Understanding the Relationship and Fit between Workers' Needs as Reflected in SSI and SSDI Claims and EEOC Charge Data and Court Decisions with Regard to Reasonable Accommodations

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Abstract

Individuals with disabilities who seek to remain in or return to the workforce may need accommodations to perform successfully. These workers have a right to reasonable accommodations from employers under Title I of the Americans with Disabilities Act (ADA). However, this statutory accommodation right as it has been interpreted by courts may not fit well with workers' actual accommodation needs. To understand the relationship between the accommodation needs of these workers and how accommodation is legally understood, this research sought to determine what the legal record reflects with regard to reported accommodation and discrimination complaints and how those complaints were resolved, as well as how those findings can be applied to Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) beneficiaries who wish to continue working or return to work. The healthcare industry was a primary focus of the study. Data was obtained from three primary sources: Equal Employment Opportunity Commission charge data, SSA National Beneficiary Survey (NBS) Round 5 data, and federal district and appellate court case law concerning post-ADA Amendments Act (ADAAA) failure to accommodate claims. The research design was empirical and quantitative. Findings show that SSI and SSDI beneficiaries wish to return to work or continue working, and many may require reasonable accommodations to do so. Key legal standards are identified, outlining certain elements that must be met in order to prevail on a theory of discrimination under the ADA. Case law findings show that certain accommodations are less likely to be determined reasonable in a healthcare setting, and that some accommodations are observed to be unreasonable as a matter of law across all industries. Employees working in the healthcare industry are less likely to survive attempts at dismissal before trial than are employees in other industries. Findings from cases surveying a number of industries demonstrate several reasons that employees fail to survive at the summary judgment stage and suggest tools they can use to advocate for themselves, supporting their initial request for accommodation and engaging in the ensuing interactive process so that they may never reach the stage of filing a charge of disability discrimination under the ADA. In the alternative, for those cases that continue to reach the courts, evidence suggests strategies for navigating such a proceeding and what groundwork employees might have been able to put in place to increase the likelihood their accommodation request will be legally successful.

Background

This research paper explores the relationship between the Social Security Administration's (SSA) approach to accommodations for beneficiaries versus the law's understanding of accommodations under the Rehabilitation Act and the Americans with Disabilities Act (as amended). Many disability scholars see the benefits afforded by the Social Security Act as welfare-based while viewing the Americans with Disabilities Act (ADA) as rights-based. While the Social Security Act and the ADA are two different statutes, they work together in that Social Security beneficiaries cross over to the ADA when they seek accommodations or experience other discrimination in the workforce. Accommodations are necessary for many individuals with disabilities who wish to continue working or return to work, including Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) beneficiaries. However, if Title I of the ADA fails to protect individuals seeking the accommodations they need, their efforts at workforce entry will not succeed.

The SSA administers SSDI and SSI, which are designed to pay disability benefits to people who cannot work because they have a medical condition that is expected to last at least one year or result in death. (Social Security Administration Red Book [SSA Red Book], 2017; 42 U.S.C. § 423(d)(1)(A)). The SSA considers someone disabled if they are unable to do the work they did before because of a medically determinable physical or mental impairment, but also cannot adjust to or engage in any other kind of work. (SSA Red Book, 2017). Individuals receiving SSA benefits via SSDI or SSI programs are often interested in returning to the workforce or remaining in the workforce for as long as possible. For many beneficiaries, these goals are attainable through vocational rehabilitation, retraining, or accommodations in the workplace. SSA endeavors to encourage this forward movement toward active work through several programs, including work incentive programs such as Ticket to Work and other employment-support provisions. These employment-support provisions allow beneficiaries to test their ability to work, continue working, or work while they medically recover while still receiving benefits and/or having benefits and supports reinstated as needed; these provisions are discussed in further detail below. For those beneficiaries who may require workplace accommodations to continue in or return to a work setting, understanding the options and resources available to them, as well as what they are entitled to request from an employer, may be significant to continued or renewed employment. For example, a 2016 research paper focusing on the factors that determine accommodation of newly disabled workers found that those workers who were accommodated following onset of a disability were more likely to have communicated with their employer and actively asserted their needs, often because of more assertive personality traits. (Hill, Maestas, & Mullen, 2016).

When individuals experience disability-based discrimination in the workplace, the Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the employment provisions of the ADA, which was amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Once administrative remedies are exhausted or the EEOC issues a notice of right to sue, individuals can seek remedies in court. Title I of the ADA prohibits employment discrimination against qualified individuals with disabilities. It defines disability as having a physical or mental impairment that substantially limits one or more major life activities, having a record of such an impairment, or being regarded by others as having such an impairment. (See 42 U.S.C. § 12102(2), defining "major life activity"; See also 29 C.F.R. § 1630.2(g), defining "disability"). A qualified individual is a person who is able to perform the

essential functions of the employment position with or without reasonable accommodation. (See 42 U.S.C. § 12111(8), defining "qualified individual"). Essential functions are the fundamental job duties of the employment position and may be evaluated using the employer's judgment, written job descriptions, the amount of time spent performing the function, the work experience of past or current workers in the job, among other factors. (See 29 C.F.R. § 1630.2(n), defining "essential functions"). A reasonable accommodation is a change or adjustment to a job or work environment that enables a qualified person with a disability to enjoy equal employment opportunities, including performing the essential functions of a job, unless doing so would cause an undue hardship (significant difficulty or expense). (See U.S. Equal Employment Opportunity Commission [EEOC], 2002). Reasonable accommodations vary depending on individual needs, but might include modifications to a job application process; alterations or adjustment to the physical workspace, including workstations, bathroom or entryway accessibility; acquisition or modification of equipment or devices such as phones or computers; modifications to work schedules; adjusting the way jobs are structured in the applicant criteria or work schedule; allowing workers to perform job tasks in non-standard ways; adjustment or modifications to workplace policies; and reassignment to a vacant position. (EEOC, 2002; 42 U.S.C. § 12111(9); Francis & Silvers, 2015, p. 61; Stein, Silvers, Areheart, & Francis, 2014, p. 712).

