cial estoppel issue has arisen, for example, where courts have found that statements made on applications for social security benefits to the effect that the plaintiff is unable to work create a presumption that the plaintiff must rebut in order to show that he or she is qualified to work.[428]

EEOC, however, disagrees with this interpretation of the law. EEOC states that its position is that representations made in connection with an application for disability benefits should not be an automatic bar to an ADA claim.[429] A majority of courts agree with EEOC's interpretation.[430] For instance, in *Griffith v. Wal-Mart Stores, Inc.*, the Sixth Circuit found that statements made in an application for social security disability benefits, while relevant, do not require application of judicial estoppel, in part because such applications give no consideration to an individual's ability to work with reasonable accommodation, which is required under the ADA.[431] In *Talavera v. School Board of Palm Beach County*, the Eleventh Circuit reversed a district court's finding that an ADA plaintiff who has claimed total disability on a benefits application is *per se* estopped from claiming she could work with reasonable accommodation, because the Social Security Administration, in determining "disability," does not take into account the potential effect of reasonable accommodation on the claimant's ability to work.[432] In another case, *Smith v. Dovenmuehle Mortgage Inc.*, a district court held that the plaintiff was not judicially estopped from arguing that he was qualified under the ADA based on the reasoning that to hold otherwise would put the plaintiff "in the untenable position" of having to choose between his right to seek disability benefits and his right to seek redress for a possible violation of the ADA and that judicial estoppel would frustrate the ADA's purpose of combating discrimination against people with disabilities.[433]

Other courts, however, are interpreting the law based on a judicial estoppel analysis.[434] For instance, the Sixth Circuit, in *Shaheen v. Amsted Industries, Inc.*, found judicial estoppel the appropriate analysis to employ where claimant continues to receive disability disabilities benefits and seeks reinstatement under ADA.[435] In *McNemar v. Disney Store*, the Third Circuit held that an HIV-positive store manager who had stated on applications for disability benefits that he was totally and permanently disabled and unable to work was judicially estopped from claiming he was a qualified individual under the ADA.[436]

EEOC states that it has five purposes with this guidance. The first is to analyze the differ-

[428] *See, e.g.*, McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 562–563,1998 U.S. App. LEXIS 1058, *10 (5th Cir., 1998) (holding that statements on a social security benefits application created a presumption that plaintiff was not a qualified person with a disability and that plaintiff provided no evidence to rebut this presumption); *see also* Shaheen v. Amsted Industries, Inc., 1997 U.S. App. LEXIS 35312, *3 (6th Cir. 1997) (finding that judicial estoppel was the appropriate analysis to employ where claimant continued to receive disability benefits while seeking reinstatement under ADA).

[429] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. i.

[430] *See, e.g.* McCreary v. Libbey-Owens-Ford Co., 132 F.3d 1159, 7 1164 (7th Cir. 1997) (finding that statements certified to the Social Security Administration claiming inability to work do not bar ADA claims because Social Security Administration definition of disability differs from that of the ADA, making disability benefits application statements inconclusive in an ADA case); Blanton v. Inco Alloys Int'l, 123 F.3d 916, 917 (6th Cir. 1997) (finding that receipt of social security benefits does not automatically estop an ADA plaintiff from claiming he could perform his job, although it is a factor to consider); Weigel v. Target Stores, 122 F.3d 461, 466–67 (7th Cir. 1997) (holding that because the Social Security Administration's definition of disability, as well as those of most disability insurance plans, differs materially from the ADA's definition of a "qualified individual with a disability," these representations are not conclusive as to the ADA). Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (a determination of disability for Social Security Act purposes cannot be construed as a judgment that an individual cannot do a particular job).

[431] Griffith v. Wal-Mart Stores, Inc., 135 F.3d 376 (6th Cir. 1998).

[432] Talavera v. School Bd. of Palm Beach County, 129 F.3d 1214, 1220 (11th Cir. 1997).

