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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CAROLYN C. CLEVELAND, Petitioner v. POLICY MANAGEMENT SYSTEMS CORPORATION, ET AL.

CASE NO: 97-1008 C.1

PLACE: Washington, D.C.

DATE: Wednesday, February 24, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

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CAROLYN C. CLEVELAND, :

Petitioner :

v. : No. 97-1008

POLICY MANAGEMENT SYSTEMS :

CORPORATION, ET AL. :

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Washington, D.C.

Wednesday, February 24, 1999

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

JOHN E. WALL, JR., ESQ., Dallas, Texas; on behalf of the Petitioner.

MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae supporting the Petitioner.

STEPHEN G. MORRISON, ESQ., Blythewood, South Carolina; on behalf of the Respondents.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We will arguments first this morning in No. 97-1008, Carolyn Cleveland versus Policy Management Systems Corporation.

Mr. Wall.

ORAL ARGUMENT OF JOHN E. WALL, JR.

ON BEHALF OF THE PETITIONER

MR. WALL: Mr. Chief Justice and may it please the Court:

Carolyn Cleveland, a stroke victim with a known perceptive and expressive aphasia, a known language disruption, didn't even get a chance to present her Americans with Disabilities Act case, even though, or even because, she had applied for Social Security disability benefits. In a case very similar to Mrs. Cleveland's case, in the McKenna case, Christine McKenna, who had committed various infractions in the workplace, got to present her case, and Carolyn Cleveland has not.

In fact, Ms. McKenna received more favorable treatment than Mrs. Cleveland in the fact that Mrs. McKenna did not have to overcome a presumption.

QUESTION: What is the bearing of the McKenna action on the question presented here?

MR. WALL: Mr. Chief Justice, the McKenna case,

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as this Court is well aware, involved the issue of after-acquired evidence.

QUESTION: It involves what?

MR. WALL: After-acquired evidence.

QUESTION: It seems to me the difference is -- I have the same concern as the Chief Justice apparently has -- here you have an application, an official form. It would be like a judgment in some other hypotheticals we might suppose. That wasn't involved in the case that you cite.

MR. WALL: I agree, Your Honor. The distinction is in our particular case this evidence, these representations, these general statements that were made by Mrs. Cleveland to the Social Security Administration, were discovered after the violation of the Americans with Disabilities Act and somehow are used to presumptively penalize Mrs. Cleveland from being able to bring action.

QUESTION: Well, Mr. Wall, do you think that statements made by your client in making an application for Social Security disability should be admissible as evidence in the event of a subsequent ADA request?

MR. WALL: I certainly believe they should, Your Honor.

QUESTION: And if somebody such as your client

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has said, I am totally disabled, that might be pretty strong evidence, I suppose, even if you don't give it presumptive effect? That's what she said: I am totally disabled. I suppose that that is some evidence. Presumably, that could change over time. But speaking as of the time she made the statement, that would be an important piece of evidence, I suppose?

MR. WALL: It would be in the sense that at various points in time she did have to say, in response to various questions of the Social Security Administration, words of that caliber or character. Now, in our particular situation here there was a period of time, as the Court is well aware, that Mrs. Cleveland returned to work and was physically capable of doing the job. And had she been accommodated by her employer, there would have been no necessity to resurrect her Social Security disability claim.

QUESTION: Well, why shouldn't it be even more than just strong evidence? If she has sworn to a government agency that she is 100 percent disabled, why doesn't that shift the burden to her to show that, even though there are differences between what "disabled" means under the Social Security Act and what it means under ADA, why doesn't it shift the burden to her to show that those differences are relevant in this case, that is to say that

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her statement did not take into account accommodation or her statement was made at a later date or whatever? Why doesn't it shift the burden to you it seems to me?

MR. WALL: Well, I would think that that would upset the normal summary judgment process here, being that this is an affirmative defense raised by the respondent. It is their burden to establish the essential elements of their defense.

QUESTION: Well, but the doctrine of judicial estoppel does upset the normal process. I mean, when you have on the record testimony under oath in another, in another government proceeding, we upset the normal process. And here she's there under oath saying that she's 100 percent disabled.

Why isn't it reasonable to put the burden on her to explain to the tryer of fact why that doesn't mean that she's 100 percent disabled for purposes of the ADA?

MR. WALL: I believe that she should be required to explain it, as we did.

QUESTION: But the question is is it just an admission against interest that can come in along with all the other evidence in the case or is it something more, something that should actually shift the burden of proof?

MR. WALL: I think not, Mr. Chief Justice.

QUESTION: Why not?

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MR. WALL: The reason being is because people who apply for Social Security disability may be victims of Down's Syndrome, may be victims of dyslexia, may be victims of brain damage, may be victims of strokes, may have expressive and perceptive aphasia, as Mrs. Cleveland does, may have any number of other psychomotor abnormalities which may interfere with their normal language perception.

QUESTION: Well, they have enough normal language perception to fill out the application, I take it?

MR. WALL: Well, the process as I understand it, Mr. Chief Justice, is that this initial application that was completed by Mrs. Cleveland here was compiled after a telephone interview, and she signs it. And sure enough, she would have the liberty, I suppose, in the normative world to give further explanation as to what she may have said.

QUESTION: With respect to that, Mr. Wall, the facts are a little confusing. I thought that when she initially had her stroke nobody knew whether she would recover, because she wasn't -- at the time she had her stroke, she had no memory, she could hardly talk.

At what point did she file that application? This is the kind of disability one may recover from and

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one may not. So had she -- had she made a startling recovery by the time she filed that application?

MR. WALL: No, Justice Ginsburg. As a matter of fact, the application for Social Security disability benefits I believe was filed on or around January the 21st of 1994, which was some 14 days after the onset of the stroke.

QUESTION: What was the medical opinion at that time? Could anyone say whether she was going to get back to any kind of non-disabled state?

MR. WALL: At that point in time no one could tell.

QUESTION: And when she -- when her doctor told her that she could work, did she notify Social Security?