Many questions concern how well accommodation is working in practice, including the current state of how accommodation cases are being handled in the courts in relation to the definitions and guidelines provided above. Since implementation of the ADAAA, plaintiffs claiming disability discrimination are now making progress in their court cases with regard to being affirmatively defined as disabled, but face challenges with regard to whether they are qualified to perform essential functions of the job with or without accommodations. This development "places significant pressures on essential job functions, reasonableness of accommodations, analysis of undue hardship, and assessment of dangers that might be cited in a direct threat defense." (Francis & Silvers, 2015, p. 60). Understanding the relationship between accommodation needs of SSA beneficiaries returning to or continuing to work and the ways in which the courts are interpreting the need for and implementation of accommodations is imperative to supporting beneficiaries working despite physical or mental impairments.

A recent publication in *Disability and Health Journal* discusses the prevalence and causes of work disability, finding that overall, the three most commonly reported causes of work disability were back/neck problems, depression/anxiety/emotional difficulties, and arthritis or rheumatism. (Theis, K., Roblin, D., Helmick, C., & Luo, R., 2018). The authors note that work disability is very common, and is reported by one in ten adults of working age. Further, a 2015 research study that was funded by the SSA found that "54-59 percent of accommodation-sensitive individuals could benefit from some kind of employer accommodation to continue or re-enter employment." (Maestas & Mullen, 2015).

SSA encourages movement toward active work for SSDI and SSI beneficiaries who wish to become self-sufficient through work incentive programs and employment-support provisions. Employment supports are intended to help beneficiaries in finding a job or starting a business, protecting benefits while working, or saving money for school, as well as in receiving benefits again with a modicum of effort (SSA Red Book, 2017). SSDI beneficiaries can use employment supports to test their ability to work or continue working over a long period of time. SSI beneficiaries can use employment supports to continue receiving cash benefits and/or Medicaid coverage while working, which allows them to continue to be covered until fully medically recovered whether they are working or are unable to work for a period of time.

According to a paper completed as part of SSA's Round Five National Beneficiary Survey, many beneficiaries who had been successful in finding and maintaining employment were able to do so because their employer provided them with necessary workplace accommodations. (Mathematica Center for Studying Disability Policy, 2016). These accommodations most often included flexible work schedules, the ability to take time off, frequent breaks, advance notice of scheduled shifts, paid sick leave, or modification of work station or changes in job duties. These beneficiaries were most often granted accommodations when they had supportive colleagues and coworkers who understood the need for their specific accommodations. The majority of the noted accommodations were considered by the authors to be low cost in nature. In order to understand the relationship between accommodation needs and how accommodation is legally understood, it is necessary to learn what beneficiaries need or purport to need in order to work, as well as what the legal record reflects with regard to reported accommodation and discrimination complaints and how those complaints were resolved.

Original Research Questions

In an effort to both focus on an important segment of the workforce and isolate a dataset of manageable size, this research focuses on analyzing the fit between accommodations and the needs of people seeking to return to work or continuing to work in the healthcare industry. Research questions included determining what portion of EEOC accommodation charge cases are resolved in favor of employees, and if any trends are present in impairment bases, type of accommodation sought, or likelihood of success; how many accommodation charge cases go all the way to a court of law before they are resolved, and what trends are present in these cases; are specific kinds of accommodation requests or types of disabilities more prevalent in the healthcare field, and what types of requests are most likely to succeed and for what impairments; if accommodations for specific impairments or disabilities more often requested or more often granted; what are the reasons requests for accommodations fail, and are specific reasons for denial more likely for certain types of accommodations or types of disabilities or impairments. Additional questions focused on how many SSA beneficiaries work in the healthcare field; what impairments do individuals have who are seeking to return to work and what accommodations might they request; as well as if there is a correlation between accommodations granted and impairment basis that is similar in the EEOC data, court decision data, and SSA beneficiary data.

This research was intended to provide greater understanding of what is working well and what could be improved with regard to how the SSA provides resources regarding accommodations to potential employees, what impairments are most often or most rarely accommodated, and what types of employees are most often or most rarely found to be qualified to work, even with accommodation. I hope that these findings will, in some small part, inform the services and resources provided by the SSA and ultimately lead to greater successes for SSDI and SSI beneficiaries who utilize work incentive programs and employment-support provisions but may need to obtain an accommodation to do so.

Research Design, Methods and Data Analysis

In order to address the identified research questions, data were obtained from three primary sources: EEOC charge data, SSA National Beneficiary Survey (NBS) Round 5 data, and legal case law. The research design was empirical and quantitative in nature.

EEOC Charge Data

EEOC charge data was requested from the EEOC via a Freedom of Information Act (FOIA) request. Data requested included EEOC data on all reported post-ADAAA cases in which workers in the healthcare industry sought an accommodation. Workers in the healthcare industry were identified by North American Industry Classification System (NAICS) codes and sub-codes. Variables requested included disability bases, resolutions to charges filed fields (receipts, resolutions, resolutions by type), settlement information, finding, and accommodation sought. The EEOC complied with the FOIA request and returned a report that included EEOC charges filed in fiscal year 2012 through fiscal year 2016 that were filed under the ADA alleging reasonable accommodation issues; 339 cases were returned. Variables provided include date received in office, closure type, total benefits awarded, closure date, disability bases, NAICS code, and NAICS description. At the time of the data return, I was informed that the EEOC database does not capture the specifics of "accommodation sought" and that I would need to request such information via a manual case-by-case search of investigative charge files. I submitted a follow-up FOIA request to obtain this information, but it was denied for reasons of masking and inability to adequately de-identify the requested data. A workaround was devised to substitute for this data; that workaround is outlined below in the Case Law subsection.

The available EEOC data was still useful in providing the number of EEOC charges filed by individuals seeking accommodation in the healthcare industry, as well as by showing potential correlations between disability bases and types of closures and how many cases settled or had a successful conciliation. This data can also be compared to broader EEOC charge statistics to get a general overview of accommodation cases in the healthcare industry within the broader scope of all filed accommodation charges; broad EEOC charge statistics by year are publicly available on the EEOC website.