[433] Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1141–43 (N.D. Ill. 1994).

[434] *See, e.g.*, McConathy v. Dr. Pepper/Seven Up Corp., 1998 U.S. App. LEXIS 1058, *10 (5th Cir., 1998) (holding that statements on a Social Security benefits application created a presumption that plaintiff was not a qualified person with a disability and she provided no evidence to rebut this presumption); August v. Offices Unlimited, Inc., 981 F.2d 576, 583–84 (1st Cir. 1992) (treating the plaintiff's statements regarding disability to insurance carriers as binding admissions).

[435] 1997 U.S. App. LEXIS 35312, *3 (6th Cir. 1997).

[436] McNemar v. Disney Store, 91 F.3d 610, 619–21 (3rd Cir. 1996), cert. denied, 117 S. Ct. 958 (1997). However, according to a Senior EEOC Attorney, after EEOC issued its policy guidance on the issue, the Third Circuit has called into question the *McNemar* decision. *See* NIDRR ADA Technical Assistance Program Project Directors' Meeting, Feb. 24–25, 1998, summary (OCRE files), statement of Sharon Rennert, p. 4.

ences between ADA's purposes and standards and those of other disability benefit programs.[437] The second is to discuss and analyze recent and significant court decisions that have addressed the judicial estoppel issue.[438] The third is to explain why judicial estoppel should not be used to bar ADA claims of individuals who also have applied for disability benefits.[439] The fourth purpose is to explain why EEOC's position on this issue is supported by public policy.[440] Finally, EEOC seeks to provide guidance to investigative staff in assessing what weight, if any, to give to representations made in applications for disability benefits in determining if an ADA claimant is a "qualified individual with a disability" for purposes of the ADA.

EEOC's Analysis

Fundamentally Different Purposes and Standards in ADA

The guidance opens its argument by stating that the ADA's definitions of the terms "disability" and "qualified individual with a disability" are "tailored to the broad remedial" purposes of the statute," including the elimination of barriers preventing individuals with disabilities from gaining access to the mainstream of American life, equal employment, and other opportunities.[441] As a result, the definitions of "disability" and "qualified individual with a disability" under the ADA differ from the definitions of the same or similar terms in the Social Security Act, State workers' compensation laws, disability insurance plans, and other disability benefits programs. Terms in these laws are tailored to their specific purposes just as terms in the ADA are tailored to its purposes.

The fundamentally different purposes of these laws are a key element of the guidance's argument that representations made by an individual in applying for disability benefits should not bar him or her from bringing an ADA claim. In advancing this argument, the guidance relies on several specific ways in which the ADA's requirement of a "qualified individual with a disability" differs from requirements of disability benefit schemes. First, the guidance notes, the ADA is based on the fundamental principle "that individuals who want to work and are qualified to work must have an equal opportunity to work," and the requirement for a "qualified individual with a disability" reflects this principle.[442] Second, the "qualified individual with a disability" requirement focuses on what an individual can do, as opposed to what he or she cannot do, which is the focus of the disability benefit schemes.[443] Third, a determination of whether an individual is a "qualified individual with a disability" requires an individualized assessment of a person's abilities, as opposed to an evaluation of general or group characteristics.[444] Finally, the 'qualified individual with a disability" requirement "looks at whether an individual with a disability is qualified for the specific position at issue, not at whether s/he is qualified for work in general."[445]

Determining if an individual is a "qualified individual with a disability" under the ADA must be made in keeping with these principles. This determination requires two steps: the first is to determine if the individual has the "education, training, skills, experience, and other job-related credentials for the position";[446] the second step is to determine if the individual can perform the essential functions of the job with or without reasonable accommodation. The guidance reiterates the principles on which this determination must be based, e.g., an individualized, case-by-case assessment of the specific abilities of the person and a focus on "whether a

[437] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 2.

[438] Ibid.

[439] Ibid.

