APPENDIX TABLE OF CONTENTS

Appendix A: Court of Appeals of the State of Washington, Division Three, Unpublished Opinion, April 3, 2025 . . . . . 1a

Appendix B: Supreme Court of Washington, Order Denying Petition for Review, October 8, 2025. . . . . 18a

Appendix C: U.S. Supreme Court, Opinion, Cleveland v. Policy Management Systems Corp., et al., 526 U.S. 795 (1999). 20a

APPENDIX A

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE

FILED
APRIL 3, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

KIMBERLY BOGARDUS,
Appellant,

v.

CITY OF YAKIMA, a Washington Municipal Corporation,
Respondent.

No. 40060-3-III

UNPUBLISHED OPINION

COONEY, J. —In an amended complaint, Kimberly Bogardus sued the City of Yakima (City) under the Washington Law Against Discrimination (WLAD) and for Wrongful Discharge in Violation of Public Policy (WDVPP). Her claims stem from the City's termination of her employment. The trial court dismissed Ms. Bogardus' amended complaint on the City's motion for summary judgment.

Ms. Bogardus appeals the trial court's order on summary judgment. We affirm.

BACKGROUND

In 2003, Ms. Bogardus was hired as a transit operator[1] for the City. During her time as a transit operator, Ms. Bogardus experienced "migraine headaches for which she sought leave." Clerk's Papers (CP) at 133. Due to her migraines, Ms. Bogardus worked with the City on her Family Medical Leave Act (FMLA) certification.

In October 2016, Ms. Bogardus was re-certified for FMLA leave for her migraines that occurred "1-3 times per week/1 day per episode." CP at 133. Because Ms. Bogardus had previously exceeded her allowed FMLA leave, the City required re-certification every 30 days. Ms. Bogardus was re-certified for FMLA leave in November 2016, January 2017, March 2017, March 2018, September 2018, and March 2019. Between 2016 and her termination on August 27, 2020, Ms. Bogardus had exhausted her annual allotment of 480 hours of FMLA leave. Ms. Bogardus used a total of 3,437.25 hours of leave during that period. On some occasions, Ms. Bogardus had exhausted her allotted leave hours, did not request additional unpaid leave, and did not report to work. These deficiencies resulted in Ms. Bogardus being in an "unauthorized leave without pay

[1] The position of transit operator required Ms. Bogardus to "operate[ ] a City bus" to "transport passengers over local routes according to prescribed time schedules." CP at 277.

status." CP at 134. Ms. Bogardus admitted at her deposition that she did not have "regular and reliable attendance," an essential function of the transit operator position. CP at 567, 133. She also admitted to not informing the City that she believed "being bounced around" while driving a bus all day triggered her migraines. CP at 550. Ms. Bogardus confessed that neither she nor her doctors knew why and when she would experience a migraine.

Due to Ms. Bogardus' apparent need for a more flexible schedule, the City offered her an "extra board" position. CP at 222, 430, 563. The "extra board" position is "for bus drivers, and so they are not put specifically on the schedule. They are—they're requested to work certain shifts whether there's an opening or there's a need" and allows the driver to "either accept the shift or decline the shift." CP at 605. Ms. Bogardus declined this position because "I have bills to pay. So I needed to take what I could because I needed the income to pay for my bills and insurance." CP at 552.

Ms. Bogardus was eventually disciplined because she had exhausted her leave hours and, though remaining absent from work, failed to request additional unpaid leave "in accordance with City policy." CP at 134. Ms. Bogardus received an oral reprimand in November 2016 and a written reprimand in February 2017 for "us[ing] more leave time than allowable per her approved FMLA allocation" and failing to "request additional unpaid leave in accordance with City policy—placing her in an unauthorized leave without pay status." CP at 134.

Ms. Bogardus again entered an unauthorized "leave without pay status" in 2018 and was issued a suspension for 40-hours without pay for the policy violation. CP at 135.

In 2020, Washington's State Paid Family and Medical Leave Act (PFMLA) took effect. Ms. Bogardus applied for and was approved for PFMLA benefits for the 2020 calendar year. Between April 20 and July 13, 2020, Ms. Bogardus called in daily to inform the City that she would not be coming to work but would instead be using PFMLA leave.