SSA NBS Round 5 Data

NBS Round 5 was conducted in 2015. A nationally representative sample of 4,062 individuals who are SSI and SSDI beneficiaries were interviewed for this survey. (Social Security Administration NBS R5 Public Use File, 2017). These individuals are a sample representing a beneficiary target population of approximately 13.8 million people. The weighted response rate for the representative beneficiary sample was 62.6%. (Mathematica Center for Studying Disability Policy NBS R5 User's Guide, 2017, p. 4). For additional information on sampling design, please see the NBS R5 User's Guide. The Round 5 Public Use File contains 4,062 records and 538 variables. It has undergone extensive masking and has fewer available variables than the Restricted Use File, presenting the same survey results but without confidential information. (Mathematica Center for Studying Disability Policy NBS R5 Public Use File Codebook, 2017). A weight variable is included in the public use file and is necessary when performing any analysis. The weights account for the sampling method, data collection method, and survey's target population. When weighted, the total study population represents 13,809,693 individuals.

Information sought from this dataset includes the number of beneficiaries currently working in the healthcare field; impairments of those beneficiaries currently working or seeking to return to the workforce; and accommodations sought by individuals who wish to work or are currently working. An approximation of the desired data is attainable through an intersection of

available variables in a number of different combinations followed by a comparison of those results. Variables used for this purpose include: r5 beneficiary weight; Not Working b/c Phys/Mental Condition; Currently Working, imputed; Goals Include Working; See Working for Pay Next Year; See Working for Pay Next Five Years; Main Condition Diagnosis Group Collapsed (Code 1), imputed (Public); Use Special Work Equip to Work; Personal Assist Services Used to Work; Current Occupation, SOC Code (Public); Current Industry, Main Job, NAICS Code (Public); Worked in 2014; Current Job Part of Sheltered Workshop (Job 1); 2014 Occupation, SOC Code (Public); 2014 Job Industry, NAICS Code (Public); Received Special Equipment in 2014; Received Work Assessment in 2014; Received Help Finding Job in 2014; Received Job Training in 2014; Received Advice for Modifying Job in 2014; Received Job Coaching in 2014; Beneficiary status at interview; and list of twelve SSA identified impairment categories.

Cross-tabulations include Current Industry Main Job NAICS Codes and Main Condition Diagnosis Group Collapsed or SSA identified impairments; Main Condition Diagnosis Collapsed and Goals Include Working; Current Industry Main Job NAICS Codes Health Care and Social Assistance with SSA identified impairments or Main Condition Diagnosis Group Collapsed; Current Job Part of Sheltered Workshop and SSA identified impairments; Goals Include Working and six receipt of job assistance in 2014 variables. Statistical analysis was conducted using SPSS version 25.

Case Law

Case law reviewed comes from two sources: Professor Leslie Francis' database of all district and appellate court decisions in which accommodations were an issue, and keyword searches of case law on Westlaw legal database.

Healthcare Case Law. In the original research design, primarily cases in the healthcare industry were to be the focus of the case law review. Scope and focus for health care cases was on judicial interpretation of federal district and appellate court cases nationwide in which employees in the healthcare field requested accommodations under the ADAAA. Selecting only cases brought under the ADAAA limited the volume of case law to be reviewed by timeframe, because the ADAAA became effective on January 1, 2009. It also optimized relevance of the case law; before enactment of the ADA, a higher percentage of individuals seeking accommodations were unable to establish a disability within the meaning of the statute. (EEOC Fact Sheet on ADAAA). I will discuss the ADAAA and its impact on the case law in further detail in the Findings/Results section. Accommodation cases in the healthcare field were identified through Professor Francis' database, as well as keyword searches in Westlaw that included "advanced: (ADAAA & employer & nurse & accommodation & health)"; "advanced: (ADAAA & employer & nurse & disability & accommodation & "Title I")"; and "advanced: (ADAAA & disability & Title I & accommodation & physician /p employer)". Ninety-four cases were retrieved using these sampling methods; all were reviewed for applicability and duplication, 67 were determined to be healthcare cases, of those seven were identified as not stating a claim for failure to provide a reasonable accommodation, 12 were identified as applying pre-ADAAA legal standards, and four were identified as doing both. The remaining 44 cases were confirmed as the research sample. Three were appellate cases and 41 were federal district court cases. Cases were coded through a process of reading the legal decision at least once and

coding content by case name, state, year, court, circuit, profession, disability/impairment, major life activity impacted, accommodation sought, cause of action, conditions and relevant facts, and outcome/disposition (including reason for denial or success). From those results, cases were further coded to note whether they were rulings on motions for summary judgment or dismissal for failure to state a claim on which relief could be granted (thus initial resolutions and not resolutions on the merits), as well as if the employee's reasonable accommodation claim survived. Cases were coded and data stored in Excel.

Universe of Accommodation Case Law. As outlined in the EEOC charge data subsection, it was necessary to devise a workaround to obtain useful and applicable case law data to substitute for unattainable EEOC accommodation charge data. This was undertaken through a gap filling process in which additional legal research was performed in an attempt to reverse engineer the missing categories from the EEOC data: accommodation sought and impairment or disability. This measure was undertaken in an effort to determine if certain accommodation requests correlate with particular disability types, both in the healthcare field and across the larger universe of accommodation case law (for example, whether requests for flexible scheduling or intermittent Family Medical Leave Act (FMLA) are especially prevalent for workers with depression, or whether requests for lifting restrictions are especially prevalent for workers with back injuries). The unattainable EEOC accommodation charge data included the link between accommodations sought and impairment or disability in reported post-ADAAA cases in which workers in the healthcare industry sought an accommodation. It was necessary to collect these variables from the broader universe of accommodation case law in order to determine if correlative differences existed between that broader universe and the healthcare industry case law research outlined above. Additional relevant case law data was identified through Professor Francis' database, as well as keyword searches in Westlaw that included "advanced: (ADAAA & employer & disability & accommodation & depression)"; "advanced: (ADAAA & employer & disability & accommodation & anxiety % depression)"; (ADAAA & employer & disability & accommodation & PTSD)"; "advanced: (ADAAA & employer & disability & accommodation & ADHD)"; "advanced: (lift & ADAAA & employer & disability & accommodation)". Using these sampling methods, 494 cases were retrieved, and 240 were reviewed for applicability and duplication. Cases returned in a Westlaw keyword search are sorted by relevance; cases were reviewed in the order they were returned in keyword searches. Due to limited time constraints and an effort to get a broad overview of the universe of accommodation case law, 48.5% of cases retrieved were reviewed. Ninety-nine of these cases were excluded because they did not state a claim for failure to provide a reasonable accommodation, applied pre-ADAAA legal standards, or were duplicates of cases already reviewed; 25 were identified as healthcare industry cases that had already been reviewed. The remaining 116 cases were confirmed as the research sample. Of the cases reviewed, 48.3% were found to be accommodation cases. One was an appellate case and 115 were federal district court cases. Cases were coded through a process of reading the legal decision at least once and coding content by case name, state, year, circuit, profession, field/industry, disability/impairment, accommodation sought, adverse action, cause of action, and outcome/disposition which included reason for denial or success. From those results, cases were further coded to note if summary judgment or a motion to dismiss was granted, as well as if the employee's reasonable accommodation claim survived. Cases were coded in Word and Excel and data stored in Excel.

