

Final Report

Understanding the Relationship and Fit between Workers' Needs as Reflected in SSI and SSDI
Beneficiary Data and Court Decisions, Settlement Data, and EEOC Data with Regard to
Reasonable Accommodations Across Industries

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Author Note

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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. This is the second year of a two year grant funded research project. First year findings showed that Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) beneficiaries wish to return to work or continue working, and many may require reasonable accommodations to do so. Certain accommodations are less likely to be determined reasonable in a healthcare setting, and employees in that industry are less likely to survive a motion for summary judgment than employees in other industries. Some accommodations are observed to be unreasonable as a matter of law across all industries, and certain legal elements must be met in order to prevail on a theory of discrimination under the ADA. Cases from multiple industries demonstrated several reasons employees' claims fail to survive at the summary judgment stage, thus never reaching a trial on the facts, and suggested advocacy tools employees can use to avoid reaching the stage of filing a charge of disability discrimination under the ADA. For those cases that continue to reach the courts, evidence suggested strategies to increase the likelihood of survival on a motion for summary judgment.

Based on these Cohort 1 research findings, current research sought to provide additional insight into issues of reasonable accommodation by: 1) further focusing on summary judgment in reasonable accommodation cases to determine if prevailing on summary judgment increases settlement frequency; 2) focusing on the prevalence of public/government employers in reasonable accommodation claims to provide greater insight into trends re: accommodation in those industries; and 3) comprehensively surveying the universe of accommodation cases to identify nuances and concrete patterns by circuit that might signify best practices for employees who find themselves facing accommodation-related issues. Data was obtained from four primary sources: SSA National Beneficiary Survey (NBS) Round 5 data, federal district and appellate court case law concerning post-ADA Amendments Act (ADAAA) failure to accommodate claims, available settlement data, and Equal Employment Opportunity Commission publicly available data. The research design was empirical and quantitative.

Findings illustrate that settlement frequency and other positive outcomes are greatly increased when an employee prevails on summary judgment or another initial resolution, with an over 72% chance of reaching settlement on that case and an over 79% chance of having some kind of positive outcome if an employee is able to bring a case that can withstand a motion for summary judgment or dismissal for failure to state a claim on which relief can be granted. Findings explain trends present in public sector cases, and identify the frequency of failure to accommodate claims and subsequent resolution in individual circuits. Findings also identify additional tools that employees can use to advocate for themselves, support their initial request for accommodation and engage in the ensuing interactive process so that they might avoid filing a charge of disability discrimination under the ADA. Finally, findings outline additional strategies for employees to navigate those cases that continue to necessitate legal intervention, allowing them to increase the likelihood of survival on a motion for summary judgment.

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 likely will not succeed. This is the second year of this grant-funded research project, and the majority of the background remains the same.

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], 2018; 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, 2018). 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 ADA, 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, 2018). 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. SSA also funds the Protection and Advocacy for Beneficiaries of Social Security (PABSS) program, administered by a local protection and advocacy agency in every state, territory, or tribal nation. This program provides free assistance in the form of resources and supports, including understanding reasonable accommodations, to SSI and SSDI beneficiaries who wish to return to work or continue working (SSA Red Book, 2018).

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 the legal record reflects with regard to reported accommodation and discrimination complaints and how those complaints were ultimately resolved. This includes insight into stumbling blocks that exist for many employees in requesting accommodations, as well as what industries might be more or less friendly to certain workers or certain impairments.

Research Questions

Findings from the first year of this research project (Cohort 1) showed that SSI and SSDI beneficiaries wish to return to work or continue working, and many may require reasonable accommodations to do so. Case law findings showed that certain accommodations are less likely to be determined reasonable in a healthcare setting, and that employees in that industry are less likely to survive a motion for summary judgment than employees in other industries. Some accommodations were observed to be unreasonable as a matter of law across all industries, and certain legal elements must be met in order to prevail on a theory of discrimination under the ADA. Findings from cases surveying multiple industries demonstrated several reasons employees fail to survive at the summary judgment stage, and suggested advocacy tools employees can use to avoid reaching the stage of filing a charge of disability discrimination under the ADA. For those cases that continue to reach the courts, evidence suggested strategies for navigating such a proceeding and to increase the likelihood of survival on a motion for summary judgment.