[440] Ibid., p. 3.

[441] Ibid.

[442] Ibid., pp. 4–5 (citing 42 U.S.C. § 12101(a) (9) (1994) (noting that discrimination "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous.")).

[443] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 5 (citing 135 CONG. REC. S10,711 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin)).

[444] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 5 (citing 42 U.S.C. § 12101(a) (7) (1994) (denouncing "stereotypic assumptions not truly indicative of the *individual ability* of [people with disabilities] to participate in, and contribute to, society") (emphasis added)).

[445] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 5

[446] Ibid., p. 6.

particular individual with a disability is qualified for a particular position, not whether the individual or a group of individuals with a disability is qualified for a class of positions."[447]

The guidance contrasts the purposes and standards of the ADA with those of social security, workers' compensation, and disability insurance.[448] Each discussion shows clear contrasts between the purposes and standards of the various disability benefits plans and those of the ADA. For example, the guidance contrasts the ADA with the Social Security Act (SSA)[449] by noting that the latter "establishes a social insurance program designed to provide guaranteed income to individuals with disabilities when they are found to be generally incapable of gainful employment."[450] The guidance further notes that, in contrast to the ADA's definitions of "disability" and "qualified individual with a disability":

> The SSA definition of the term "disability," . . . reflects the obligation to provide benefits to people who generally are unable to work. As a result, the definition focuses on what a person cannot do and on whether s/he cannot find work in the national economy in general.[451]

Workers' compensation laws also differ significantly from the ADA—for example, they are based on general classifications of disability and ability to work.[452] Disability insurance, the guidance observes, is meant to provide partial wage replacement to employees whose health conditions prevent them from working.[453] As a result, just as with SSA and workers' compensation laws, disability insurance plans focus on what a person with a disability cannot do rather than on what he or she can do.[454]

In determining eligibility for benefits, the guidance explains, an essential requirement under the SSA is that the claimant must be unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[455] This standard is substantially different from that of the ADA in the way it describes work and the way it describes disability.

The next important difference is that the ADA focuses on an individualized assessment of a person's ability to work, while the SSA relies on a general profile.[456] The guidance further notes that the ADA distinguishes between essential and nonessential functions in determining whether an individual with a disability is qualified to work.[457] The SSA does not make this distinction, so someone who can perform essential but not all job functions may be disabled under SSA while the same individual would be a qualified individual with a disability under the ADA.[458] Finally, the guidance notes that the ADA determination is based on a consideration of whether an individual can perform essential job functions if provided with reasonable accommodation.[459] The SSA system does not consider reasonable accommodation in making its determination as to ability to work.[460]

The SSA regulations explicitly recognize that its determinations are based on social security

---

[447] Ibid. (citing 29 C.F.R. pt. 1630 app. (noting in "Background" section that "the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis" and that a "case-by-case approach is essential if qualified individuals of varying abilities are to receive equal opportunities to compete for an infinitely diverse range of jobs.")).

[448] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 7.

[449] *See generally,* 42 U.S.C. §§ 301–1397f (1994).

[450] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 8.

[451] Ibid.

[452] Workers' compensation laws typically provide the following four classifications of disability: temporary partial, temporary total, permanent partial, and permanent total. Ibid., p. 14.

[453] Ibid., p. 16.

[454] Ibid.

[455] Ibid., p. 8 (citing 42 U.S.C. § 423(d) (1) (A) (1994); 20 C.F.R. § 404.1505 (1997)).

[456] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 11 (stating "whereas the ADA always requires an individualized inquiry into the ability of a particular person to meet the requirements of a particular position, the SSA permits general presumptions about an individual's ability to work.").

[457] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 11–12.

[458] Ibid., p. 12.

[459] Ibid. (stating: "the definition of the term 'qualified individual with a disability' expressly requires consideration of whether the individual can perform essential functions with reasonable accommodation.") *See* 42 U.S.C. §§ 12111(8) (1994) (citation added).