Findings/Results

Each individual data source was reviewed, coded, and analyzed on its own before being compared and applied to other data sources. Individual analysis results are detailed below, and correlated findings and inferences follow.

EEOC Charge Data

Of the 339 charges filed by individuals seeking accommodation in the healthcare industry, 26 were settled with benefits, 11 were resolved through successful conciliation, and 14 were withdrawn with benefits. Nineteen cases were still open with the EEOC at the time data was produced, and in 216 cases a no cause finding was issued, which means that the individual filing the charge was also issued a right to sue in federal court, should they wish to continue to pursue their claim. Of the 320 cases that reached resolution, 67.5% resulted in a right to sue in federal court, and 15.9% were resolved in the claimant's favor. The disability bases that correlate with those cases which were favorably resolved can be found Table 1.

According to publicly available aggregate data, total EEOC charges filed under the ADA where reasonable accommodations were at issue between fiscal year 2012 and 2016 were 9,041, 9,496, 9,765, 10,781, and 11,865, respectively, totaling 50,948 charges filed. (Equal Employment Opportunity Commission Statutes by Issue, 2017). Comparing these numbers to the data provided via the FOIA request would indicate that only 0.8% of reasonable accommodation charges under the ADA were filed by individuals working in the healthcare industry. This number may be low and cannot be independently validated.

SSA NBS Round 5 Data

As noted above, the NBS Round 5 data consists of 4,062 observations that, when weighted, are representative of a national beneficiary population of 13,809,693 individuals. Pertinent Round 5 data was analyzed and weighted using SPSS version 25. In an effort to gain an understanding of how many SSI and SSDI beneficiaries are currently working or are interested in returning to the workforce, several variables were analyzed. As of the time of the study in 2015, 8.3% of beneficiaries, or 1.064 million, were currently working. Those who reported working in 2014 totaled 10.6% of beneficiaries, or 1.373 million, with 0.2% missing. Individuals who responded that their goals included working totaled 37.2% of all beneficiaries, or 4.8 million, with 3.5% missing. When asked if they could see themselves working for pay next year, 8.3% of beneficiaries strongly agreed, while 17.1% agreed, totaling 3.267 million replying in the affirmative, with 2.5% missing.

Impairments were measured in two ways: via a Main Condition Diagnosis Group that was collapsed for the publicly available data file and contains five impairment designations, and via twelve impairment categories that were pulled directly from SSA beneficiary data. Both sets of variables were used to gain an understanding of impairments of beneficiaries overall, as well as impairments of those beneficiaries currently working or seeking to return to the workforce. Impairments of beneficiaries currently working or seeking to return to the workforce were determined by cross-tabulating the impairment variables with Current Industry NAICS Codes and Goals Include Working. These results are detailed in Tables 2 and 3.

With regard to the healthcare field specifically, the *National Beneficiary Survey: Disability Statistics, 2015* publication states that 6.8% of beneficiaries employed at the time of the study were employed in the health care industry and 34.3% were employed in the social assistance industry. According to the publicly available NBS data, the number of beneficiaries currently working in the combined healthcare and social assistance industry totaled 3.4% of all beneficiaries and 41.2% of beneficiaries currently working, or 437,664. Beneficiaries working in the combined healthcare and social assistance industry in 2014 totaled 3.1% of all beneficiaries and 35.4% of beneficiaries working in 2014, or 396,420. These totals were derived from Current and 2014 NAICS Code Health Care and Social Assistance variables. It is important to note that the publicly available Health Care and Social Assistance variable includes ambulatory health care services, hospitals, nursing and residential care facilities, and social assistance. Additionally, all beneficiaries whose current job is part of a sheltered workshop are categorized as working in the social assistance industry; this group totaled 263,810 beneficiaries for 2015. The SSA defines sheltered workshop as a "private non-profit, state, or local government institution that provides employment opportunities for individuals who are developmentally, physically, or mentally impaired, to prepare for gainful work in the general economy." (Social Security Administration Program Operations Manual System, 2017). It is unclear why all sheltered workshop workers are categorized in the health care and social assistance variable, apart from the assumption that, because a sheltered workshop is perhaps designated as a social assistance program, these positions are coded as such instead of in the category of job function workers might actually be performing. This leads to a skewing of the publicly available data for beneficiaries currently working in the healthcare industry, as beneficiaries currently working in a sheltered workshop account for 60.2% of beneficiaries currently working in the healthcare and social assistance industry. It would be imprudent to assume that all, none, or any other approximation of the sheltered workshop variable is or is not meaningfully employed in the healthcare industry, leaving unanswered questions as to the validity of this measurement. Impairment variables were also cross-tabulated to determine impairments of beneficiaries working in the healthcare field, but their applicability is weakened by the unknown impact of the sheltered workshop variable. These results are detailed in Table 4.