MR. WALL: Yes, Justice Ginsburg, she did. She wrote to them in April of 1994 and advised them that she had returned to work.

QUESTION: So I think that would be relevant, too. She was not claiming benefits, entitlement to benefits, when she went back to work.

MR. WALL: Precisely.

QUESTION: Well, why couldn't all of that evidence come in and nonetheless have the burden of proof shifted by virtue of the application? I mean, all of that obviously could come in by way of explanation of why she

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shouldn't be bound by this thing.

MR. WALL: Well, the reason being, Mr. Chief Justice, is that this unfairly, I would submit, submits the burden upon the petitioner or the plaintiff in an ADA case to disprove an affirmative defense raised by a defendant.

QUESTION: Well, but as Justice Scalia says, if we were to apply any sort of judicial estoppel that would be the effect. And why not at least a halfway house here, where you say the burden of proof is simply reversed?

MR. WALL: Because it's not Mrs. Cleveland's burden to prove or disprove an affirmative defense. They bear the burden of the preponderance of the evidence.

QUESTION: But that doesn't deal at all with the whole idea of judicial estoppel.

MR. WALL: I agree.

QUESTION: Well, I think you have to deal with it.

MR. WALL: I agree, Your Honor. The reason we would submit to the Court that this theory of judicial estoppel should be discarded in the ADA-Social Security Administration context is because of all of the reasons we have enunciated for the Court here.

QUESTION: That lots of people have disabilities and so forth who file, who sign the applications?

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MR. WALL: I'm sorry, I missed.

QUESTION: Well, you say for all the reasons that you have assigned. What are those reasons?

MR. WALL: Well, number one, the Social Security Administration never takes into consideration a reasonable workplace accommodation at any stage of the game. All of the information that's gathered, I would submit, from the Social Security Administration passes through the filter of the Social Security Regulations and, as we know from the amicus brief by the United States of America in this case, those issues are never inquired about.

QUESTION: Well, fine and she can bring in that evidence as part of the rebuttal. I mean, the proposal is simply the only burden that's placed on her is to show that the reason that this prior sworn statement does not put her out of court here is because the accommodation issue was the difference, that at that time had she taken into account accommodation she wouldn't have made that sworn statement. That's the only burden put on her.

But if in fact accommodation is irrelevant to the matter, then I don't know why she should be able to swear one way one time and another way another time.

QUESTION: May I ask, may I ask you what you think that the -- is it the Fifth Circuit here -- Court of

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Appeals held? They spoke in terms of saying a rebuttable presumption was created that would judicially estop your client from asserting she was a qualified individual and that she could overcome it, if at all, only under some limited and highly unusual set of circumstances.

Do you think that the Fifth Circuit applied more than just a simple burden shift, but rather a very strong sort of a presumption?

MR. WALL: Well, we know in light of --

QUESTION: It isn't clear to me. How do you interpret that opinion?

MR. WALL: Two ways, Justice O'Connor. Number one, the Fifth Circuit since the Cleveland decision was enunciated has not ruled in favor of an ADA claimant, period, on this issue. So clearly it is very limited and highly unusual as far as their review.

QUESTION: Well, what if it were just a normal burden shift? Somebody has filed with an application for a permanent disability, an application that says I'm totally disabled. Now, what if it were just an ordinary rebuttable presumption, so that the burden shifts then to the claimant to say, yes, I said that then, but in the meantime I've recovered almost totally, and besides I could be, with reasonable accommodation, I could be employed?

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Now, would that be okay?

MR. WALL: Yes, Your Honor, and I think that's precisely what happens in a normal summary judgment setting. What would happen, I would envision, is the defense would say: You cannot establish that you're otherwise qualified to perform this job with or without accommodation, by reason of what you said to the Social Security Administration.

QUESTION: But it would alter, it would alter the summary judgment matrix, I take it, in one sense, that you would lose, if you don't carry at least showing a factual dispute about a point, rather than the other side losing.

MR. WALL: Precisely.

QUESTION: Well, if you -- let's assume there is no, there is no presumption, rebuttable presumption of estoppel. The other side files a motion for summary judgment. On the basis of the motion -- in support of the motion for summary judgment, it presents through affidavits the records of what your client had sworn to in getting the Social Security benefits, and on the face that evidence shows that your client says, I am disabled.

Do you agree that if you do nothing, if you present no counter-affidavit, no counter-evidence, you're going to lose the motion for summary judgment, right? You

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don't need a presumption to lose it; you're going to lose it?

MR. WALL: Perhaps, depending upon the filing dates, Justice Souter, depending upon what's represented.

QUESTION: So it's a difference, it's the timing is perhaps the one respect in which it will make a difference whether we have an enduring presumption or whether we simply follow the normal rules of summary judgment, which would require a response in order to establish that there's a genuine issue. Is that basically what it boils down to?

MR. WALL: Yes, sir. Also there is this issue that ever remains, and that's the issue of whether or not workplace accommodation is taken into consideration. In light of the guidelines --

QUESTION: Well, we all realize that it's not. But I think it's also -- you may dispute this, but I was assuming that it was fair to say that, even though the legal standards of the two acts are different, in most cases in which an individual says for Social Security purposes, I'm disabled, that person probably is not going to be in a position to work at the old job for ADA purposes even with some accommodation.

I'm sure there are cases in which that is not true, but I would suppose that as a general rule if you're

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disabled for one you're probably not going to be able to work with accommodation for the other, and therefore a probability inference would be justifiable for summary judgment purposes, i.e., you would raise an issue of fact and if that fact was not rebutted you'd lose.

Am I wrong about the unlikelihood that you would be disabled for Social Security and still be able to work with some accommodation?

MR. WALL: I would humbly disagree.

QUESTION: What do we have -- do we have any empirical evidence on it? I mean, we all recognize that legally it's possible, no question about it. Do we know in the real world how this tends to work out?