[460] *See generally* 42 U.S.C. §§ 423(d), 1381–1383 (1994).

law and that, as the guidance notes, "a decision by any other entity about whether an individual is disabled is based on the entity's rules and may not be the same as the SSA's determination."[461]

In the section of the guidance discussing the SSA program, EEOC also argues that courts are wrongly applying the judicial estoppel analysis by explaining that although the SSA program is based on serving people with disabilities who are deemed unable to work, even the SSA recognizes that an individual may be found unable to work under its definition but still be capable of working in a particular position. The guidance explains that although the SSA program is designed to provide a guaranteed income to people who meet its eligibility requirements, it has work incentives built into it. For example, the SSA has a trial work period that allows beneficiaries to work for 9 months while still receiving benefits.[462]

EEOC provides hypothetical examples in illustration and cites caselaw to support its position. The first example involves an individual whose disability is the loss of both hands and feet. The listed impairments in SSA's regulations include the loss of both hands and feet in its musculoskeletal category of impairment. Because this is a listed impairment, an individual who has lost both hands and feet may be presumed unable to work for purposes of SSA's disability benefits determination. However, under the ADA, the same individual can be a "qualified individual with a disability" who is capable of working and performing the essential functions of a job with or without reasonable accommodation.[463]

The second hypothetical example involves an individual who is blind. Under the SSA, any claimant over 55 with a visual impairment that meets the statutory definition of blindness is presumed to be incapable of "substantial gainful activity" and deemed eligible of SSA disability benefits. There are a number of reasons why this individual might be considered qualified to work under the ADA. First, the SSA, unlike the ADA, does not consider whether there is a reasonable accommodation that might allow this individual to perform the essential functions of a particular job. Second, there are no statutory definitions of disabilities under the ADA that presume an individual incapable of working.[464]

The guidance notes several cases that support EEOC's position. For instance, in *Overton v. Reilly*,[465] the Seventh Circuit held that a determination of disability for purposes of SSA cannot be construed to mean that an individual cannot do a particular job. Another case the guidance cites is *Eback v. Chater*,[466] in which the Eighth Circuit stated that SSA's determination as to whether an individual can engage in "substantial gainful activity" is a generalized one and not based on an individualized assessment of the requirements or accommodations of a particular job.[467]

The guidance's discussion of workers' compensation and disability insurance plans points out the differences from the ADA. For example, workers' compensation laws focus on lost earning capacity, and on what the worker "can no longer do rather than on what s/he still is capable of doing with or without reasonable accommodation."[468] Also, in determining disability, workers' compensation laws do not distinguish between essential and nonessential job duties; nor do they consider reasonable accommodation. As a result, "a person may be 'totally disabled' for workers' compensation purposes and yet still be able to perform a position's essential functions with or without reasonable accommodation."[469] Like the other disability benefits plans, disability insurance plans often do not distinguish between essential and nonessential job functions;[470] and they "frequently do not make allowance for an individual's ability to work with reasonable accommodation."[471]

EEOC's subsequent legal analysis has two parts. The first is a section on how the ADA definition of "qualified individual with a disabil-

[461] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 11 (citing 20 C.F.R. § 404.1504 (1997)).

[462] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 9 (citing 20 C.F.R. § 404.1592(a) (1997)).

[463] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 11, n. 41.

[464] Ibid., pp. 11–12, n. 41.

[465] 977 F.2d 1190, 1196 (7th Cir. 1992).

[466] 94 F.3d 410 (8th Cir. 1996).

[467] *Id.* at 412.

[468] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 13–16.

[469] Ibid., p. 15.

[470] Ibid., pp. 16–17.