Accommodations sought by individuals who wish to work or are currently working are a bit more difficult to approximate from available Round 5 data, but their measurement was attempted in two ways: via cross-tabulating the six receipt of job assistance in 2014 variables with Goals Include Working, as well as with the Main Condition Diagnosis Group variable. Cross-tabulations between 2014 Job Industry NAICS Codes and receipt of job assistance in 2014 variables was also considered, but Goals Include Working seemed a more prospective approach; additionally, obtaining information on the healthcare field specifically through this approach would likely have been skewed by the sheltered workshop variable.

Case Law

As described above, legal cases were analyzed in two distinct sets. Findings are discussed for each set and then compared for similarities and differences.

Healthcare Cases. Healthcare industry cases were a primary focus of this research project, both as a way of narrowing the scope of the work to be undertaken and addressing the research questions in a way that might make research outcomes more meaningful, substantial,

and readily comprehensive through focus on a single industry. Of the 44 federal appellate and district court cases confirmed as the research sample, employees in 13 cases survived the employer's motion for summary judgment or dismissal. Surviving such an attempt to end the case without trial does not mean that the employee prevailed on the merits of their claim, but instead that they survived having their claim of failure to provide a reasonable accommodation dismissed, and were able to continue through the judicial process. Surviving a motion for summary judgment can be important because it gives the employer the incentive to settle to avoid the costs of a full trial and the risks of an adverse jury verdict. If a case does not settle, the next step would usually be a jury or bench trial to determine factual issues that were found during the summary judgment review. This means that the remaining 31 cases were dismissed, at least to their reasonable accommodation claims. That is, 70.4% of healthcare industry cases where reasonable accommodation claims were at issue failed without ever reaching the stage of a trial on the facts. In at least two of the cases that did not survive the summary judgment stage, the employee appealed to the federal circuit court and the claim was dismissed by a joint stipulation of the parties, which suggests that a settlement agreement of some kind was reached. The role of summary judgment in potential settlement will be addressed in additional detail in the Discussion section.

Of the 13 cases that survived a motion for summary judgment or dismissal, accommodations requested generally fell into these categories: schedule modifications, medical leave, job reassignment, light duty, use of a medical device (electrolarynx device), lifting restrictions, and modification of physical space. Survival of such a motion did not mean that the accommodations were found to be reasonable or granted; employees were considered to have alleged sufficient facts to be allowed to continue onto the next stage of legal proceedings regarding their case. The issues of material fact put at issue were most frequently: whether the employer had engaged in the interactive process or terminated the employee during the interactive process, whether the employee had notified the employer of their disability and request for accommodation, whether an employee who had been out on leave was replaced before they could return to work to be reinstated, whether the employer had not attempted to accommodate the employee at all, or whether the employer failed to establish that accommodation would be an undue hardship. Any of these issues of fact would then go to trial for a factfinder to determine the ultimate outcome. In order to survive a motion for summary judgment, an employee must show enough evidence to dispute or prove a fact such that a reasonable factfinder could rule on the case and return a verdict for the employee. Legal elements for proving a prima facie case of failure to accommodate, among other legal standards, are addressed below in the Discussion section.

Findings from healthcare industry cases also show that certain accommodations are less likely to be determined reasonable in a healthcare setting. These include intermittent time off or a variable later start time for shifts, particularly when that start time will vary from day to day or week to week, and particularly if the position is one offering direct patient care or services, such as a nurse. Similarly, the ability to leave work during flare ups of a condition that is considered to be unpredictable and flexible are less likely to be found reasonable, particularly for those employees engaged in direct patient care; attendance may be cited as an essential function of the job that cannot be altered with a reasonable accommodation. Lastly, patient safety and direct threat arguments are often raised by healthcare employers as a reason to deny accommodations or terminate an employee with a disability; ensuring patient safety or reacting to an emergency may be cited as an essential function of the job. Such arguments are also discussed below.

Universe of Accommodation Cases. Those cases surveyed across a variety of industries consisted of a research sample of 116 federal appellate and district court cases. Of that sample, 68 did not survive employer's motion for summary judgment or dismissal, a dismissal rate of 58.6%. Employer's motion for summary judgment was granted in 62 of the cases; employer's motion to dismiss was granted in the remaining six cases. However, 46 of these cases survived this stage: employer's motion for summary judgment was denied as to reasonable accommodation claims in 39 cases; the employer's motion to dismiss was denied in four cases; the employee's motion for reconsideration was granted in one case; the appellate court reversed the district court's finding of summary judgment for the employer in one case; and the employee's motion for summary judgment was denied in one case. And two cases prevailed: one on an employee's motion for summary judgment, and the other with a jury trial verdict on behalf of the employee.

These cases were instructional, suggesting several strategies that can assist employees in surviving at summary judgment:

- properly and completely fill out medical documentation and requests for reasonable accommodation;
- if an employee is looking for reassignment as a reasonable accommodation, identifying reassignments in the form of vacant positions for which the employee is qualified is reasonable on its face;
- an employee must show that they can perform the essential functions of the position, with or without an accommodation—but if it is an accommodation case, showing that an accommodation was not necessary to allow the employee to perform the essential functions of the job will mean that the employee does not require an accommodation and the case will fail;
- in order to prove that an employee was terminated because of their disability or because they requested an accommodation, the employee must show a genuine issue of material fact that will get them to the next stage of the judicial proceeding so that a factfinder might rule on those issues of fact;
- it is important to understand the burden-shifting paradigm of disparate treatment on the basis of disability, which will be discussed below;
- an employee must show that an accommodation is reasonable and is not an undue hardship to the employer.

Alternatively, these cases also suggested several reasons that employees fail to survive at the summary judgment stage, including failure to exhaust administrative remedies, such as filing a properly-stated charge with the EEOC. Cases may be time-barred if the administrative filing is not undertaken in a timely manner or if the complaint does not include the employee's later basis for litigation. These time limitations can vary from state to state, as well as if the employer is a federal entity. Additional reasons that employees fail to survive at the summary judgment stage include the following:

- an employee is not able to show that they are disabled under the ADA; an employee is unable to perform the essential functions of the job, even with an accommodation;
- accommodation was provided to employee in the course of employment;
- an employee never explicitly asked for an accommodation, or made a request with specificity, but instead only voiced vague concerns—activating the interactive process requires clarity;
- there is no evidence that an employee was terminated because of their disability;

- an employee fails to show that they are substantially limited in a major life activity because of their impairment; employee fails to show that they are qualified.