On July 6, 2020 when her PFMLA leave was nearly exhausted, the City sent a letter to Ms. Bogardus stating it was scheduling a meeting for July 20, 2020, to discuss her medical condition, limitations, and ways in which the City could help her improve her attendance. Ms. Bogardus, her union representative, and representatives from the City attended the meeting. The City and Ms. Bogardus again discussed the extra board position, but Ms. Bogardus was not interested. The City encouraged Ms. Bogardus to "come up with alternative accommodations that she believed would work for her." CP at 136, 221. She was also reminded of the City's leave without pay policy that she had previously violated.

By the end of July, Ms. Bogardus depleted her PFMLA leave. On August 4 and 5, 2020, she did not report to work despite having exhausted all of her leave, putting her in an unauthorized leave without pay status once again. A pre-disciplinary hearing was held in late August to address the issue. Ms. Bogardus

claimed at that hearing that she had checked her computer on August 3 and believed she had accrued leave, but the leave she thought she had accrued had disappeared when she looked again on August 4.

On August 27, 2020, Ms. Bogardus was terminated by the Interim City Manager, Alex Meyerhoff. The four-page termination letter explained that Ms. Bogardus was being terminated because she called out of work on August 4 and 5, despite not having "sufficient leave accruals to cover these two days of absence" therefore leaving her in an "unauthorized leave without pay" status. CP at 186. The letter noted that she had been disciplined numerous times for this same violation. Mr. Meyerhoff stated in the letter that he found her proffered excuses at the disciplinary hearing "not credible." CP at 187.

Ms. Bogardus was alleged to have violated City of Yakima Transit Operations Policy and Procedures Manual Section 2.6(3), which states:

> Each employee shall be held responsible for tracking and knowing the amount of accrued leave to which they are entitled to assure coverage of all requested leave time. Taking leave without sufficient accrued leave to cover the time taken off is considered an unauthorized absence and subject to disciplinary action.

CP at 187. The termination letter also noted Ms. Bogardus violated City of Yakima General Civil Service Rules and Regulations, Chapter IX, Section

(A)(1) for which discipline is appropriate for "dereliction of duty." CP at 187. Finally, the letter stated Ms. Bogardus had violated City of Yakima Administrative Policy Nos. 1-100 by taking "[u]nauthorized absence from the job" and "[u]nauthorized or improper use of any type of leave." CP at 187.

Following her termination, the City learned Ms. Bogardus had applied for full and permanent disability benefits with the Social Security Administration (SSA), stating on the application that she had stopped working on April 17, 2020. Her application was granted effective April 17, 2020, approximately four months prior to her termination.

In January 2021, Ms. Bogardus filed suit against the City and individual defendants. In her original complaint, Ms. Bogardus asserted claims for (1) "Violation of Washington State Law Against Discrimination," including disparate treatment, retaliation, and failure to engage in the interactive process; (2) "Willful Violation of the Washington State Family Leave Act (WFLA);" (3) "Hostile Work Environment in Violation of WLAD;" (4) "Wrongful Termination in Violation of Public Policy;" and (5) "Intentional infliction of physical injury and aggravation." CP at 6-7.

In 2023, the City moved for summary judgment dismissal of all of Ms. Bogardus' claims. In response to the City's motion, Ms. Bogardus indicated that she intended to dismiss her claims for WFLA, hostile work environment, and intentional infliction of physical

injury. Ms. Bogardus also noted an intention to dismiss her claims against "Each Individual Defendant" and asserted that her WDVPP claim was not addressed in the City's motion and was therefore not subject to summary judgment.[2] CP at 456.

Ms. Bogardus moved to continue the City's motion for summary judgment. Following a hearing on her motion, the court issued an order stating, "Plaintiff indicates intent to dismiss all but 3 theories of complaint and will dismiss against all defendants but City of Yakima." CP at 248. Thereafter, Ms. Bogardus filed an amended complaint naming only the City as a defendant and asserting claims for violating the WLAD and for WDVPP.

Following a hearing on September 28, 2023, the court granted the City's motion for summary judgment and dismissed Ms. Bogardus' claims with prejudice.

Ms. Bogardus timely appeals.

ANALYSIS

We review orders on summary judgment de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is only appropriate if there are no genuine issues of material fact, and "the moving party is entitled to judgment as a matter of law." *Id.*;

---

[2] Despite this assertion, the City *did* move for summary judgment dismissal of Ms. Bogardus' WDVPP claim, dedicating a page and a half of argument to it in its opening brief.