[471] Ibid., p. 17.

ity" always requires an individualized assessment under the ADA, whereas the three other schemes, SSA, workers' compensation, and disability insurance plans, permit generalized inquires and presumptions.[472] The second part of the analysis discusses how the ADA definition of "qualified individual with a disability" requires consideration of reasonable accommodation whereas in the other schemes, the equivalent definition of disability does not.[473]

The analysis opens by stating the proposition developed in the earlier sections, namely, that "an individual may be 'unable to work' for purposes of a disability benefits program and yet still be able to perform the essential functions of a particular position with or without reasonable accommodation."[474] The guidance supports this statement with precedent in the caselaw.[475] For example, the guidance notes a case, *Robinson v. Neodata Services, Inc.*,[476] in which the Eighth Circuit found that SSA determinations of disability "are not synonymous with a determination of whether a plaintiff is a 'qualified' person for purposes of the ADA." In another case cited in the guidance, a court found that a finding by a State workers' compensation commission or the SSA does not automatically foreclose an ADA claim.[477]

In the analysis of the ADA's requirement of an individualized assessment in determining whether someone is a "qualified individual with a disability," the guidance states that unlike the various disability benefit schemes, the ADA never presumes that some impairments are so severe as to prevent an individual from working. In fact, the ADA presumes the opposite, that individuals with disabilities can work.[478] The guidance cites numerous cases in which courts have agreed that the ADA's requirement of an individualized assessment in determining disability and ability to work is a fundamental difference between the ADA and the various disability benefits programs, which rely on generalized classifications.[479]

This part of the analysis also addresses *McNemar v. The Disney Store, Inc.*,[480] a case that disagrees with EEOC on the judicial estoppel issue. The *McNemar* court rejected the argument that because ADA's purposes and standards are fundamentally different from those of the SSA's, their conclusions as to qualifications and ability to work may differ significantly. The guidance states that the *McNemar* court wrongly decided the case because it had "overlooked the fact that 'unable to work' for SSA purposes does not mean unable to perform the essential functions of a particular position with or without reasonable accommodation."[481]

In the second part of its analysis, the guidance emphasizes that the ADA, unlike the various disability benefits plans, requires an assessment as to whether an individual can work with a reasonable accommodation. In this discussion, the guidance further develops its argument with case precedent. For example, the guidance cites the case of *D'Aprile v. Fleet Services Corporation*,[482] in which the court found that an application for disability benefits "sheds no light" on how the plaintiff would have fared had the reasonable accommodation she had requested been made.[483] Like *D'Aprile*, the cases discussed in this part of the analysis stand for the proposition that receipt of disability benefits does not show that an individual is totally un-

[472] *See* ibid., pp. 18–19.

[473] *See* ibid., pp. 19–23.

[474] Ibid., p. 18.

[475] Ibid. (citing Robinson v. Neodata Services, Inc., 94 F.3d 499, 502 n.2 (8th Cir. 1996); Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992); Pegues v. Emerson Electric Co., 913 F. Supp. 976, 980 (N.D. Miss. 1996); Palmer v. Circuit Court of Cook County, 905 F. Supp 499, 508 n.10 (N.D. Ill. 1995), *cert. denied*, 118 S. Ct. 893 (1998) ; Smith v. Dovenmuehle Mortgage, Inc., 859 F. Supp. 1138, 1141–43 (N.D. Ill. 1994)).

[476] 94 F.3d at 502 n.2.

[477] Pegues, 913 F. Supp. at 980. The court in *Pegues* noted, however, that the substance of plaintiff's testimony and representations made in the workers' compensation and social security administration proceedings and their subsequent findings "trouble this court and pose the greatest hurdle for [plaintiff]." The court found against the plaintiff.

[478] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 19.

[479] Ibid., pp. 20–22 (citing Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992); Smith v. Dovenmuehle Mortgage, Inc. 859 F. Supp. 1138, 1141 (N.D. Ill. 1994); Daffron v. McDonnell Douglas Corp., 874 S.W. 2d 482, 486 (Mo. Ct. App. 1994)).

[480] 91 F.3d 610 (3rd Cir. 1996) *cert. denied*, 117 S. Ct. 958 (1997).

