

amended, 43 P.S. §§ 951- 963 and on the basis of his age, in violation of the Age Discrimination in Employment Act. Massey alleged that he was qualified for the vacant position of welding instructor at the School when he was interviewed for the position on November 2, 2000 and that he was not selected because of his race and age.

Prior to his application for employment with the School, Massey had worked for Trinity Industries (Trinity) though November 25, 1997. While at Trinity, Massey was injured on the job when he was hit with a steel beam. From the date of his injury, until his application with the School, Massey was unemployed.

Subsequent to his separation from Trinity, Massey, on May 20, 1999, made an application for disability insurance, benefits alleging that he was totally disabled and unable to work. (R.R. at 295a.) Massey's application was denied because he failed to take a medical examination that the social security administration had asked him to take at his own expense. (R.R. at 308a.)

On February 15, 2000, Massey, who was represented by counsel, filed a request for reconsideration, alleging that "I feel that I am disable[d] according to the guidelines set forth by the Social Security Administration." (R.R. at 312a.) He further indicated that he was unable to work. (R.R. at 314a.) To support his contention of total disability, Massey submitted a reconsideration disability report, which was completed on February 8, 2008, some nine months prior to his interview with the School. In the report, Massey stated that he was experiencing pain, suffering and memory loss. He stated, "I don't know any type of job I can do, unless I am

seriously medicated where I would be unsafe to be on the job. It affects my concentration when I'm in pain.” (R.R. at 316a.)

On March 4, 2000, Massey completed a personal pain questionnaire in which he revealed that he was taking Neurontin and Hydroquinone, a controlled substance, daily. With regard to activities that he had to restrict or stop because of pain, Massey reported that he had trouble walking, sitting, bending, sleeping and crawling. When asked to describe his activities in a twenty-four hour day, Massey stated that “all my days vary now due to my medications. I restrict driving to times when the pain levels are low & when my medication is wearing off during painful periods. I do hardly any work & repairs. I fish hardly not at all. I used to fish regularly.” (R.R. at 323a.)

On March 10 to 13, 2000, Massey completed a subsequent daily activities questionnaire. In that document, he stated “I usually can't do much without resting and/or medication. I sometimes try to prepare a meal for myself around noon or when my daughter comes home.” (R.R. at 325a.) When asked how his daily activities changed because of his injury he answered, “Yes considerably, I rely on my daughter & family members outside my home to assist me.” (R.R. at 325a.) He also claimed to have suffered short term memory loss because of the accident, is unable to sleep and cannot mop or vacuum the floor. (R.R. at 326a.) Massey also claimed he is unable to drive long distances, that it takes him a while to handle his bills and complete forms because of his back and neck condition. (R.R. at 326a.)

In a letter sent in April of 2000, Massey's request for social security disability was denied, in that it was determined that Massey's condition was not severe enough to keep him from working. In response to the denial, Massey applied for a hearing before an administrative law judge (ALJ), again claiming disability according to the guidelines set forth by the social security administration. (R.R. at 351a.) In support of his appeal, Massey completed a daily activity questionnaire dated June 27, 2000, wherein he stated that he had difficulty completing household chores, had difficulty cooking and needed assistance with putting on his socks, shoes and in grooming his hair. (R.R. at 356a-357a.)

Massey was thereafter granted a hearing, which was held on August 23, 2000. In a decision dated September 13, 2000, the ALJ granted Massey's application for social security disability benefits. The ALJ made the following relevant findings:

1. The claimant met the disability insured status requirements of the Act on November 25, 1997, the date the claimant stated he became unable to work
2. The claimant has not engaged in substantial gainful activity since November 25, 1997.
3. The medical evidence establishes that the claimant has discogenic disorders of the back, diabetes mellitus, diabetic neuropathy of the legs, a brain and spinal cord injury, chronic obstructive pulmonary disease, obesity and sleep thyroid disorder, impairments which are severe within the meaning of the regulations but which do not meet or equal the criteria of any impairment listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's assertions concerning his impairments and their impact on his ability to work are generally credible.
5. The claimant lacks the residual functional capacity to perform substantial gainful activity due to his combination of impairments, especially memory loss, confusion, and fatigue.
6. The claimant is unable to perform his past relevant work.
7. The claimant is 47 years old, a "younger individual age 45-49," has a high school education and semi-skilled work experience but has acquired no transferable work skills.
8. Considering the claimant's age, education, work experience, and residual functional capacity, the claimant cannot make a successful vocational adjustment to any jobs which exist in significant numbers in the national economy.
9. The claimant has been under a disability, as defined in the Social Security Act, since November 25, 1997 (20 C.F.R. §404.1520).