Additionally, even though supports and protections exist within SSA to allow beneficiaries to return to or continue to work a certain number of hours and still receive benefits, statements to SSA about being unable to work and applying for benefits can bar ADA claims. The U.S. Supreme Court established the standard that SSDI and ADA claims may not inherently conflict, so long as the plaintiff can provide a sufficient explanation for the seemingly inconsistent claims (Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999)). Because the definitions of disability differ between the ADA and SSA, it is possible to make statements about being unable to work under SSA and still show that one is qualified to perform the essential functions of the job, with or without reasonable accommodations, under the ADA. The important point here is the way in which an application for SSA benefits is framed: statements about being unable to work at all in the relevant labor market are different than statements about being unable to work without a reasonable accommodation or because no one in the relevant labor market will hire the individual and provide a needed reasonable accommodation. The plaintiff must be able to provide a sufficient explanation of the inconsistencies of the SSA claim statements with the elements of an ADA claim in order to survive summary judgment (Cleveland at 807).

ADAAA. A more detailed note on the importance of the ADAAA and why only cases where facts occurred after January 1, 2009, were included in the research samples. When Congress enacted the ADAAA in 2009, it became easier for an individual to establish that he or she has a disability within the meaning of the statute when seeking protection under the ADA. Title I of the ADA defines disability as having a physical or mental impairment that substantially limits one or more major life activities, or having a record of or being regarded by others as having such an impairment (U.S. Equal Employment Opportunity Commission [EEOC], 2002; See 42 U.S.C. § 12102(2), defining "major life activity"; See also 29 C.F.R. § 1630.2(g), defining "disability"). Courts had been narrowly interpreting the definition of disability, and Congress felt that protections were being denied to individuals with impairments that might not traditionally be considered disabilities, such as diabetes and cancer. The ADAAA is intended to be interpreted in favor of broad coverage, and the definition of disability should be construed broadly, such that an impairment does not have to prevent or severely restrict a major life activity to be substantially limiting. The definition of disability remained unchanged, but the "substantially limited" requirement was not intended to be an exacting standard; this determination should be made without regard to the effects of mitigating measures such as medications, and episodic impairments, or those that are in remission, can still qualify as substantially limiting if they would do so when active. (Equal Employment Opportunity Commission ADAAA Fact Sheet, n.d.; See 42 U.S.C. § 12102(4)(D)-(E), describing "substantially limits"). The ADAAA has also made it easier for an employee to be regarded as disabled, and does not require a showing of impairment limiting a major life activity, but instead simply focuses on how the employee was treated because off a perceived impairment. (42 U.S.C. § 12102(3)(A), defining "regarded as"). However, an employee who brings a claim that s/he was regarded as disabled is not entitled to a reasonable accommodation.

Further implications regarding case law findings are addressed in the Discussion section.

Findings from Correlations among Data Sets

Once review, coding, and analysis of individual sources was concluded, gap-filling case law results were compared with SSA NBS Round 5 results to determine whether impairments identified by beneficiaries are present in accommodation cases. To the degree that specific impairments can be derived from the Round 5 results, many of these impairments are present in accommodation cases. The majority of data reviewed and addressed in the Discussion section is case law-specific. SSA beneficiary information is important in that it directly informs the applicability of the legal information and demonstrates a link between the two, but the ADAAA is the key statute in this study.

Discussion/Implications

This research project was intended to move toward an increased understanding of what impairments are most often or most rarely accommodated under the ADA, and what types of employees are most often or most rarely found to be qualified to work, even with accommodation. Instead, findings primarily consisted of key reasons why employees might fail at the summary judgment stage and tools they can use to advocate for themselves, supporting their initial request for accommodation and engaging in the ensuing interactive process so that they never reach the stage of filing a charge of disability discrimination under the ADA. In the alternative, for those cases that continue to reach the courts, evidence suggests strategies for how to navigate such a proceeding and what groundwork might already have been laid to increase the likelihood of survival on a motion for summary judgment.

SSA data on accommodation is speculative or hypothetical at best, based on available data in the Round 5 public data set. This leads to concerns about addressing the original research questions regarding links between impairment and need for accommodation of a particular type, and what accommodations might be more successful. But analysis of case law demonstrates that primary key findings in this study include the reasons that employees may fail or succeed when they bring claims under the ADA for failure to provide a reasonable accommodation, and strategies that can be undertaken to survive a legal claim. Perhaps these findings can be extrapolated to answer questions such as: what can be done better when requesting a reasonable workplace accommodation and working with employer regarding accommodation?, and what accommodations might always be found unreasonable overall, or in certain work settings or the healthcare industry?

While the link between accommodation sought and impairment type was not a core element of the findings in this research project, certain correlations do appear, such as individuals with depression/anxiety requesting time off, or individuals with back issues requesting reduced hours/time off for flare ups. These sorts of accommodations would need to be evaluated based on the particular essential functions of the job and the individual employee in a highly fact specific inquiry. Some employees might succeed with such a request, while others may fail. Additional observations include that some accommodations are unreasonable as a matter of law, such as indefinite leave, reassignment when there are no vacant positions for which employee is qualified, transfer to a different supervisor, or reallocating duties to others to change the essential functions of a job.

It is also important to understand the key legal standards where certain elements must be met in order to prevail on a theory of discrimination under the ADA. In order to prove a prima

facie case of disability discrimination or disparate treatment on the basis of disability, an employee must show that they were an individual with a disability as defined by the ADA, that they were qualified with or without accommodation to perform the essential functions of their job, and that they were subject to adverse action because of their disability. Once the employee demonstrates that the prima facie elements are met, the employee either presents direct evidence of the employer's discriminatory intent, or the burden shifts to the employer to show a legitimate non-discriminatory reason for the adverse action, such as performance issues or non-compliance with company policy. The burden then shifts to the employee to show that the proffered non-discriminatory reason is pretext by demonstrating evidence of discriminatory animus or temporal proximity between the protected activity (requesting an accommodation) and the adverse action.