[481] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 21–22.

[482] 92 F.3d 1 (1st Cir. 1996).

[483] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 24 (citing 92 F.3d 1, 5 (1st Cir. 1996)).

able to work, because disability benefit plan applications do not consider whether the person could work with a reasonable accommodation.[484] In concluding this analysis, the guidance states that the cases discussed demonstrate that "an individual can meet the eligibility requirements for disability benefits and still be able to perform the essential functions of particular positions with reasonable accommodation."[485]

Role of Representations Made in Applications for Disability Benefits

The second section of the guidance sets forth EEOC's position that judicial estoppel should not be used as a bar to an ADA claim where the claimant has made previous representations on applications for disability benefits.[486] The guidance addresses the doctrine of judicial estoppel and the role of summary judgment in cases involving ADA claimants who previously have applied for disability benefits.[487] EEOC sets out several reasons why courts should not invoke judicial estoppel to bar ADA claims. First, an individual who claims that he or she is both "totally disabled" and a "qualified individual with a disability" has not necessarily made inconsistent statements.[488] Second, the guidance notes that the doctrine of judicial estoppel generally has applied only when an individual made his or her earlier inconsistent statement in a prior *judicial proceeding*. However, applications for disability benefits are made as part of an administrative determination, a wholly different process. The guidance observes "[a]ccordingly, courts that have recognized the significant differences in judicial proceedings and administrative determinations have declined to apply judicial estoppel to bar claims of disability discrimination."[489] A third argument is that several circuits have refused to recognize the doctrine of judicial estoppel, so it has not been universally accepted as a legitimate legal theory.[490]

The guidance argues that summary judgment, a judicial determination of whether a trial is necessary, should not be granted to ADA defendants on the basis that the claimant previously has filed an application for disability benefits. In this discussion, the guidance notes that a court only will grant summary judgment where it determines that there is no genuine issue of material fact.[491] The guidance argues that because an individual's representations on an application for disability benefits do not mean that he or she is incapable of performing essential functions of a job with reasonable accommodation, the application for disability benefits does not mean that there is no question as to whether the individual is a "qualified individual with a disability."[492]

The guidance notes that some weight may be given to representations made on disability benefits applications in determining whether an individual is a "qualified individual with a disability." Context and timing are the criteria for deciding how much weight is allowed. For context, the guidance states that representations made on disability benefits applications should not be viewed in a vacuum, but rather in the context of all other relevant documents and the conditions under which the individual applied for the benefits.[493] For example, the guidance cites cases where individuals who applied for disability had done so only after their employers had refused to provide reasonable accommoda-

---

[484] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," pp. 23–26 (citing Eback v. Chater, 94 F.3d 410, 412 (8th Cir. 1996); D'Aprile v. Fleet Services Corp., 92 F.3d 1 (1st Cir. 1996); Kennedy v. Applause, 90 F.3d 1477 (9th Cir. 1996); Ward v. Westvaco Corp., 859 F. Supp. 608, 615 (D.Mass. 1994)).

[485] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 26.

[486] Ibid., p. 28.

[487] Ibid.

[488] Ibid. (citing Smith v. Dovenmuehle Mortgage Co., 859 F. Supp. 1138 (N.D. Ill. 1994)).

[489] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 28 (citing Mohamed v. Marriott, 944 F.Supp. 277, 283–84 (S.D.N.Y., 1996)).

[490] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 27 citing United Mine Workers of America 1974 Pension v. Pittston Co., 984 F.2d 469, 477 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993); Chrysler Credit Corp. v. County Chrysler Inc., 928 F.2d 1509, 1520 n.10 (10th Cir. 1991)).

[491] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 29 (citing Fed. R. Civ. P. 56(c)).

[492] EEOC, "Enforcement Guidance on the Effect of Representations Made in Applications for Benefits," p. 30.

[493] Ibid., p. 31.