MR. WALL: Unfortunately, no, and the reason being is the question has never been as far as I can understand analyzed on an empirical basis as to how many people have been on Social Security disability, have tried to remove themselves from the roll as a ward, and have been unsuccessful in their effort to return to gainful employment with accommodation.

QUESTION: Is there any -- is there any study of the Social Security program that allows people to keep their disability benefits and yet work for this nine-month trial period? How many people are enrolled in that program?

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MR. WALL: Have enrolled? That I'm aware of, no, Your Honor. I'm sure there is the data available. Unfortunately, I'm not able to provide it.

QUESTION: But at least the two are not inconsistent, because the law itself allows people who are getting benefits to be working and keeping those benefits for the, is it, nine-month period?

MR. WALL: Precisely, to effectuate this rehabilitation program, the nine-month period, the intermittent periods of unsuccessful work attempt, the efforts to go to some sort of rehabilitation program.

If I may, I would like to reserve the remainder of my time for rebuttal if necessary.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Wall.

Mr. Roberts, we'll hear from you.

ORAL ARGUMENT OF MATTHEW D. ROBERTS

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE PETITIONER

MR. ROBERTS: Mr. Chief Justice and may it please the Court --

QUESTION: Could you tell us, Mr. Roberts, is it true that the Social Security Administration in administering disability provisions of the act did not take into consideration reasonable accommodations under the ADA?

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MR. ROBERTS: Yes, the Social Security Administration doesn't consider reasonable accommodations that have not been made. That's because the question of whether a reasonable accommodation is necessary is very fact-intensive, resource-intensive, and a time-consuming effort, and it's one about which the Social Security Administration doesn't have much expertise.

Therefore, to do it would be detrimental to the efficiency of the program, and that efficiency is critical to the program because the Administration handles about two and a half million claims a year, which is about ten times as many cases as go in the Federal court system.

In addition to that --

QUESTION: You could -- you could not take it into account in the initial granting of benefits, but allow it to be refuted later on, it seems to me. I just find it extraordinary that we have a law here which requires employers to make accommodations to disabled persons and yet your agency is giving away money under the, under the Social Security disability provisions presumably to people who are entitled to those accommodations and who therefore are employable, but you're just closing your eyes to the fact that the employer must make accommodations.

It just doesn't make any sense at all. The law

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doesn't require that, does it? It's just your regulations?

MR. ROBERTS: The Social Security Administration has interpreted the law to permit it to consider the jobs as they actually exist and the jobs as they existed. And in addition to the efficiency reason that I stated before to Justice Kennedy, there are additional reasons, because the purpose of the Social Security Act, which is also a purpose of the ADA, is to try to enable people to move off the benefit rolls and return to work.

QUESTION: Well, of course, the Social Security Act, there are substantial hearings on whether or not the applicant can pursue any kind of gainful employment, and the Administration just closes its eyes to the employer's duty to accommodate? I just don't understand that.

MR. ROBERTS: No, Your Honor, it doesn't close its eyes. It looks at the jobs as they actually exist, as the jobs are ordinarily performed in the national economy or as the past job was performed. If an employer had made an accommodation to somebody, then the Social Security would consider that as part of their past job. If the accommodations were routinely made in jobs in the national economy, then the Social Security Administration would consider that.

QUESTION: Well, if they were not accommodated

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but then the employee in fact pursuaded the employer, because of ADA, to let him go back to work with accommodation, at that point the permanent disability would be cut off presumably?

MR. ROBERTS: Yes, their disability benefits would terminate if the person was performing substantial gainful activity after --

QUESTION: Is there some nine-month interval, though --

MR. ROBERTS: Yes.

QUESTION: -- to see how it works out --

MR. ROBERTS: After the --

QUESTION: -- during which --

MR. ROBERTS: Yes, I'm sorry.

QUESTION: -- it would continue?

MR. ROBERTS: After the trial work period, which is nine months long, then the benefits would cut off in the third month after that, although a person would also be entitled to benefits in any month for the next 36 months in which their earnings fell below $500, which is the level that the Social Security --

QUESTION: So for nine months the person both gets the pay of the job and total disability benefits?

MR. ROBERTS: Yes, Your Honor.

QUESTION: But what's the justification for

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that?

MR. ROBERTS: Well, that's required by the statute, Your Honor, and the purpose of that provision in the statute is to enable people to test their ability to return to work.

QUESTION: Well, so there's a real incentive for someone certainly to apply for Social Security disability, but also to pursue whatever rights there are under ADA. I mean, there would be that incentive, presumably.

MR. ROBERTS: Congress certainly intended the possibility of people doing both.

QUESTION: Let me ask you whether you think that it is workable in the government's view to have just a presumption that shifts the burden of proof based on an allegation in the Social Security application of total disability.

MR. ROBERTS: We don't believe a presumption would be appropriate, Your Honor, because --

QUESTION: Isn't it workable and wouldn't it be the normal thing you would expect in other contexts? I'm not sure what the Fifth Circuit did here. They may have applied more than just a rebuttable presumption. It looked like a pretty tough test. But what if it just shifted the burden so then the claimant has to go forward and say: Yes, I said that, but look, look at the timing,

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look at the reasonable accommodation.

MR. ROBERTS: That would mean that in the borderline cases there would be a risk that the claimant would lose, which would be contrary to the policy of the act of encouraging as many people to go back to work as possible.

But it's important to realize that there's no reason --

QUESTION: I don't understand. The policy of the act that in close cases the claimant wins? Is that a policy of the act?

MR. ROBERTS: No, Your Honor. But if people are forced to choose between disability benefits, the chance to get disability benefits and the chance to vindicate their rights, and those disability benefits may be necessary for survival, then it's likely that many people will choose the disability benefits. And if they are the presumed to be unable to bring an ADA action, they will be denied a remedy that might enable them to get back to work.

QUESTION: They're not presumed unable. It's just this evidence comes in against them and puts upon them the burden of simply explaining why that wasn't the case. It shouldn't be hard. In the present case it doesn't seem hard at all. You show evidence that there

were later developments or whatever.