(R.R. at 337a-338a.)

On October 29, 2000, forty-six days after Massey was declared totally disabled, Massey submitted a resume and letter of interest to the School for the position of welding instructor. On November 2, 2000, Massey interviewed for the position. None of the materials submitted by Massey to the School or the information contained on the interview sheets reveals any information indicating that Massey was disabled.

According to Massey's deposition testimony, he claimed that he was medically able to go back to work in the year 2000, when he applied for

the job at the School. He stated that he was in general good physical condition at the time of his interview. Ultimately, Massey was not selected for the position at the School.

In granting the School's motion for summary judgment, the trial court observed that the pursuit and receipt of social security disability benefits does not automatically estop the recipient from pursuing a discrimination claim, nor does the law erect a strong presumption against the recipient's success under the age discrimination laws. Cleveland v. Policy Management Systems Corporation, 526 U.S. 795 (1999), Detz v. Grenier Industries, Inc., 346 F.3d 109 (3d Cir. 2003). However, a recipient's previous statements to the social security administration cannot be ignored.

When faced with a plaintiff's previous sworn statement asserting "total disability" or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless "perform the essential functions of [his] job, with or without "reasonable accommodations."

Cleveland at 807.¹ In other words, a plaintiff is required to offer 'a sufficient explanation. Id.

¹ "While Cleveland only specifically addressed a conflict between SSDI and ADA claims, the analysis is not limited in its application to cases involving those particular statutory and administrative schemes. Like an assertion that one is a 'qualified individual' for ADA purposes, a declaration that one is a 'qualified individual' under the ADEA is a 'context-related legal conclusion' therefore, a prima facie showing under the

The trial court went on to examine the requirements necessary to obtain social security disability benefits and the elements necessary to establish a *prima facie* case of race and age discrimination. Specifically, in order to qualify for social security disability benefits, an applicant must be incapable of performing his past relevant work and must be found to be unable to perform any other job existing in significant numbers in the nations economy.² As to the requirements necessary to establish a *prima facie* case of race and age discrimination, the plaintiff must show that he applied for a job for which he was qualified.³

ADEA that conflicts with earlier statements made to the SSA is subject to the same analysis ... in Cleveland” Detz, 346 F. 3d at 117.)

² According to Detz, the social security administration applies a five-step test to determine eligibility.

The five-step procedure consists of the following set of inquiries: (1) Is the applicant presently working? If so, he is ineligible. (2) Does the applicant have a “severe impairment” that “significantly limits” his ability to perform basic work activities? If not, he is ineligible. (3) Does the applicant’s impairment match one that is included on a list of specific impairments compiled by the SSA? If so, he is eligible and inquiry ends here. (4) If the applicant’s impairment is not on the SSA list, can he perform his “past relevant work?” If so, he is ineligible. (5) If the applicant’s impairment is not on the list and he cannot perform his “past relevant work,” can he perform other jobs that exist in significant numbers in the national economy? If not, he is ineligible.

Detz at 113, n1.

³ To establish a *prima facie* case of discrimination, the plaintiff must show:

1. That he is a member of a protected class.
2. That he applied for a job for which he was qualified.
3. That he was rejected.
4. That the defendant continues to seek applicants of equal qualifications.

According to the trial court, Massey represented to the social security administration that he was totally disabled and could not work. The ALJ found that Massey met the disability requirements for benefits and that Massey's assertions regarding his impairments and his inability to work were credible, that he lacked functional capacity to perform substantial gainful activity due to his impairments, memory loss, confusion and fatigue and that he could not perform his past relevant work.