Based on these Cohort 1 research findings, I focused on three research strategies to provide additional insight into issues of reasonable accommodation. (1) Further focusing on summary judgment in reasonable accommodation cases to determine if prevailing on summary judgment increases settlement frequency. (2) Focusing on the prevalence of public/government employers, such as law enforcement, public safety, fire and EMS, utilities, and education, in reasonable accommodation claims to provide greater insight into trends regarding accommodation in those industries. (3) Comprehensively surveying the entire universe of accommodation cases to identify nuances and concrete patterns by circuit that might signify best

practices for employees who find themselves facing accommodation-related issues. Additional questions include what are the reasons that requests for accommodations fail, and are specific reasons for denial more likely for certain types of accommodations or types of disability/impairment or in specific industries.

This research was intended to build on findings from Cohort 1 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 and what happens after an employee survives a motion for summary judgment or other hurdle in federal court that allows them to continue to pursue their disability discrimination claim. 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 sought and obtained from four primary sources: EEOC charge data and publicly available data, SSA National Beneficiary Survey (NBS) Round 5 data, legal case law, and available settlement data. The research design was empirical and quantitative in nature.

EEOC Charge Data

EEOC charge data was requested from the EEOC via three Freedom of Information Act (FOIA) requests. The first set of data requested included aggregate EEOC data on all reported post-ADAAA cases in which workers in the public sector sought an accommodation. Workers in the public sector were identified by North American Industry Classification System (NAICS) codes and sub-codes. The EEOC does not record occupation using the Bureau of Labor Statistics' Standard Occupational Classification (SOC). Variables requested included disability bases, resolutions to charges filed fields (receipts, resolutions, resolutions by type), settlement information, and finding. The EEOC denied the first FOIA request for procedural reasons that seemed to stand in for underlying concerns about releasing non-comprehensive data because all fields are not required to be completed in every record. After speaking with EEOC FOIA staff, I made appropriate modifications and submitted a second aggregate data request; that request is still pending.

The third set of data requested included a manual case-by-case search of investigative charge files of all reported post-ADAAA cases in which workers in the public sector sought an accommodation. Workers in the public sector 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. This request was denied for reasons of masking, inability to adequately de-identify the requested data, and exemption from disclosure by statute.

Broader EEOC charge statistics are publicly available on the EEOC website; these are listed by charge type, by filing receipt, by resolution, and by issue.

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 public sector; 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; Current Occupation SOC Codes and Main Condition Diagnosis Group Collapsed or SSA identified impairments; Main Condition Diagnosis Collapsed and Goals Include Working; Goals Include Working and six receipt of job assistance in 2014 variables. Statistical analysis was conducted using SPSS version 25.

Case Law and Outcome Data

Case law reviewed comes from three sources: Professor Leslie Francis' database of all district and appellate court decisions in which accommodations were an issue, keyword searches of case law on Westlaw legal database, and docket reviews on Westlaw, Lexis Advance, and Bloomberg Law legal databases.

Universe of Accommodation Case Law. Scope and focus for reasonable accommodation cases across industries was on judicial interpretation of federal district and appellate court cases nationwide in which employees 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 ADAAA, 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 across industries were identified during Cohort 1 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)"; "advanced: (ADAAA & employer & nurse & accommodation & health)"; "advanced: (ADAAA & employer & nurse & disability & accommodation & "Title I")"; "advanced: (ADAAA & disability & Title I & accommodation & physician /p employer)". Slightly less than half of these cases were reviewed and coded during Cohort 1. I reviewed and coded the remaining cases, as well reviewed the cases coded last year, refining those results. In order to capture cases that made it to federal court after Cohort 1 research was completed, I also performed a keyword search in Westlaw for "advanced: (ADAAA & employer & disability & accommodation)" and filtered the results for May 1, 2018 through March 15, 2019.