MR. ROBERTS: A presumption might be appropriate if there was a reason to believe that there was an inconsistency that arises simply from the application or the receipt of benefits. But there's no reason to believe that there's that inconsistency.

QUESTION: Well, I mean, there certainly is. You have to say that, well, the one reason why there may not be, the one reason why there may not, is that it may not have taken into account accommodation. You know, that may be the case in how many percentages of the cases, do you think?

MR. ROBERTS: Well, in 40 percent, 42 percent of the cases that people who had Social Security disability benefits returned to work, their employer made an accommodation. So I think that there is evidence that it is in a large percent of cases. Plus 60 percent, nearly 60 percent of Social Security disability benefit determinations, awards, are made at step three of the process, which is at the state of listed impairments. And in that case the Administration presumes that somebody is entitled to benefits without any inquiry into their ability to do their past job or their ability to do other employment in the national economy.

In fact, many of those impairments are

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impairments that, while most people might not be able to work, many people could -- blindness, complete loss of speech or loss of hearing, inability to use both legs.

So I would say that there are more than one instance of reasonable accommodation. There is also the impairment difference, there is the trial work period difference that Justice O'Connor brought up.

QUESTION: What about any difference in the time that it takes to get the benefits going? Compare a request for Social Security disability and a claim under ADA. Is there any difference in the speed with which these determinations are made?

MR. ROBERTS: They're both fairly, fairly lengthy processes, although I would say that probably the ADA suit would take longer to resolve.

QUESTION: The ADA would depend on what district you sued in, wouldn't it?

MR. ROBERTS: Certainly the courts move at different speeds, Your Honor.

QUESTION: You don't disagree with Mr. Wall, do you? I mean, I thought you were saying -- I'm not sure -- I don't know this presumption, but look. The person, the handicapped person, always has the burden of proof of proving his ADA suit.

MR. ROBERTS: Yes, Your Honor.

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QUESTION: They always have that. Now there's a motion for summary judgment and it's pointed out that the handicapped person asserted that he was substantially disabled to the point where he could not do his past work or any other substantial gainful work in the economy. And he did say that. So therefore, since he did say that, at that point he's going to lose unless he explains it. And if he explains it to the point where there's a genuine and material issue of fact in his favor at least, you go to trial.

Do you disagree with that?

MR. ROBERTS: No, we believe ordinary summary judgment principles are adequate to deal with --

QUESTION: Yes, that's the ordinary summary judgment principle, that's it.

MR. ROBERTS: -- to deal with this situation.

QUESTION: But he has to explain it, he has to explain it. And he might explain it because of subpart P, he might explain it because of Justice Kennedy, he might explain it because of everybody, nobody was accommodated.

MR. ROBERTS: He has the burden of proof. He is the plaintiff and he has the burden of proof, so he must come forward with specific facts.

QUESTION: Suppose he lied, suppose he lied in the affidavit?

QUESTION: Why does he have to explain it? I mean, all he has to say is what you've said here: My statement to SSI is totally irrelevant because what is meant by unemployability there is not what is meant by employability here, thank you very much. And he sits back and folds his arms, and that's the end of that whole sworn statement.

MR. ROBERTS: He has the -- that might be sufficient to deal with the past statement, but he would have the burden of proof to show that he's a qualified individual with disability.

QUESTION: To show his current, to show his current disability. But that past sworn statement is totally washed out.

MR. ROBERTS: No.

QUESTION: It's right off, it's right off the slate.

MR. ROBERTS: No, Your Honor, it's not washed out.

QUESTION: Why not?

MR. ROBERTS: It's a factor that could be considered in determining whether a reasonable tryer of fact could find for the plaintiff.

QUESTION: Well, that's simply an admission against interest, then.

MR. ROBERTS: Yes, it would certainly be considered as an admission against interest.

QUESTION: But no more, under your view?

MR. ROBERTS: It could also be considered to limit relief if it was determined that the plaintiff prevailed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Roberts.

Mr. Morrison, we'll hear from you.

ORAL ARGUMENT OF STEPHEN G. MORRISON

ON BEHALF OF THE RESPONDENTS

MR. MORRISON: Mr. Chief Justice and may it please the Court:

The courts will continue to be faced with the obvious tension between the Social Security Administration definition of "disability" and the ADA. They will continue to find some cases where this is -- the Social Security Administration records should be dispositive, and the courts will need a sensitive and sensible tool to deal with that.

That sensitive and sensible tool should begin with the fact that the under oath statements to the Social Security should be given great credit.

QUESTION: Well, except that I -- may I interrupt you there, because if that were the issue here I

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think we'd have a somewhat different case. As I understand it, the presumption that the circuit applied was a presumption that depended on either application for benefits or an award of benefits under the Social Security Act. It was not a presumption that rested upon the terms of the statements made by the applicant.

MR. MORRISON: Justice Souter, I think it relied on both and, as the rebuttable --

QUESTION: Well, I looked at the Fifth Circuit opinion and I thought the Fifth Circuit opinion referred specifically to application or award of benefits, not to statements made in aid of the application. Am I wrong?

MR. MORRISON: Justice Souter, that is the reference in the case.

QUESTION: Okay.

MR. MORRISON: However, the rebuttable presumption would be a sensitive tool to require the courts to go down into the record and look at the statements, because if the rebuttal was made the court would then look at the context of the statements that were made.

QUESTION: Okay, and that gets to the suggestion that I was going to make and ask you to comment upon, which goes to the question of what difference does it make to have the presumption as opposed to following the normal

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rules.

Let's assume that the person has applied for the Social Security benefits and later makes an ADA claim. There's a motion for summary judgment made by the defending party in the ADA claim and what that summary judgment says, the motion says, is this: The applicant, the plaintiff, said in support of his application for Social Security benefits that he was totally disabled, or whatever it was, if the -- and therefore I'm entitled to summary judgment because the person cannot work with accommodation. That's the normal meaning of the terms that the applicant used.