Shortly after the decision granting him disability benefits on September 13, 2000, Massey applied for the instructor position with the School on November 2, 2000, representing that he was "qualified" to do the work. He represented that he could perform the job at a level that met the School's legitimate expectations.

The trial court observed that Massey made inconsistent statements with regards to social security disability benefits and his ability to perform the job with the School. The trial court further determined that Massey did not reconcile the inconsistent statements. Massey had a good faith belief in the statements he made to the social security administration that he was disabled and could not do any work. At about the same time in the year 2000, Massey represented that he was capable of performing the position of welding instructor. Massey, like the applicant in Detz, did not adequately explain his inconsistent positions and, as such, the trial court granted summary judgment.

McDonnell-Douglas Corp. v. Greene, 411 U.S. 792, 802 (1973).

On appeal, Massey argues that he adequately reconciled any conflicts in his position regarding social security disability benefits and his ability to perform the welder instructor position.⁴ We disagree.

Initially, we observe, as did the trial court, that Massey expressed to the social security administration officials that he was totally disabled and unable to work. It was determined by the social security administration that Massey's assertions regarding his impairments and the impact on his ability to work were credible and that Massey lacked residual functional capacity to perform substantial gainful activity due to his impairments, memory loss, confusion and fatigue.

Such is contrary to Massey's position some forty-six days later when he applied for the position of welding instructor and claimed that he was qualified to do the work. As stated in Detz, to be qualified, an individual must have been performing his job at a level that met his employer's legitimate expectations at the time of separation.

Moreover, as determined by the trial court, Massey did not adequately reconcile his inconsistent positions. Despite claiming that he was totally disabled and unable to work because of his memory loss, fatigue and confusion, Massey maintained in his deposition testimony, that forty-six days later, he was in physically good condition and qualified to perform the position of welding instructor. In attempting to explain the inconsistencies, Massey testified:

⁴ Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admission and affidavits, if any, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Kniaz v. Benton Borough, 642 A.2d 551 (Pa. Cmwlth. 1994).

Q. So Mr. Massey, what you're telling us is that you are physically capable of working today.

A. Yes.

Q. And you were physically capable of working in November of 2000 as a welding instructor?

A. I feel that I could have done it, yes.

Q. Then tell me, Mr. Massey, why did you accept disability benefits when you were capable of working?

A. Because that job wasn't available.

Q. So are you telling us, when the Administrative Law Judge said that you lacked the capacity to perform substantial gainful activity – and I've already told you what that means. That means you can't work for money – due to your combination of impairments especially your memory loss, your confusion and fatigue, are you saying that's not true, Mr. Massey? Are you saying that on September 13th, 2000 you were capable of engaging in work for money? Is that your testimony today?

A. I'm saying had that been an option and we could have entertained that fact of me going to work there, that may have been another option for me, yes.

Q. Is it true or not Mr. Massey – that's all I want to know. Is it true that you were incapable of working at any occupation or at any job that you could earn money in August of 2000, in September 2000? Could you have worked for money in that time frame?

A. It was their determination. They made the determination that I was disabled right? They made the determination.

(R.R. at 282a-283a.) The explanation offered by Massey does not reconcile his inconsistent positions. Massey maintained to the social security administration officials that he was disabled and stated without qualification that he was unable to work. (R.R. at 216a.) Only a short time later, Massey maintained that he was qualified and able to perform the position of welding instructor. Although Massey maintains that the welding position was not available at the time that his disability claim was pending before the social security administration officials, such does not adequately explain his contention that he was unable to perform any work and was disabled.

The positions taken by Massey in his application for social security benefits and in his race and age discrimination suit are inconsistent. In seeking social security benefits, Massey claimed that he was totally disabled and could not perform any work. In his deposition testimony with respect to his race and age discrimination claims, he maintained that he was qualified for the welding instructor position and that he could work and perform the job of welding instructor. As determined by the trial court, his explanation as to the inconsistencies “is, quite clearly, not good enough.” (Trial court opinion at p. 11.)

In accordance with the above, the decision of the trial court is affirmed.

JIM FLAHERTY, Senior Judge