Using these sampling methods, 667 cases were retrieved, and 657 were reviewed for applicability and duplication. 367 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. The remaining 286 cases were confirmed as the research sample. Of the cases reviewed, 43.5% were found to be accommodation 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 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. Once the research sample was confirmed, 87 were determined to be public sector employer cases. Cases were coded in Word and Excel and data stored in Excel.

Settlement Data. Settlement and other outcome data was collected by searching Westlaw, Lexis Advance, and Bloomberg Law jury verdict and settlement tracker tools for docket numbers and case names of those cases surviving an initial resolution, such as a motion for summary judgment or dismissal for failure to state a claim on which relief could be granted, as well as cases that were appealed following a resolution on the merits. Settlement information was coded to cases 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. Variables were measured nominally, but from those results, ratio analysis is possible.

EEOC Charge Data

According to publicly available aggregate data, total EEOC charges filed under the ADA where reasonable accommodations were at issue between fiscal year 2010 and 2017 were 8,400, 8,566, 9,041, 9,496, 9,765, 10,781, 11,865, and 11,754 respectively, totaling 79,668 charges filed. (Equal Employment Opportunity Commission Statutes by Issue, 2018). Charges for 2018 have not yet been reported. Because the ADAAA went into effect on January 1, 2009, many charges filed with the EEOC during 2009 would have been evaluated under the pre-ADAAA legal standard because discriminatory events would have occurred before the ADAAA went into effect. EEOC charge statistics that are publicly available on the EEOC website do not allow for a more specific or nuanced breakdown of this number, as the statutes by issue statistics are the only statistics that break out reasonable accommodation cases. Resolution statistics are for all ADA charges filed with the EEOC and do not break out reasonable accommodation cases; receipts are for all ADA charges filed with the EEOC and do not break out reasonable accommodation cases, but are broken down by disability/impairment; and filings and closures (charge type) are for all ADA charges filed with the EEOC and do not break out reasonable accommodation cases, but are broken down by outcomes.

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,

Current Occupation SOC Codes, and Goals Include Working. These results are detailed in Tables 1, 2, and 3.

With regard to the public sector specifically, the *National Beneficiary Survey: Disability Statistics, 2015* publication states that 8.2% of beneficiaries employed at the time of the study were employed in the other services and public administration industry, 7.1% in the educational services industry, 6.8% in the health care industry, and 2.4% in the administration, support, and waste management/remediation services industry. While these industry groupings are not exclusively made up of public sector employers, they are dominated by public sector employers. Further, the *Disability Statistics* publication also states that 5.5% of beneficiaries employed at the time of the study were employed in education, training, community, and social services occupations, 2.6% in health care practitioners, tech, and support occupations, and 0.9% in protective service occupations. While these occupational groupings are not exclusively made up of public sector employees, they are dominated by those employees, particularly in education and protective service.

Publicly available NBS data further combines these groupings for industry and occupation, abbreviating each into only four or five total categories. For industry, NAICS codes were combined into five categories, as defined in Table 1. Public sector employers are scattered throughout four of the five industry categories, with the majority of public sector employers in the “Other Industries” category; this category includes public administration, transportation and warehousing, arts and entertainment, accommodation and food, and other services. For occupation, SOC codes were combined into four categories, as defined in Table 2. Public sector occupations are scattered throughout these categories, but are primarily concentrated in the “Other Occupations” category; this category includes education, protective service, healthcare, sheltered workshop, management, business, computer/math, architecture/engineering, scientists, social service, legal, arts and entertainment, farming, construction, repair, and military professions. These combined groupings makes meaningful analysis of publicly available NBS data difficult, as primarily public sector industries and occupations are combined into categories with private sector industries and occupations.

