.C. Cir. 1994).

⁸³ *See Breen*, 282 F.3d at 843.

of the job, are not dispositive.⁸⁴ The *per se* rule the District Court adopts would supplant the “truth seeking function of the court” by allowing summary judgment in situations that often involve genuine issues of material fact.⁸⁵

The lower court’s decision would even bar judicial review when OPM based its allowance of disability retirement on its own mistake, the parties’ misstatement of fact or the employer’s fraud. Disability retirement regulations specifically state that OPM may rescind allowance of an application for “fraud, misstatement of fact, or upon the acquisition of additional medical or other documentation.”⁸⁶ OPM may even be able to

⁸⁴ See 42 U.S.C. § 12111(8); *Barnett*, 535 U.S. at 405 (an employee “remains free to show that special circumstances warrant a finding that...the requested ‘accommodation’ is ‘reasonable’ on the particular facts”); *Rice*, 451 F.3d at 907 (considering whether an employer adhered to its stated policies to determine whether a duty was essential); *Breen*, 282 F.3d at 842 (concluding that a genuine issue of material fact existed as to whether an accommodation is reasonable where employer allowed other employees to take advantage of the accommodation but denied it to plaintiff); 29 C.F.R. §1630.2(n).

⁸⁵ *Rice*, 451 F.3d at 911 (reversing grant of summary judgment because of disputed facts over reasonableness of accommodation); *Breen*, 282 F.3d at 842 (same); *Lamberson v. Dep’t of Veterans Affairs*, 80 M.S.P.R. 648, 655 (1999) (quoting *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 382 (6th Cir. 1998)).

⁸⁶ 5 C.F.R. § 844.203(c)(2) (2009).

rescind a decision based on its own error.⁸⁷ Under the District Court's rule, receipt of disability benefits bars an employee's Rehabilitation Act claim even if OPM mistakenly approved the application.⁸⁸ As the intended final arbiters of Section 501 Rehabilitation Act claims, the federal courts cannot tolerate such absurd, unjust, and clearly unintended outcomes.

D. There are several possible meanings behind responses to key questions on the application for disability retirement, but a *per se* rule would prohibit an employee from reconciling her answers with her claim for disability discrimination.

- 1. Answering "No" to "Has your agency been able to grant your request?" could mean that the agency has unlawfully failed to provide reasonable accommodation to the employee.**

By regulation, OPM limits disability retirement to those who cannot be accommodated. 5 CFR § 844.103. To determine whether an employee satisfies this condition, the application asks the employee two questions regarding accommodation:

"What accommodations have you requested from your agency?" and

⁸⁷ See *Cerone v. Office of Personnel Mgmt.*, 85 M.S.P.R. 380, 383 (2000); *Longoria v. Office of Personnel Mgmt.*, 78 M.S.P.R. 242, 245 (1998).

⁸⁸ *Solomon*, 656 F. Supp. 2d at 62.

“Has your agency been able to grant your request?”⁸⁹

To the second question, the application prompts the employee to check “Yes” or “No” and provide an explanation.⁹⁰ When an employee checks “No” to the latter question she is hardly representing that the agency *cannot* accommodate her or that the agency *will not be able* to accommodate her in the future. OPM even acknowledges this fact with the instruction to the employer that your “agency’s obligation to continue to try to accommodate or reassign the employee does not cease with the filing of this application.”⁹¹

Ironically, while the new *per se* rule formulated by the District Court would assume that every successful disability retirement application is voluntary and follows the employer’s good-faith effort to make an accommodation, the Merit Systems Protection Board (“MSPB”) has long acknowledged these assumptions are sometimes incorrect. It has taken involuntary retirement appeals from individuals who have also received

⁸⁹ U.S. Office of Personnel Management, *Standard Form 3112A: Applicant’s Statement of Disability* (1995), available at http://www.opm.gov/forms/pdf_fill/sf3112.pdf.

⁹⁰ *Id.*

⁹¹ See U.S. Office of Personnel Management, *Standard Form 3112A: Agency Certification of Reassignment and Accommodation Efforts* (1995), available at http://www.opm.gov/forms/pdf_fill/sf3112.pdf.

disability retirement.⁹² For MSPB to have jurisdiction over an appeal of involuntary retirement, the claimant must make sufficient non-frivolous allegations that “(1) after the onset of his disability and prior to his retirement, he sought to continue working, despite his medical limitations, with an accommodation; (2) an accommodation was available on the date of his retirement at, or above, his position level; and (3) the agency refused to provide him with an accommodation.”⁹³ That MSPB has found that it has jurisdiction in such cases, confirms that MSPB does not regard OPM’s determinations as dispositive of whether an agency could have accommodated an employee’s disability.⁹⁴ For these reasons, the responses on the disability retirement application should not estop civil rights claims.

2. Representations on the application fail to reveal whether the employer unlawfully failed to accommodate because the application merely aims to determine whether an employee is eligible for benefits.

Finally, “the nature of an individual’s disability may change over time, so that a statement about the disability at the time of an individual’s

⁹² See, e.g., *Nordhoff v. Dep’t of Navy*, 64 MSPR 478, 484 (1994) (remanding claim to regional office to determine whether employee’s disability retirement was involuntary).

⁹³ *Watkins v. Dep’t of Veterans Affairs*, 117 Fed. Appx. 718 (Fed. Cir. 2004).

⁹⁴ See *Atkins v. Dep’t of Commerce*, 81 M.S.P.R. 246, 249-52 (1999).

application for [federal] benefits may not reflect an individual's capacities at the time of the relevant employment discrimination."⁹⁵ The application for disability retirement does not ask the employee or employer whether the employer could have, at some earlier time, reasonably accommodated the employee's disability. Thus, when Ms. Solomon asked to work flexible hours in March of 2004, the agency may very well have been able to accommodate her condition so that she could perform the essential functions of her job. If that were the case, and the agency nevertheless failed to provide the accommodation, it would be liable for violating Section 501. The fact that an employee's condition progressed in a manner such that the agency is not able, at the time the application is filed, to accommodate the disability, does not negate its earlier violation. This Court cannot allow federal employers to use employees' applications for disability retirement to absolve employers of their continuing obligations under Section 501.

⁹⁵ *Cleveland*, 526 U.S. at 805.

CONCLUSION

For the foregoing reasons, *amicus*, the Metropolitan Washington Employment Lawyers Association, respectfully submit that this Court should reject the *per se* rule created by the District Court and vacate the grant of summary judgment.

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 and D.C. Cir. Rule 32(a)(7) because the brief contains 6,641 words, less than half the length permissible for the principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) and D.C. Cir. Rule 32(a)(1) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

_____/s/_____
Les Alderman

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Corrected Brief of the Metropolitan Washington Employment Lawyers Association as *Amicus Curiae* was served on all parties on this 28th day of June, 2010, by this Court's electronic case filing system and by electronic mail, with a copy to follow by first class mail to:

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