If the applicant makes no response to that, I presume the applicant is going to lose the summary judgment motion as a general rule. If the applicant does make a response, the applicant is going to come in and say: Those are the words that I used, but I was using them as terms of art, or there has been a time difference which makes what I said then not necessarily true now, whatever.

Under the normal rules of summary judgment, the applicant in fact is going to have to come up with some kind of an explanation for the statements that the applicant made. Why isn't that enough to protect the interests that you're obviously concerned with here?

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MR. MORRISON: Because the applicant has made, Justice Souter, 11 representations under oath to the Social Security Administration that she is fully and totally disabled.

QUESTION: But Mr. Morrison, Mr. Morrison, why do you accept the premise that in order to survive the motion for summary judgment he must explain the prior statement? He could certainly come in and say: Your Honor, I don't know what I said then. It may well have been wrong. It may well have been a lie. But here is the evidence that I currently am able to do the job with accommodation, whatever I said then.

Wouldn't that be enough to overcome a motion for summary judgment?

MR. MORRISON: Exactly, Justice Scalia, and yet it would be unfair --

QUESTION: Excuse me. Isn't that also exactly what the applicant is going to say in order to rebut the presumption that we're working with here? Isn't the court in fact going to end up with exactly the same material in front of it, and isn't the so-called burden shifting rather a fiction?

MR. MORRISON: Justice Souter, I don't agree that it is, that it is a fiction, because you're giving

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credibility to those statements made under oath at one time.

QUESTION: Isn't the difference that the evidence which this presumption requires is not evidence that he is now able to work with accommodation, but evidence to show that his prior statement was not perjurious?

MR. MORRISON: Exactly, Justice Scalia.

QUESTION: And if it was perjurious then he's out of court.

MR. MORRISON: Exactly, Justice Scalia.

QUESTION: And do you think that if the rule is otherwise he is going to ignore the risk of having his earlier statements regarded as being genuinely inconsistent and hence raising a presumption of perjury? I would assume no, he's going to explain it. So in any case the issue that ends up in the lap of the court is going to be exactly the same, it seems to me.

MR. MORRISON: Justice Souter, the statements that are made have to be given weight or credit in the course -- he can't just come in and say, I didn't mean it, or I was lying back then. They have to be given power to --

QUESTION: But Mr. Morrison, you're talking about credit and power. I think the inquiries from the

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bench are how does this affect the summary judgment matrix. I mean, it really doesn't do a lot of good to say a statement has to be given credit or power without placing it in some -- the litigation context.

MR. MORRISON: These matters, Chief Justice Rehnquist, will arise frequently at the summary judgment stage, and essentially what we would suggest is what the Fifth Circuit did. You have a foundation of judicial estoppel, which allows the credit to be given to the statement. That is, you cannot take a contrary position before the second court, if you will.

QUESTION: Mr. Morrison, I would like to stop you at that point --

QUESTION: I think he's still answering the question.

QUESTION: Oh, I'm sorry.

MR. MORRISON: And when that occurs, when that occurs, then the rebuttable presumption comes into play and you may try to explain. You may explain that away. If you are able to explain that away, then the summary judgment burden of going forward still exists and you try to go forward.

QUESTION: Thank you.

MR. MORRISON: So that's the matrix, Your Honor.

QUESTION: This notion of judicial estoppel, you

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talked about court. There's an irony here because there's a representation made to an agency about a condition that can change. Somebody can really be disabled. The doctor can say: I don't know if you'll ever get your speech back. We just don't know. It's a condition of uncertainty. She's not barred from filing her disability until we know five years from now.

The representation is made to an agency that Congress has said should be interested in getting the person off the disability roll and into the workplace. So the statute itself says there's nothing inconsistent between getting benefits and going back to work. In fact, that seems to be Congress' objective.

And yet your position seems to be this person can't seek employment, because if she does she's going to be in this bind of having -- being judicially estopped. The judicial estoppel works against the agency, works against the Social Security Administration, because they don't want to carry this person on the disability roll if the person is able to work.

So you are getting the benefit, it seems to me, of an estoppel that if it should benefit anybody, it should be the Social Security Administration, the taxpayers. And the taxpayers are benefited by your not having -- being able to use the estoppel. That's a very

curious thing about this case.

MR. MORRISON: Justice Ginsburg, that is the genius of the rebuttable presumption that tempers what could be considered the harshness of judicial estoppel. In other words, the party is presumed judicially estopped, but if she can --

QUESTION: But are there precedents in judicial estoppel where you never got anywhere near a court? Here there was never any court proceeding. How far did the thing go in the Social Security Administration?

MR. MORRISON: It went for 18 months, all the way through a decision by an administrative law judge. During that 18 months she continually represented that she was totally and completely disabled from all work in the national economy. Her Social Security Administration benefits were denied on three occasions. Each time they told her that she could do other work. One, she could be a kitchen helper or she could be a laundry folder.

QUESTION: But didn't she tell them when she went back to work? When she went back to her old employment, didn't she tell them?

MR. MORRISON: This is after, Justice Ginsburg, after she went back to work, and after she left work the second time she said she had been continuously disabled back to January the 7th of 1994. Her representations are

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not just that I'm disabled now, but that I have been continuously disabled for the past 18 months.

So her circumstances are that when the rebuttable presumption comes in -- and it's an ideal case for it -- the rebuttable presumption comes in and she is then required to say why these representations that she's been continually and completely disabled from all work in the national economy and from her past job are no longer true.

She was unable to do that. In fact, she brought the ADA suit two days before the administrative judge --

QUESTION: May I ask, because I'd still like to get this clear in my mind. I'm not aware of any other kind of situation where one party relies on an estoppel based on a statement that was made to some other person in whose interest it is not to have that estoppel.

MR. MORRISON: The point of the estoppel is that she has made a statement under oath binding on her, that she should be bound by her word unless --

QUESTION: Mr. Morrison, do you assume that it's in the interest of the Social Security System not to have the estoppel? Don't you think there has to be added to Justice Ginsburg's formula, which says of course it's in the interest of SSI to have the people who are on the rolls get off the rolls by getting a job, but it's also in

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the interest of SSI not to have people who don't belong on the rolls apply for benefits and get them?