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). According to an NBS data quality report, when beneficiaries responded that their current job was a position in a sheltered workshop, the industry was coded as social assistance because this industry code encompasses services for individuals with disabilities. (Mathematica Center for Studying Disability Policy NBS R5 Data Cleaning and Identification of Data Problems, 2017). These same sheltered workshop positions were coded with an appropriate SOC occupation classification as long as one was identifiable; otherwise, they were coded with a sheltered workshop occupation code. This could lead to a skewing of the publicly available data for beneficiaries currently working in the healthcare and social assistance industry or in a number of public sector occupations.

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 or 2014 Occupation SOC 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 public sector specifically through this approach would have proven almost impossible because of the abbreviated categories available via the public data. The *Disability Statistics* publication states that 56.2% of beneficiaries employed at the time of the study had an employer who made at least one accommodation for them. Additionally, 24.9% of beneficiaries employed at the time of the study used special equipment, 18.5% used personal assistance, and 4.1% needed changes to the workplace in order to perform their job. Of those employed beneficiaries who received at least one accommodation, 72.9% required assistance from a co-worker or other person, 49.8% required work schedule changes, 50.1% required work task changes, 37.1% required physical work environment alterations, 11.8% required special equipment, and 8.5% required some other accommodation.

Case Law and Outcomes

As described above, legal cases were analyzed at two distinct stages. Findings from the universe of accommodation case law are discussed as a whole, by public sector, and by circuit. A discussion of subsequent findings from settlement data follows.

Universe of Accommodation Cases. Of the confirmed research sample of 286 federal district and appellate court cases in which employees stated a claim for failure to provide a reasonable accommodation under the ADAAA, employees in 180 cases did not survive an initial resolution, such as a motion for summary judgment or dismissal for failure to state a claim on which relief could be granted, resulting in a dismissal rate of 62.9%, at least as to the employee's reasonable accommodation claims. The employer's motion for summary judgment was granted in 152 of the cases; employer's motion to dismiss was granted in 25 of the cases, three of which included a motion to compel arbitration and one of which granted the employee leave to amend the complaint within 30 days; the court affirmed judgment as a matter of law on behalf of the employer in one case; the employee's motion to amend was denied as to their accommodation claim in one case; and the employee's failure to accommodate claim was voluntarily dismissed in one case. These 180 cases where reasonable accommodation claims were at issue failed without ever reaching the stage of a trial on the facts. In contrast, employees in 106 cases survived at the initial resolution stage: the employer's motion for summary judgment was denied as to reasonable accommodation claims in 75 cases; employer's motion to dismiss was denied in 20 cases; the appellate court reversed the district court's finding of summary judgment for the employer in three cases; the employee's motion for summary judgment was denied in two cases; the employee's motion for reconsideration was granted in one case; the employee's motion to amend the complaint was granted in one case; and the employer's motion for summary judgment was granted regarding the employee's ADA claims because the employer was a state actor but denied regarding their Rehab Act claims in once case. And three cases prevailed: one on an employee's motion for summary judgment, and two with a jury trial verdict on behalf of the employee. Surviving such an attempt to end the case without trial does not mean that the employee prevailed on the merits of their claim or that the accommodations were found to be reasonable or granted, 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 because the employee was considered to have alleged sufficient facts to be allowed to continue onto the next stage. 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. Findings on the prevalence of settlement are discussed in detail in the Settlement Data section below.