CR 56(c). The moving party bears the initial burden of establishing that there are no disputed issues of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

When considering a motion for summary judgment, evidence is considered in a light most favorable to the nonmoving party, here, Ms. Bogardus. *Keck*, 184 Wn.2d at 370. If the moving party satisfies its burden, then the burden shifts to the nonmoving party to establish there is a genuine issue for the trier of fact. *Young*, 112 Wn.2d at 225-26. While questions of fact are typically left to the trial process, they may be treated as a matter of law if "reasonable minds could reach but one conclusion." *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

A nonmoving party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, a nonmoving party must put "forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Id.*

WLAD— FAILURE TO ACCOMMODATE

Ms. Bogardus argues summary judgment in favor of the City was erroneous because the City failed to accommodate her in violation of the WLAD. The City

contends that judicial estoppel bars Ms. Bogardus' claims under the WLAD. We agree with the City. The WLAD prohibits an employer from discharging an employee "because of . . . the presence of any sensory, mental, or physical disability." RCW 49.60.180(2). To prevail on a failure to accommodate claim, a plaintiff must prove: (1) "the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform their job[;]" (2) "*the employee was qualified to perform the essential functions of the job*[;]" (3) the employee gave the employer notice of the abnormality and its resulting substantial limitations; and (4) upon receiving notice, the employer failed to adopt measures that were available to the employer and that were medically necessary to accommodate the employee's abnormality. *Davis v. Microsoft Corp*., 149 Wn.2d 521, 532, 70 P.3d 126 (2003) (emphasis in original).

The term "essential functions" as used in element (2) is "derived from WLAD's federal counterpart, the Americans with Disabilities Act (ADA)."[3] *Id.* at 533. "While the question of whether an employer adequately accommodated an employee normally presents a factual question for a jury to decide, summary judgment is appropriate on a WLAD accommodation claim when reasonable minds could reach but one conclusion." *Slack v. Luke*, 192 Wn. App.

---

[3] ""The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."" *Davis*, 149 Wn.2d at 533 n.5 (quoting 42 U.S.C. § 12111(8)).

909, 919, 370 P.3d 49 (2016).

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App 95, 98, 138 P.3d 1103 (2006)). Three factors guide a court's determination of whether to apply the doctrine of judicial estoppel: (1) whether the party's later position is "clearly inconsistent with its earlier position[;]" (2) whether acceptance of the "inconsistent position in a later proceeding would create the 'perception that the first or second court was misled[;]'" and (3) whether the party asserting the inconsistent position would receive an unfair advantage or impose an unfair disadvantage on the opposing party if not estopped. *Id.* at 538.

In *Cleveland v. Policy Management Systems, Corporation*, the United States Supreme Court held:

> [P]ursuit, and receipt, of [Social Security Disability Insurance (SSDI)] benefits does not *automatically* estop a 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."

526 U.S. 795, 797-98, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999) (emphasis added). The Supreme Court explained "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—at least if she does not offer a sufficient explanation." *Id.* at 806. This is because 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." *Id.* at 806.

In essence, the Court held a plaintiff's assertion that they cannot work in an SSDI application does not inevitably result in them being estopped from asserting an ADA claim, but it can if the plaintiff does not provide an explanation for why both of their positions are consistent with one another.

Here, Ms. Bogardus offered no explanation for why or how her assertion in her SSDI application that she was too disabled to work could be reconciled with her later position that she could, in fact, work had the City offered her a reasonable accommodation. Her SSDI application negates element (2) of her WLAD failure to accommodate claim—that she was qualified to perform the essential functions of the job. Because she provides no explanation for her contrary positions,

her accommodation claim cannot survive the City's summary judgment motion.

WLAD—RETALIATION

Ms. Bogardus argues that her WLAD retaliation claim was improperly dismissed on summary judgment. However, aside from reciting the legal standard for such a claim, she provides no argument or analysis explaining why her claim was improperly dismissed. For this reason, we decline to address this issue. *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008) ("Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review."), *rev'd on other grounds by* 170 Wn.2d 117, 240 P.3d 143 (2010).

WDVPP CLAIM

Ms. Bogardus argues her WDVPP claim was erroneously dismissed on summary judgment.[4] We disagree.