MR. MORRISON: Exactly. It's also in the interest, Justice Scalia, of --

QUESTION: And someone who knows that statements that are false at that stage are going to cause trouble later on will not make those statements at that stage.

MR. MORRISON: Exactly my point.

QUESTION: But is your point any different than -- I hate to say this, but I don't understand what the disagreement is about. I thought I heard the SG and everybody saying, yeah, we agree to that; one thing an applicant cannot do is go in and say, wait, I am disabled, Social Security Administration, and then later in the next suit they can't come in and say, oh, no, no, no, what I said before was false.

Everybody says they can't say that. What they could say is, yes, yes, I did say I was disabled, I was disabled for purposes of the Social Security Act, that means I couldn't hold any job in the economy, and I'd like to tell you something; I just did it under subpart P, where they don't really look to see whether there's some other job somewhere, that's why.

Or you might say, you know what, I got better. Or they might say, you know what, nobody in this line of

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business is properly accommodating.

But they have to say something like that, and they can't just say, I didn't tell the truth before or sweep it under the rug.

Now, if they agree to that and you agree to that, why don't we end this case? What's this about?

QUESTION: Have they agreed to that, Mr. Morrison? Again, I question the premise. I thought -- I thought that what they would say is, I'm entitled to come in with evidence to show that I currently am entitled to accommodation and I can do the work with accommodation. Now, you're entitled to bring in that statement in the past and that'll go to the factfinder for whatever it's worth. But the factfinder can find that that statement in the past was false --

QUESTION: No.

QUESTION: -- but that's irrelevant to the decision.

QUESTION: No, no, I don't think they could. I think what you'd have to do is -- it's summary judgment, is that right? It's summary judgment. I mean, how does it work? It's summary judgment. Therefore the defendant has said, look, there's this statement she's disabled. At that point your opponent has to come in with a piece of information that shows there's a genuine and material fact

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that would entitle her to win. And to do that she has to explain that there's a difference now of the sort we're talking about, that Justice Kennedy mentioned or that I mentioned.

Now, is that your understanding of it or not?

MR. MORRISON: Justice Breyer, let me narrow slightly this issue. In this case, and I think it's important, what Mrs. Cleveland is saying is that she was able to work with a reasonable accommodation in April after her stroke. She is now saying that she was continuously disabled back to January 7th. Those statements are inconsistent and she is bound by that statement.

And under those circumstances, the rebuttable presumption should come into play and she should be required to explain that in some way. If she cannot --

QUESTION: Mr. Morrison, the problem I have with your explanation is that as I read the Fifth Circuit opinion they did more than just say she has to come in with an explanation. They said only under some limited and highly unusual set of circumstances can it be rebutted.

I don't understand that. That seems to be more than burden shifting, more than allowing her to come in with a reasonable explanation.

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MR. MORRISON: Justice O'Connor, I believe that their feeling at that time in making that statement was that the vast majority of these cases where you're totally disabled would not allow for the accommodation.

QUESTION: But that language as I read it does more than you are saying.

MR. MORRISON: Justice O'Connor, under those circumstances, where you're taking that language and pushing it to the suggestion that, on the spectrum analysis, that you'd almost never be able to recover, we do not articulate that as a standard.

QUESTION: Don't defend that as the standard?

MR. MORRISON: We don't defend that specific language way out there. However, I believe this tool that they've created is right in the center and that that dicta, while it is -- while it is very high rhetoric, if you will, if you apply the tools that they've created, it allows for some cases to be left available and other cases to not be left available.

So that what we have then is --

QUESTION: I can understand an ordinary we'll shift the burden concept. But it looks to me like they did more than that.

MR. MORRISON: Justice O'Connor, I don't believe they did more, and it may be because they were dealing

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with this case. In this case there was not only a showing that she was disabled and completely disabled and that she had sworn to that over a period of 18 months, that she was disabled back to her stroke date, but there was also a showing in the file underlying that accommodation would not be available to her.

She actually showed evidence in the record that, number one, the computer training, which she said might accommodate her, she tried computer training in October of 1994 for two weeks and she said she couldn't absorb what the teacher was saying and couldn't write down the notes, just the same problem she had in doing her job on the telephone.

QUESTION: Mr. Morrison, are you finished?

MR. MORRISON: Well, there were two -- I am, yes, sir.

QUESTION: Okay.

MR. MORRISON: What I meant was yes.

QUESTION: There's been considerable discussion of rebuttable presumption in your ADA case, where presumably the burden of proof is on the plaintiff. How much difference, if any, would a rebuttable presumption make in the summary judgment context?

MR. MORRISON: Your Honor, it would change the summary judgment matrix to the degree that someone could

not simply come in and say, I didn't mean that before. In other words, they're presumed to be bound by that in the absence of a credible evidence, admissible evidence explanation.

QUESTION: I suppose our problem here could be put in focus if we asked, what are we trying to do in the second trial? A, are we trying to find out the facts of her capabilities and her disabilities and her illnesses? Or B, are we trying to do that plus penalize her, discourage her, sanction her, for making false statements?

It seems to me that implicit in what the Fifth Circuit has done is a test -- an objective to do the latter, to discourage false statements, and that's what judicial estoppel is for, I suppose.

MR. MORRISON: Justice Kennedy, the primary goal is to focus on the search for the truth, and in that you cannot ignore past statements under oath. And so the secondary goal --

QUESTION: Because that's just standard admission against interest and we're trying to find out. It's a tool to find out what the facts are?

MR. MORRISON: It's more than an admission against interest, in the sense that it has been made in a judicial body, a position has been taken that is contrary to the current position being taken.

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QUESTION: Well, if you say it's just a search for the truth, you lose, because then it just goes in like all the other evidence. We have all this evidence that shows that she can't be accommodated, and among them is this statement that she herself made previously. That's just normal litigation.