Public Sector Cases. In Cohort 1, a prevalence of public/government employers was observed in reasonable accommodation claims. In an effort to better understand trends regarding accommodation that might be occurring in these industries, I employed a sub-focus on those cases where employers were in the public sector – these primarily include law enforcement, public safety, fire and EMS, education, utilities, and some healthcare. Of the confirmed research sample of 286 federal district and appellate court cases in which employees stated a claim for failure to provide a reasonable accommodation under the ADAAA, 87 were identified as public sector employer cases, or 30.4% of the confirmed research sample. Of these 87 cases, 37 survived the initial resolution stage, at least to the employee’s reasonable accommodation claims, a survival rate of 42.5%. Thus, it seems that public sector employees fair slightly better overall than those employees in the larger universe of accommodation cases. Findings show that direct threat affirmative defense arguments are often raised by public sector employers as a reason to deny accommodations or terminate an employee with a disability, but these arguments are rarely successful, at least at the summary judgment stage. These arguments are more likely to be made in hospital-based positions where direct patient care is generally a large part of the employee’s position, in broader public sector positions where lifting is an essential function of the position, and in detention positions where an employer can attempt to argue that restraining residents is an essential function. With regard to law enforcement and corrections positions, several cases discussed a potential difficulty in granting an accommodation of light duty when restrictions included no contact with inmates and an inability to restrain individuals because light duty positions may not otherwise be available, and what accommodation would allow the employee to perform the essential functions of the position if not given light duty, but other cases cited a variety of other positions within such a facility for transfer, at least on a temporary basis. Also with regard to law enforcement and corrections positions, at least two cases stated that psychological unfitness makes an officer unqualified, and that while what is a reasonable accommodation is usually a question for the jury, when it comes to police officers and issues of mental health, the court would not second-guess personnel decisions when they are deciding how to use an officer with a mental health condition. Finally, the ability to carry and use a firearm was found to be an essential function of some law enforcement positions, such as an ATF special agent, as an inability to lift a gun could be damaging to the employee and others. Lastly, issues of attendance and leave came up in several public sector cases, including: regular attendance as an essential function that cannot be performed with or without a reasonable accommodation, unlimited or unspecified lengths of leave being unlikely to be found reasonable, and the ability to leave work during flare ups of a condition that is considered to be unpredictable and flexible is less likely to be found reasonable.

Circuit Trends. In an effort to better understand and identify nuances and patterns regarding accommodation that might exist by circuit court, I also sorted and reviewed the confirmed research sample by circuit. The federal judicial system is organized into twelve regional circuits, and federal district courts are housed under these circuits based on geography.

Circuit courts each have a court of appeals where cases can be reviewed to determine if the law was correctly applied in the lower court. These twelve circuit courts consist of the First through Eleventh Circuit and the DC Circuit. In the First Circuit, there were nine cases from the confirmed research sample, and two of them survived the initial resolution stage, a survival rate of 22.2%. In the Second Circuit, there were 31 cases and ten of them survived the initial resolution stage, a survival rate of 32.3%. In the Third Circuit, there were 36 cases and 20 of them survived the initial resolution stage, a survival rate of 55.6%. In the Fourth Circuit, there were 28 cases and 9 of them survived the initial resolution stage, a survival rate of 32.1%. In the Fifth Circuit, there were 27 cases and five of them survived the initial resolution stage, a survival rate of 18.5%. In the Sixth Circuit, there were 33 cases and ten of them survived the initial resolution stage, a survival rate of 30.3%. In the Seventh Circuit, there were 32 cases and 17 of them survived the initial resolution stage, a survival rate of 53.1%. In the Eighth Circuit, there were 20 cases and seven of them survived the initial resolution stage, a survival rate of 35%. In the Ninth Circuit, there were ten cases and five of them survived the initial resolution stage, a survival rate of 50%. In the Tenth Circuit, there were 29 cases and 13 of them survived the initial resolution stage, a survival rate of 44.8%. In the Eleventh Circuit, there were 29 cases and seven of them survived the initial resolution stage, a survival rate of 24.1%. And in the DC Circuit, there were two cases and one of them survived the initial resolution stage, a survival rate of 50%. There are a number of potential reasons and explanations for the disparity in number of accommodation cases present in each circuit, as well as the number of accommodation cases which survive an initial resolution. These include the resolution rate of regional EEOC offices, the knowledge level regionally of employers regarding reasonable accommodations and the ADA, the intervention which occurs at the state level and what protections exist in state law, the perceived politics of the particular circuit and if they are considered friendly to employees or employers, and the amount of resolution that occurs before a formal legal action is filed, such as via settlement between the parties with the help of a protection and advocacy agency or private attorney.