---

[4] The City contends that though it moved for summary judgment dismissal of Ms. Bogardus' WDVPP claim, Ms. Bogardus did not substantively respond to its argument below. In moving for summary judgment, the City bore the initial burden of proving the absence of a genuine issue of material fact related to Ms. Bogardus' WDVPP claim. After making this showing, the burden shifted to Ms. Bogardus to present evidence demonstrating the presence of a genuine issue of material fact. In not responding to the City's argument, Ms. Bogardus failed to meet her burden. Notwithstanding Ms. Bogardus' deficiency, because we review the trial court's order de novo, we exercise our discretion and review her claimed error.

To establish a prima facie case under the WDVPP, an employee must demonstrate: (1) her discharge may have been motivated by reasons that contravene a clear public policy, and (2) the employee's public-policy linked conduct was a significant factor in the decision to terminate the employee. *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 577-78, 459 P.3d 371 (2020).

A WDVPP claim is typically limited to four scenarios: (1) when the discharge was a result of the employee refusing to commit an illegal act (e.g. refusing to engage in price fixing); (2) when the discharge was a result of the employee performing a public duty or obligation (e.g., jury duty); (3) when the termination resulted due to an employee exercising a legal right or privilege (e.g., filing a worker's compensation claim); and (4) where the discharge is premised on an employee "whistleblowing." *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989).

Upon the employee making a prima facie case of WDVPP, the burden shifts to the employer to "'articulate a legitimate, nondiscriminatory reason'" for the employee's termination. *Mackey*, 12 Wn. App. 2d at 571 (quoting *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County*, 180 Wn.2d 516, 527, 404 P.3d 464 (2017)). If the employer meets its burden, the employee "must produce sufficient evidence showing that the employer's alleged nondiscriminatory reason for the discharge was a 'pretext.'" *Id.* at 572 (quoting *Mikkelsen,* 180 Wn.2d at 527). "'An employee may satisfy the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1)

that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer.'" *Mikkelsen*, 180 Wn.2d at 527 (quoting *Scrivener v. Clark College*, 181 Wn.2d 439, 446-47, 334 P.3d 541 (2014)).

In order to defeat summary judgment, the employee must show only that a reasonable trier of fact could find that discrimination was a substantial factor in the employer's decision to discharge the employee. *Id.* at 528.

Here, Ms. Bogardus' WDVPP claim is premised on two legal rights she exercised: requesting a reasonable accommodation and taking protected leave. However, there is no evidence that this conduct was a significant factor in her termination. Indeed, Ms. Bogardus' termination letter articulated multiple reasons for her discharge, including: violations of the City of Yakima Transit Operations Policy and Procedures Manual's rules for how to take time off; violation of City of Yakima General Civil Service Rules and Regulations, namely "dereliction of duty;" and violations of City of Yakima Administrative Policies for "[u]nauthorized absence from job" and "[u]nauthorized or improper use of any type of leave." CP at 186-87. The letter clearly expressed that Ms. Bogardus was not being terminated for using protected leave, but instead for being in an "unauthorized leave without pay status" for which she had been disciplined prior. CP at 186.

Ms. Bogardus is unable to direct this court to any evidence in the record that indicates discrimination

was a factor in her termination. Rather, her argument is limited to the City "openly admit[ing] in their discipline and termination letters that their reason for reprimanding and terminating [Ms. Bogardus] was due to time off that she took as an accommodation and protected time off for her disability." Appellant's Am. Open. Br. at 16. She provides no citation to the record supporting her argument, and the letter itself clearly contradicts her unsupported statement. Consequently, there is an absence of any genuine issue of material fact related to her WDVPP claim, and it was properly dismissed on summary judgment.

WFLA CLAIM

Ms. Bogardus argues the trial court improperly dismissed her WFLA claim. The City responds that it was Ms. Bogardus, not the trial court, who voluntarily dismissed her WFLA claim. We agree with the City.

In Ms. Bogardus' response to the City's motion for summary judgment, she wrote "Plaintiff Intends to Dismiss her Claim for Willful Violation of Washington State Family Leave Act." CP at 455. On September 26, 2023, Ms. Bogardus filed a first amended complaint that did not include a claim for a violation of the WFLA. If an amended complaint "abandons a former theory or cause of action, it does not relate back to the original complaint, but, instead, rests the action upon the pleadings as amended." *Ennis v. Ring*, 49 Wn.2d 284, 288, 300 P.2d 773 (1956). Because Ms. Bogardus voluntarily dismissed her claim for violation of the WFLA, we decline review.