What we're talking about here -- actually, I think we put it wrong. It's not shifting the burden in the sense of shifting it from one party to the other party. It's shifting the burden in the sense of changing, changing the nature of the burden. As I understand your position, what happens is when there has been this inconsistent statement the nature of the trial changes. She has to explain why that statement was true at the time, and if she cannot explain why it was true at the time she loses, even if, even if she carries her burden of showing that currently she is entitled to an accommodation.

Isn't that what you're saying?

MR. MORRISON: Yes, Justice Scalia.

QUESTION: And why is that?

MR. MORRISON: The reason for that is that she has made -- she has gone down a path of consistently telling one set of facts that are inconsistent with the current set of facts. This is more than just a factual

inquiry.

QUESTION: So we are attempting to vindicate the integrity of the administrative and the judicial system; is that the point?

MR. MORRISON: Yes, Justice Kennedy, we are attempting to vindicate it. But we are also attempting in this process to give the plaintiff a reasonable opportunity, which I think is what's so important, to explain it. It's only after that explanation is not available that you vindicate the process. You give that opportunity under the rebuttable presumption.

QUESTION: Would you agree with me that the petitioner and the government do not share that concern? The petitioner and the government are not interested in vindicating the integrity of the system, to punish for past malfeasance or past wrong. They are simply interested in knowing the facts of the disability. It seems to me that's why the two arguments don't meet here. Maybe I'm mischaracterizing their position.

QUESTION: Maybe the taxpayer ought to be vindicated and let's get her off the disability rolls and back to work if a reasonable accommodation is possible. I mean, that's theoretically in the balance, too.

MR. MORRISON: It is, Justice O'Connor, theoretically in the balance. However, if she's taken the

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position in her proceeding that she cannot be accommodated --

QUESTION: But why isn't that more than just in the balance, because Congress put into the statute that you can maintain your disability pay and work? So there was no deception before the ALJ, was there, as to -- this thing went on for how many months, and in the interlude she tried to go back to work, was unsuccessful. None of that was hidden in the agency proceeding, was it?

MR. MORRISON: Justice Ginsburg, none of that was hidden, and what she said during that whole proceeding is, I can't be accommodated, essentially, and I've been totally disabled back to January 7th. When she came into the ADA she said, oh I'm sorry, I really wasn't totally disabled during April and May of that year.

QUESTION: But the employer's position is consistent with hers to this extent: The employer is saying, we can't accommodate this woman; she's disabled.

MR. MORRISON: The employer, my position, yes, Your Honor, is --

QUESTION: But she said when she went back to work, she told Social Security, I'm not asking for benefits now because I'm working. The employer said, you can't work, you're disabled.

MR. MORRISON: Yes, and then she reapplied and

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made several assertions that she not only was disabled after she was terminated from her job, but that she had been disabled during the entire time from all work in the national economy.

QUESTION: But as far as the facts of what she did --

MR. MORRISON: Yes.

QUESTION: -- all of that was before the Social Security Administration when it made its decision?

MR. MORRISON: Yes.

QUESTION: They knew that she had gone back to work.

MR. MORRISON: Yes.

QUESTION: First part time, then full time. And then they made the decision that they did. But I don't understand an estoppel when the full record of everything that happened -- she withheld nothing from the Social Security Administration.

MR. MORRISON: That's the point, Justice Ginsburg. What she's now saying in the ADA proceeding is, time out, I'm sorry, I didn't really mean it, I wasn't really disabled during April, May, and June.

QUESTION: Well then, what is -- when Congress said you put in an application that says you're totally disabled --

MR. MORRISON: Yes.

QUESTION: But we know that some people with accommodation can work, and also that people surprise the medical profession, they get better.

MR. MORRISON: Yes.

QUESTION: And then sometimes they get worse.

MR. MORRISON: Right.

QUESTION: So we're setting up this program to encourage people, despite that statement that they've made, to work.

MR. MORRISON: To try to go back to work, yes, ma'am.

QUESTION: So I don't see that there's this clash, that if I said I'm disabled that means that I'm disabled today and will be disabled tomorrow.

MR. MORRISON: Justice Ginsburg, what she's saying is, I am disabled and have been disabled for the past 18 months, and she says that under oath consistently, I am and I have been. And then she sued us and she said to us, she said, I haven't been disabled for the past 18 months, in fact I was able to work with an accommodation. It's totally contrary to everything she had said before.

QUESTION: May I ask you to comment on this. One answer to the argument that you're making is that her statements were made using what I guess lawyers would call

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terms of art. She was talking about disability for the Social Security Act in terms of disability as understood through step three of the process of certification.

MR. MORRISON: It's through step five.

QUESTION: Well, I thought -- at any rate, through the steps, whatever number. And for purposes of ADA she's simply using the word in a different fashion. One reason that has been suggested in the briefs, although that's not what we're here to resolve, but I mean one reason that's been suggested in the briefs is that in her Social Security application she was using form language. In other words, she was using the language of Social Security's own application. That may or may not be ultimately a satisfactory explanation. I have no idea.

But isn't that a further reason for saying we ought to think twice before we set up presumptions, because in fact if people use the terms of statutes the way the statutes are written and the terms are not inconsistent with each other, even though they might seem to be in normal English, we don't want to penalize somebody by setting up this presumption?

What is your answer to that argument?

MR. MORRISON: Justice Souter, it is not sufficient to say that this case involves just the language on the record. It is much more substantive than

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that, and I think the better answer to that is that she is required under the Social Security Act to tell her condition as only she can tell it. And what she said is, I can't process information and data.

She was a telephone operator taking telephone information constantly and writing reports on that. She couldn't take in the information, process it through the aphasia that had occurred on the stroke, and put it down on a piece of paper. That's what she could not do.

She consistently said, I can't do it. In September of 1994 she said, I can't do it back to January 7th of 1994. She tried to work, she failed. She said, I can't work because of my condition, her aphasia, her stroke. And then she went on to say that 11 times.