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

Settlement Data. In Cohort 1, it became clear that surviving an initial resolution, such as a motion for summary judgment or dismissal for failure to state a claim on which relief could be granted, may increase settlement frequency because the employer sees the potential merits of the case and also is incentivized to settle to avoid the costs of a full trial and the risks of an adverse jury verdict. It was unclear, however, to what degree prevailing at this stage increased settlement frequency, as well as what may happen when cases are appealed following a resolution on the merits or dismissal at the initial resolution stage. Through an examination of the dockets of all 106 cases from the confirmed research sample that survived at the initial resolution stage, findings show that 77 of these cases were settled. Sixty of these cases were settled after the employer's motion for summary judgment was denied as to reasonable accommodation claims, including one in which the employer's motion for summary judgment was granted regarding the employee's ADA claims because the employer was a state actor but denied regarding their Rehabilitation Act claims; 11 after the employer's motion to dismiss was denied; three after the appellate court reversed the district court's finding of summary judgment for the employer; one after the employee's motion for summary judgment was denied; one after the employee's motion for reconsideration was granted; and one after the employee's motion to amend the complaint

was granted. This constitutes a settlement rate of 72.6% following survival at the initial resolution stage. These results are detailed in Table 4.

Of the remaining 29 cases that survived the initial resolution stage, seven had other positive outcomes: four cases resulted in a jury verdict for the employee, including one that survived as a jury verdict for the employee, two after the employer's motion for summary judgment was denied, one after the employee's motion for summary judgment was denied; one case resulted in a judgment for the employee after survival of the employer's motion for summary judgment and a hung jury; and in one case, the parties stipulated to damages after a jury verdict for the employee was opposed by the employer and remanded for determination of front pay and other damages. Further, one case resulted in a jury verdict for the employee after the employer's motion for summary judgment was denied; this case is still in the courts on employer's motion for a new trial and judgment as a matter of law. This constitutes a total positive outcome rate after surviving at the initial resolution stage of 79.3%. Twelve cases ended in a negative outcome for the employee, including: a verdict for the employer after the employer's motion for summary judgment was denied in six cases; a granting of employer's motion to dismiss because employee continued to delay the judicial process after the employer's motion for summary judgment was denied in one case; a granting of employer's motion for summary judgment after employee was granted a partial motion for summary judgment in one case; a dismissal of the claim for employee's failure to amend after the employer's motion to dismiss was denied in one case; a judgment for the employer after the employer's motion for summary judgment was denied in two cases; and judgment as a matter of law for the employer after the employer's motion for summary judgment was denied in one case. And one case was settled on the regarded as disabled prong after the employer's motion to dismiss was denied, so the employee would not have been entitled to reasonable accommodations. Of the remaining nine cases, seven are currently in the courts, including six that survived the employer's motion to dismiss and one that survived the employer's motion for summary judgment. And two are currently in the courts on appeal, one following initial survival of the employer's motion to dismiss and subsequent granting of employer's motion to dismiss, appeal, and granting of employer's motion for summary judgment; and the other following initial survival of the employer's motion for summary judgment and subsequent jury verdict for employer on ADA claims and employee on FMLA claims – this case is on cross-appeal.

Further, of those 180 cases that did not survive the initial resolution stage, four were settled following an appeal, four are currently in the courts on appeal following summary judgment for the employer, two are currently in the courts on appeal following a motion to dismiss for the employer, and one is currently in the courts after a motion to dismiss was granted for the employer but the employee was granted leave to amend the complaint and did amend.

For the 87 public sector cases identified above, of the 37 cases that survived the initial resolution stage, 26 were settled, six ended in a negative outcome for the employee, four are still in the courts, and one resulted in judgment for the employee. This constitutes a settlement rate of 70.3%, and a positive outcome rate of 73%. Of the 50 cases that did not survive the initial resolution stage, one is currently in the courts on appeal.