ATTORNEY FEES

Ms. Bogardus requests her attorney fees pursuant to RAP 18.1 and RCW 49.48.030. RCW 49.48.030 provides: "In any action in which any person *is successful in recovering judgment for wages or salary owed to him or her*, reasonable attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer." (emphasis added). Because Ms. Bogardus has not been successful in recovering judgment for wages or salary owed to her, she is not entitled to her attorney fees on appeal.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

/s/
Cooney, J.

WE CONCUR:

/s/
Lawrence-Berrey, C.J.

/s/
Johnson, J.P.T.[†]

[†] Brandon L. Johnson, an active judge of a court of general jurisdiction, is serving as a judge pro tempore of this court pursuant to RCW 2.06.150(1).

APPENDIX B

THE SUPREME COURT OF WASHINGTON

FILED
SUPREME COURT
STATE OF WASHINGTON
10/8/2025
BY SARAH R. PENDLETON
CLERK

KIMBERLY BOGARDUS,
Petitioner,

v.

CITY OF YAKIMA,
Respondent.

No. 104306-6

O R D E R

Court of Appeals
No. 40060-3-III

Department I of the Court, composed of Chief Justice Stephens and Justices Johnson, González, Yu, and Whitener, considered at its October 7, 2025, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 8th day of October, 2025.

For the Court

/s/
CHIEF JUSTICE

APPENDIX C

OCTOBER TERM, 1998

CLEVELAND *v.* POLICY MANAGEMENT SYSTEMS CORP. et al.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97–1008. Argued February 24, 1999—Decided May 24, 1999

After suffering a stroke and losing her job, petitioner Cleveland sought and obtained Social Security Disability Insurance (SSDI) benefits, claiming that she was unable to work due to her disability. The week before her SSDI award, she filed suit under the Americans with Disabilities Act of 1990 (ADA), contending that her former employer, respondent Policy Management Systems Corporation, had discriminated against her on account of her disability. In granting Policy Management Systems summary judgment, the District Court concluded that Cleveland's claim that she was totally disabled for SSDI purposes estopped her 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, holding that the application for, or receipt of, SSDI benefits creates a rebuttable presumption that a recipient is estopped from pursuing an ADA claim and that Cleveland failed

to rebut the presumption.

Held:

1. Pursuit, and receipt, of SSDI benefits does not automatically estop a recipient from pursuing an ADA claim or erect a strong presumption against the recipient's ADA success. However, to survive a summary judgment motion, an ADA plaintiff cannot ignore her SSDI contention that she was too disabled to work, but must explain why that contention is consistent with her ADA claim that she can perform the essential functions of her job, at least with reasonable accommodation. Pp. 801–807.

(a) Despite the appearance of conflict between the SSDI program (which provides benefits to a person with a disability so severe that she is unable to do her previous work or any other kind of substantial gainful work) and the ADA (which prohibits covered employers from discriminating against a disabled person who can perform the essential functions of her job, including those who can do so only with reasonable accommodation), the two claims do not inherently conflict to the point where courts should apply a special negative presumption such as the one applied below. There are many situations in which an SSDI claim and an ADA claim can comfortably exist side by side. For example, since the Social Security Administration (SSA) does not take into account the possibility of "reasonable accommodation" in determining SSDI eligibility, an ADA plaintiff 's claim that she can perform her job *with* reasonable accommodation may well prove consistent with an

SSDI claim that she could not perform her own job (or other jobs) *without* it. An individual might qualify for SSDI under SSA's administrative rules and yet, due to special individual circumstances, be capable of performing the essential functions of her job. Or her condition might have changed over time, so that a statement about her disability made at the time of her application for SSDI benefits does not reflect her capacities at the time of the relevant employment decision. Thus, this Court 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. Pp. 801–805.

(b) 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 a plaintiff fails to make a sufficient showing to establish the existence of an essential element on which she has the burden of proof at trial. *Celotex Corp.* v. *Catrett,* 477 U.S. 317, 322. An ADA plaintiff's sworn assertion in an application for disability benefits that she is unable to work appears to negate the essential element of her ADA claim that she can perform the essential functions of her job, and a court should require an explanation of this apparent inconsistency. 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. Pp. 805–807.