In order to prove a case for failure to accommodate on the basis of disability, an employee must show that s/he was an individual with a disability as defined by the ADA, that s/he was qualified with or without accommodation to perform the essential functions of his/her job, that his/her employer knew or had reason to know of his/her disability, that s/he requested an accommodation, and that the accommodation was not granted or the employer failed to engage in the interactive process. An employer's argument in reply is that the employee did not request an accommodation or that the accommodation requested is not reasonable because the employee could not perform the essential functions of his/her position, even with a reasonable accommodation, or that the requested accommodation would prove to be an undue hardship to the organization. If the employee is unable to create a genuine issue of material fact at any stage of either theory, s/he may be in danger of failing at the summary judgment stage.

Case law research highlighted an apparent circuit split with regard to the burden-shifting paradigm outlined above. Both the 6th and 11th Circuits have held that, as long as the employer applied a legitimate nondiscriminatory reason to the condition resulting in termination, such as job performance, it makes no difference if the misconduct was caused by the employee's disability (being under the influence of medication, for example). (Caporicci v. Chipotle Mexican Grill, Inc., 189 F. Supp. 3d 1314 (M.D. Fla. 2016); Sper v. Judson Care Center, Inc., 29 F. Supp. 3d 1102 (S.D. Ohio 2014)).

Case law data also show that, when courts consider substantial limitations to major life activities, there are several factors that must be considered with regard to certain types of impairments. Courts often interpret the ADAAA's guidelines for a broader conception of substantially limited by applying a reasonable person standard to determine if an individual is substantially limited in a major life activity. This standard was applied in the case law to the major life activities of working and lifting. When applied to working, the reasonable or average person standard suggests that being restricted in the ability to work in one job does not equate to being restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to an average person with comparable training, skills, and abilities. Lifting comparisons are similar, suggesting that having a lifting restriction does not equate to a substantial limitation in the major life activity of lifting, and so lifting is often found not to constitute such a limitation. If an impairment does not constitute a substantial limitation of a major life activity, an employee may fail to meet all of the prongs of their prima facie case, which will mean they are not entitled to a reasonable accommodation on the basis of disability.

As noted above, direct threat arguments in the form of patient safety concerns are often raised by healthcare employers as a reason to deny accommodations or terminate an employee with a disability, and ensuring patient safety or reacting to an emergency may be cited as an essential function of the job. Such reasoning is found in the case law in hospital-based positions

where lifting is an essential function of the position, where accommodations are requested with regard to visual disabilities, where medication is being dispensed to patients or employees are taking medication as an accommodation for their disability, and where direct patient care is generally a large part of an employee's position.

The dismissal rate of healthcare industry cases versus the cases that span a variety of industries, 70.4% versus 58.6%, is a seemingly significant difference and warrants additional study. This disparity suggests that it may be more difficult to succeed on a reasonable accommodation claim as an employee in the healthcare industry, or that reasonable accommodations are interpreted more narrowly in a healthcare setting. Taken in tandem with the seemingly low rate of EEOC charges where reasonable accommodations are at issue, there is a suggestion that the healthcare industry may be unique when it comes to providing reasonable accommodations to individuals seeking protection under the ADA.

An identified goal of this research was to contribute to the knowledge and resources SSA provides to beneficiaries regarding success in requesting necessary accommodations when returning to or continuing in the workforce. While SSA may not directly inform or advise beneficiaries about accommodation-related resources, they do provide general information on workplace accommodations in the SSA Red Book, a reference tool geared toward "educators, advocates, rehabilitation professionals, and counselors who serve persons with disabilities." (SSA Red Book, 2017). It is clear, based on this small inclusion in the Red Book, as well as SSA's continued interest in funding and/or commissioning publications and research studies around the issue of accommodations in recent years, that SSA understands that accommodations are necessary for some beneficiaries to be successful in the workforce. SSA is uniquely situated to provide beneficiaries with information and resources on workplace accommodations, and SSA should consider implementing methods and procedures through which they can directly advise and inform beneficiaries about workplace accommodations.

While findings primarily consisted of key reasons why employees might fail at the summary judgment stage, tools were also identified that can be used for self-advocacy, such as identifying positions that might be a closer fit for their impairment or required accommodation, affirmatively and specifically requesting accommodations from an employer, bolstering their initial request for accommodation and engaging in the ensuing interactive process so that they may be successful in obtaining a reasonable accommodation and avoid filing a charge of disability discrimination under the ADA. In the alternative, for those cases that continue to reach the courts, findings suggested strategies for navigating these proceedings and what groundwork might already have been laid to increase the likelihood of survival on a motion for summary judgment. It is my hope that these findings will inform the way SSA thinks about the realistic prospects of returning to or continuing to work for beneficiaries, encouraging them to incorporate tools for self-advocacy and information on how to request an accommodation into the services and resources currently provided to beneficiaries. Increasing SSA's institutional knowledge and provision of information about workplace accommodations could ultimately lead to greater successes for SSDI and SSI beneficiaries who utilize work incentive programs and employment-support provisions but may need to obtain an accommodation to do so.

This is an area of law with an enormous capacity for research and learning. Many research problems remain partially answered or unanswered, as noted above, and redirecting research to look at issues of disability and reasonable accommodation from a novel angle may be helpful with regard to research design and also meaningful as research product. Suggestions for future research include further focusing on summary judgment in reasonable accommodation

cases to determine if prevailing on summary judgment increases settlement frequency. Employees who bring reasonable accommodation claims to court feel that their claims are meaningful and worthwhile; additional research into the types of accommodation claims that are dismissed before the merits of the claim are ruled upon, as well as how those claims align with types of industries or employers, could be valuable. A subset of this research could include identifying the prevalence of public/government employers in reasonable accommodation claims. Additionally, a comprehensive survey of the entire universe of accommodation cases, identifying nuances and concrete patterns by circuit, might signify best practices for employees who find themselves facing accommodation-related issues. Leave is also a significant concern to many individuals with disabilities, and the Family and Medical Leave Act (FMLA) provides job protection to employees when they require leave for medical reasons. Further study of the interplay between FMLA leave and protections and utilizing medical leave, either on an intermittent or long-term basis, as a reasonable accommodation under the ADA would be worth pursuing.