The role of survival at the initial resolution stage with regard to settlement and other positive outcomes will be addressed in additional detail in the Discussion section.

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 they have 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 of a perceived impairment. (42 U.S.C. § 12102(3)(A), defining “regarded as”). However, an employee who brings a claim that they were regarded as disabled is not entitled to a reasonable accommodation.

Discussion/Implications

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, as in Cohort 1, the ADAAA is the key statute in this study. While EEOC charge data was not obtained and aggregate charge data is still pending, this does not weaken the findings of this research project. Outcome data gathered via docket review provided useful and applicable data regarding ultimate outcomes of cases alleging a failure to accommodate claim.

This research project was intended build on findings from Cohort 1 to provide additional insight into issues of reasonable accommodation, 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, and what happens after an employee survives a motion for summary judgment or other hurdle in federal court that allows them to continue to pursue their disability discrimination claim. Findings primarily answered these questions, illustrating that settlement frequency is greatly increased when an employee prevails on summary judgment, explaining trends present in public sector cases, and identifying the frequency of failure to accommodate claims and subsequent resolution in individual circuits. Findings also identified additional tools that employees can use to advocate for themselves, support their initial request for accommodation and engage in the ensuing interactive process so that they might avoid filing a charge of disability discrimination under the ADA. Findings also outlined additional strategies for employees to navigate those cases that continue to necessitate

legal intervention, allowing them to increase the likelihood of survival on a motion for summary judgment. These tools and strategies are discussed in additional detail below.

As in Cohort 1, it is 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 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, that their employer knew or had reason to know of their disability, that they 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 their 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, they may be in danger of failing at the summary judgment stage.

Cases and settlement data were instructional, and suggest several strategies that can assist employees in surviving at summary judgment on a failure to accommodate claim:

- properly and completely fill out medical documentation and requests for reasonable accommodation, and review them before submitting to employer; a request for an accommodation that violates a medical provider's restrictions is not reasonable; a note from a medical provider can serve as a request for reasonable accommodations;
- 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; at summary judgment, an employee must identify vacant positions which they were qualified to perform and that were available at or around the time they requested reassignment; collective bargaining agreements may preclude reassignment if the new position is considered a promotion or if the agreement requires that an employee compete for the position, unless special circumstances can be effectively argued; if another effective accommodation is available, an employer does not have to consider reassignment;
- 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;
- an employee must show that an accommodation is reasonable and is not an undue hardship to the employer; an accommodation that was granted and then removed is sufficient to state a claim of failure to accommodate.

Alternatively, cases and settlement data 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 at least to some degree 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 on a failure to accommodate claim 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; an employee is found to qualify only under the "regarded as" prong;
- accommodation was provided to employee in the course of employment; an employee declined employer's offer of a reasonable accommodation and did not continue to engage in the interactive process; an employee didn't attempt to engage in or actively broke down the interactive process;
- 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; if possible, an employee should identify one or more specific accommodations that would allow them to perform the essential functions of their position;
- there is no evidence that an employee was terminated because of their disability; a showing of adverse action which is an ultimate employment action is needed to prevail on a failure to accommodate claim, because failure to accommodate is rarely an adverse action on its own;
- 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;
- an employee must present their failure to accommodate claim from the start – mentioning it for the first time in opposition to a motion for summary judgment from employer will fail; if an existing claim for failure to accommodate is not addressed in the employee's response to employer's motion for summary judgment, the claim is deemed abandoned.

Additionally, as detailed in Cohort 1 and as supported by additional case law in the present project, 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).