2. Here, the parties should have the opportunity in the trial court to present, or to contest, Cleveland's explanations for the discrepancy between her SSDI statements and her ADA claim, which include that the SSDI statements that she was totally disabled were made in a forum that does not consider the effect that reasonable workplace accommodation would have on her ability to work and that those statements were reliable at the time they were made. P. 807.

120 F.3d 513, vacated and remanded.

Breyer, J., delivered the opinion for a unanimous Court.

John E. Wall, Jr., argued the cause for petitioner. With him on the brief was *Laura Eardley Calhoun.*

Matthew D. Roberts argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Waxman, Acting Assistant Attorney General Lee, Deputy Solicitor General Underwood, Arthur J. Fried, C. Gregory Stewart, Philip B. Sklover, Lorraine C. Davis,* and *Robert J. Gregory. Stephen G. Morrison* argued the cause for respondents. With him on the brief were *C. Adair Bledsoe, Jr., David N. Kitner,* and *Kimberly S. Moore.*[*]

---

[*] Briefs of *amici curiae* urging reversal were filed for the Aids Policy Center for Children, Youth, and Families et al. by *Catherine A. Hanssens* and *Beatrice Dohrn;* and for the National Employment Lawyers Association et al. by *Alan B. Epstein* and *Paula A. Brantner.*

JUSTICE BREYER delivered the opinion of the Court.

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. § 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

Briefs of *amici curiae* urging affirmance were filed for the Association of American Railroads by *Daniel Saphire;* and for the Equal Employment Advisory Council by *Ann Elizabeth Reesman.*

contention is consistent with her ADA claim that she could "perform the essential functions" of her previous job, at least with "reasonable accommodation."

I

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 (CA10 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 (CA6 1998) (same), cert. pending, No. 97–1991; *Swanks* v. *Washington Metropolitan Area Transit Authority,* 116 F.3d 582, 586 (CADC 1997) (same), with *McNemar* v. *Disney Store, Inc.,* 91 F.3d 610, 618–620 (CA3 1996) (applying judicial estoppel to bar plaintiff who applied for disability benefits from bringing suit under the ADA), cert. denied, 519 U.S. 1115 (1997), and *Kennedy* v. *Applause, Inc.,* 90 F.3d 1477, 1481–1482 (CA9 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).

II

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." § 423(d)(1)(A).

The individual's impairment, as we have said, *supra,* at 797, 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 . . . ." §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 ADA prohibits covered employers from discriminating "against a qualified individual with a disability because of the disability of such individual." § 12112(a). The ADA 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." § 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. § 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 work force, 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 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 alternately 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 (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—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 (CA1 1994); *Rule* v. *Brine, Inc.,* 85 F.3d 1002, 1011 (CA2 1996); *Hackman* v. *Valley Fair,* 932 F.2d 239, 241 (CA3 1991); *Barwick* v. *Celotex Corp.,* 736 F.2d 946, 960 (CA4 1984); *Albertson* v. *T. J. Stevenson & Co.,* 749 F.2d 223, 228 (CA5 1984); *Davidson & Jones Development Co.* v. *Elmore Development Co.,* 921 F.2d 1343, 1352 (CA6 1991); *Slowiak* v. *Land O'Lakes, Inc.,* 987 F.2d 1293, 1297 (CA7 1993); *Camfield Tires, Inc.* v. *Michelin Tire Corp.,* 719 F.2d 1361, 1365–1366 (CA8 1983); *Kennedy* v. *Allied Mutual Ins. Co.,* 952 F.2d 262, 266 (CA9 1991); *Franks* v. *Nimmo,* 796 F.2d 1230, 1237 (CA10 1986); *Tippens* v. *Celotex Corp.,* 805 F.2d 949, 953–954 (CA11 1986); *Pyramid Securities Ltd.* v. *IB Resolution, Inc.,* 924 F.2d 1114, 1123 (CADC), cert. denied, 502 U.S. 822 (1991); *Sinskey* v. *Pharmacia Opthalmics, Inc.,* 982 F.2d 494, 498 (CA Fed. 1992), cert. denied, 508 U.S. 912 (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.