In addition to that, when they said, you can do work as a kitchen helper or a laundry folder, she said, no, I can't, I can't even do that work.

She then proceeded to go to an administrative law judge, who said, looking at your five doctors and your three rehab specialists who say you're totally disabled and you cannot be rehabilitated and your own testimony that you cannot be rehabilitated, I agree. Two days before that order came out, she sued us under the Americans with Disabilities Act saying, I can be accommodated or I could have been during that last 18

months. It's not that I can be accommodated in the future.

She's got an absolute inconsistency here that has to be dealt with.

QUESTION: But your answer is, number one, she didn't just confine herself to the forms, and I take it your answer is no one, in effect, can plead that as an applicant he was just using forms, because you have to make discursive statements in which you tell facts not repeating formal language. Is that basically it?

MR. MORRISON: Exactly, Justice Souter, exactly.

So when we look at this matter altogether and we begin to focus on what the individual test would require in this case, we find that she's made this series of statements, and then you come back to her statement in the ADA case and it's completely inconsistent. Then the court has to deal with that tension, that obvious tension. How do they do that? They work with what should be a reasonable rebuttable presumption, basically giving full credit to her statements under oath.

QUESTION: Maybe courts should get matter about this than the Social Security Administration might.

MR. MORRISON: Well, the Social Security Administration should be upset about anyone who's taking contrary positions because they have an administrative

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quasi-judicial proceeding. The courts and the Social Security Administration should be upset with anyone who takes contrary positions between two Federal agencies.

QUESTION: How would that affect the Social Security's program of telling people, try to go back to work, we'll keep your benefits? You said you weren't disabled. We want you to work.

Shouldn't Social Security -- that seems to be a real clash.

MR. MORRISON: No, Justice Ginsburg, it's completely in sync with the meaning and point of the act. Number one, the Social Security Administration says, tell the truth about your condition, tell the truth from the beginning.

QUESTION: Well, but now look. The Social Security has certain disabilities that they automatically treat as qualifying -- blindness.

MR. MORRISON: Yes.

QUESTION: And yet the ADA clearly contemplates that for some blind people reasonable accommodation can be made. So there is a conflict, if you will, in the two approaches, and someone could apply for disability under one of those automatic provisions and yet qualify under ADA with reasonable accommodation. So you do have a problem.

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MR. MORRISON: Justice O'Connor, you could, you could come under part three of the test and say that, I fall within a statutory disability. However, if you go to part four you're saying, I cannot do the essential job functions of my last job. And if you go to part five you're saying, I cannot do any work in the national economy that's available in significant numbers, given my age, etcetera.

So what she has done in this case and what the Fifth Circuit was struggling with was what to do under those circumstances. And the Fifth Circuit specifically said that if there is a blindness or if there is two legs that are unavailable that that person could be an exception.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Morrison.

MR. MORRISON: Thank you very much.

CHIEF JUSTICE REHNQUIST: Mr. Wall, you have four minutes remaining.

REBUTTAL ARGUMENT OF JOHN E. WALL, JR.

ON BEHALF OF THE PETITIONER

MR. WALL: Mr. Chief Justice, please the Court:

The very troubling notion that's posed here by the respondent in this case is that somehow the matrix of the summary judgment system should be reinvented. As a

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practical matter, the presumption arises once the motion is filed. What we have is a complaint filed by the disabled, the motion is filed, the evidence comes forward in the form of the claim file, and then the explanation must be made.

QUESTION: Must it be made? I'd like to clarify whether Justice Breyer's assumption of your position is correct. Do you acknowledge that, even though in the summary judgment proceedings the plaintiff establishes that she currently could do the work with an accommodation, even though she establishes that, nonetheless if she does not establish that she was not lying previously she loses?

MR. WALL: Well --

QUESTION: Suppose you come in with all the evidence that shows she can be accommodated, but what you haven't done is explain the contrary statement she made earlier. Do you lose?

MR. WALL: I think not.

QUESTION: I didn't think you thought so.

QUESTION: If you take out the word "currently." Sorry, then I didn't understand it. I thought you said on day one your client has filed an application for Social Security saying, I'm totally disabled. On day two she's in court and she says, I want to tell you about day one.

On day one, the same day, I want to win under the ADA, and they say, what about your application to Social Security? She says, I'm not telling you a word about that, I refuse to explain it.

All right. Now, does your client win or not?

MR. WALL: Loses.

QUESTION: Fine, okay. Add something else. In the context of the summary judgment motion, although she doesn't explain the prior statement, she puts in a ton of evidence that demonstrates quite conclusively that her current condition can be accommodated. Does she win or lose?

MR. WALL: She wins.

QUESTION: I missed that.

QUESTION: I rest, I rest my case.

(Laughter.)

QUESTION: Your time has expired.

(Laughter.)

MR. WALL: The frightening proposition here is is that somehow these people for whom Mrs. Cleveland is the voice, the voice of one, the disabled, who cry from the wilderness, the wilderness of the world if the disabled, is that they are presumed to have lied. I have a fundamental problem with that concept, particularly in

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light of the fact that the Social Security Administration doesn't ask these questions that arise in the ADA, never inquires about accommodation.

In the normative, in the ideal world, what would happen here is in Mrs. Cleveland's case there would have been a referral from the investigator at the Texas Rehabilitation Commission to the EEOC and they would have sent the enforcement division there. But that doesn't happen, unfortunately.

QUESTION: But I thought it's been conceded that if all that she's done is to make the conclusory allegation that tracks the language of the statute that she's disabled, that that would not trigger this, this alteration in the summary judgment matrix. It's only when she makes very concrete statements -- I have been unable to do, I have been unable to lift my arm, I have been unable to do work. That's not terms of art.

MR. WALL: It still never inquires, Your Honor, about the question of accommodation.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wall.

The case is submitted.

(Whereupon, at 11:08 a.m., the case in the above-entitled matter was submitted.)

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Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

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CASE NO: 97-1008

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Fiona M. May
(REPORTER)