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Appendix

Table 1. Favorably Resolved EEOC Charges Alleging Accommodation Issues

	Closure Type			
Disability Bases	Settlement With Benefits	Successful Conciliation	Withdrawal With Benefits	Total
Cancer, Retaliation	0	0	1	1
Depression	0	1	1	2
Depression, Learning Disability, Other Anxiety Disorder, Post-Traumatic Stress Disorder	1	0	0	1
Epilepsy	0	1	0	1
Hearing Impairment	1	0	0	1
Heart/Cardiovascular	0	0	1	1
HIV	0	0	1	1
Manic Depression (Bi-polar), Other Anxiety Disorder	1	0	0	1
Manic Depression (Bi-polar), Regarded As Disabled, Retaliation, Schizophrenia	1	0	0	1
Multiple Sclerosis	0	1	0	1
Nonparalytic Orthopedic Impairment	0	0	1	1
Nonparalytic Orthopedic Impairment, Other Disability	0	1	0	1
Nonparalytic Orthopedic Impairment, Retaliation	0	0	1	1
Orthopedic/Structural Back Impairment	0	1	2	3
Orthopedic/Structural Back Impairment, Other Pulmo/Respiratory	0	0	1	1
Other Anxiety Disorder	0	0	1	1
Other Anxiety Disorder, Post-Traumatic Stress Disorder, Retaliation	1	0	0	1
Other Disability	9	4	1	14
Other Disability, Retaliation	2	0	0	2
Other Psychiatric Disorders, Retaliation	0	0	1	1
Other Pulmo/Respiratory	1	0	0	1
Post-Traumatic Stress Disorder	1	0	0	1
Record Of Disability	0	0	1	1
Regarded As Disabled	2	0	0	2
Retaliation	6	2	1	9
Total	26	11	14	51

Table 2. Impairments of Beneficiaries Currently Working – by NAICS Code Group

			Main Condition Diagnosis Group Collapsed					
			Other	Mental Illness	Cognitive Disability	Muscular/ Skeletal	Sensory Disorders	Total
Current Industry, Main Job, NAICS Code (Public)	Manuf, Construct, Utilities, Mining, Ag	Count	13462	7292	1002	0	2335	24091
		% within Main Condition Diagnosis Group	3.7%	3.5%	0.9%	0.0%	9.3%	2.9%
	Retail and Wholesale Trade	Count	81756	25955	4207	12398	4873	129189
		% within Main Condition Diagnosis Group	22.7%	12.3%	3.9%	8.8%	19.3%	15.3%
	Admin, Mgmt, Professional, Real Estate, Info, Fin	Count	69891	49547	3097	50907	1627	175069
		% within Main Condition Diagnosis Group	19.4%	23.5%	2.9%	36.2%	6.5%	20.8%
	Health Care and Social Assistance	Count	141329	77272	87244	41199	13701	360745
		% within Main Condition Diagnosis Group	39.2%	36.7%	81.8%	29.3%	54.4%	42.8%
	Other Industries	Count	53863	50400	11144	36276	2648	154331
		% within Main Condition Diagnosis Group	14.9%	23.9%	10.4%	25.8%	10.5%	18.3%
Total		Count	360301	210466	106694	140780	25184	843425
		% within Main Condition Diagnosis Group	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Note: Main Condition Diagnosis Group Collapsed responses totaled 12,896,735, with 8.2% missing overall (1,055,032).

Table 3. Impairments of Beneficiaries Whose Goals Include Working

			Main Condition Diagnosis Group Collapsed					
			Other	Mental Illness	Cognitive Disability	Muscular/ Skeletal	Sensory Disorders	Total
Goals Include Working	Yes	Count	1879416	1130712	255682	819086	129229	4214125
		% within Main Condition Diagnosis Group	35.0%	44.4%	50.9%	30.1%	47.1%	36.9%
	No	Count	3489738	1415348	246762	1901076	145067	7197991
		% within Main Condition Diagnosis Group	65.0%	55.6%	49.1%	69.9%	52.9%	63.1%
Total		Count	5369154	2546060	502444	2720162	274296	11412116
		% within Main Condition Diagnosis Group	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Table 4. Impairments of Beneficiaries Currently Working in the Health Care Field (Current Industry, Main Job, NAICS Code (Public), Health Care and Social Assistance)

Impairment (SSA codes)		Currently Working in Health Care and Social Assistance	Current Job Part of Sheltered Workshop
Psychiatric Impairment	Count	124410	70776
	% within Health Care & Social Assistance	28.4%	26.8%
Musculoskeletal Impairment	Count	45752	9980
	% within Health Care & Social Assistance	10.5%	3.8%
Circulatory Impairment	Count	20533	0
	% within Health Care & Social Assistance	4.7%	0.0%
Endocrine Impairment	Count	7388	7388
	% within Health Care & Social Assistance	1.7%	2.8%
Intellectual Disability	Count	205253	171317
	% within Health Care & Social Assistance	46.9%	64.9%
Neoplasm	Count	1861	0
	% within Health Care & Social Assistance	0.4%	0.0%
Nervous System Impairment	Count	51235	37310
	% within Health Care & Social Assistance	11.7%	14.1%
Respiratory Impairment	Count	6005	1887
	% within Health Care & Social Assistance	1.4%	0.7%
Sensory Impairment	Count	24850	13182
	% within Health Care & Social Assistance	5.7%	5.0%
Injury or poisoning	Count	1448	1448
	% within Health Care & Social Assistance	0.3%	0.5%
Other Impairment	Count	47993	21990
	% within Health Care & Social Assistance	11.0%	8.3%
Missing Impairment	Count	15703	3869
	% within Health Care & Social Assistance	3.6%	1.5%

Notes: SSA impairment codes were drawn directly from SSA administrative records. Secondary impairments identified in SSA administrative records may also be included here. All beneficiaries whose current job is part of a sheltered workshop are categorized as working in the Health Care and Social Assistance NAICS Code.