Case law data show that accommodations must be evaluated using a highly fact-specific inquiry based on the particular essential functions of the job and the individual employee. An individualized assessment must always be performed, and is particularly important in direct threat defenses. Further, 100% healed policies from employers in order for employees to return to work are per se violations of the ADA as applied to individuals with disabilities. This is because 100% healed policies prevent individualized assessment, which the ADA requires. Regarding failure to accommodate claims based on a failure of the interactive process, an employer's failure to engage in the interactive process does not form the basis for a claim under the ADA and evidence of this does not allow the employee to avoid summary judgment unless the employee also establishes that, with an accommodation, they were qualified for the position at issue. Failure to engage in the interactive process is not an independent basis for liability under the ADA, and is only actionable if it prevents identification of appropriate accommodations for a qualified individual. It is also important to note that an employer is not required to provide an accommodation of the employee's choice if the employee is qualified for the position, but only an accommodation that is reasonable or effective. Additional observations include that some accommodations are unreasonable as a matter of law, such as indefinite leave or the intent to return to work "at some indefinite point" in the future, missing work whenever an employee requires it, reassignment when there are no vacant positions for which employee is qualified, transfer to a different supervisor, and reallocating duties to others to change the essential functions of a job.

Findings made clear the role of survival at the initial resolution stage with regard to settlement frequency and other positive outcomes for employees. If an employee is able to bring a case that can withstand a motion for summary judgment or dismissal for failure to state a claim on which relief can be granted, they have an over 72% chance of reaching settlement on that case and an over 79% chance of having some kind of positive outcome. These findings bear out the theory that survival at the initial resolution stage results in an employer recognizing the potential merits of the case and also being incentivized to settle to avoid the costs of a full trial and the risks of an adverse jury verdict. And just as it is important to understand what happens at the conclusion of a claim for failure to accommodate, it is also useful to understand the spectrum on which such a claim exists. Before a charge of disability discrimination in form of failure to accommodate is filed with the EEOC, intervention and resolution may have occurred on an informal basis. It is unknown how many employees experience issues with reasonable accommodation by employers and seek legal intervention from a private attorney or a protection and advocacy agency in the form of a demand letter and/or settlement discussions, which might include monetary damages, a neutral reference, reinstatement to their position, an apology, or

some other outcome. In some cases, this intervention is successful and these cases never reach the EEOC or the courts.

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, 2018). 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. It is my hope that this research 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. Suggestions for future research include 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, and further research into the nuances and concrete patterns that exist by circuit. While this research project identified settlement frequency after prevailing on summary judgment, research into actual settlement outcomes, including the amount of the settlement, based on what damages, and was reinstatement for the employee included, could provide valuable insight into ultimate outcomes for employees with disabilities. Much of this information is confidential and would require contacting parties and attorneys directly, which could be time-consuming and onerous. Research into those cases that are resolved before formal legal intervention is taken would also provide insight into the process; perhaps surveying protection and advocacy agencies that assist employees in negotiating settlements or reinstatements with employers before an EEOC charge is filed would provide useful data. 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. 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 2. Impairments of Beneficiaries Currently Working – by SOC Code Group

			Main Condition Diagnosis Group Collapsed					
			Other	Mental Illness	Cognitive Disability	Muscular/Skeletal	Sensory Disorders	Total
Current Occupation, SOC Code (Public)	Service Occupations	Count	88044	60180	41750	33140	5987	229101
		% within Main Condition Diagnosis Group	24.4%	28.6%	39.1%	23.5%	23.8%	27.2%
	Sales, Office, and Administrative Occupations	Count	138204	40637	5870	49142	5718	239571
		% within Main Condition Diagnosis Group	38.4%	19.3%	5.5%	34.9%	22.7%	28.4%
	Production and Transportation	Count	46037	17386	24648	12731	6210	107012
		% within Main Condition Diagnosis Group	12.8%	8.3%	23.1%	9.0%	24.7%	12.7%
	Other Occupations	Count	88015	92262	34427	45768	7268	267740
		% within Main Condition Diagnosis Group	24.4%	43.8%	32.3%	32.5%	28.9%	31.7%
Total		Count	360300	210465	106695	140781	25183	843424
		% within Main Condition Diagnosis Group	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

Notes: Main Condition Diagnosis Group Collapsed responses totaled 12,896,735, with 8.2% missing overall (1,055,032). Other Occupations category includes: sheltered workshop, management, business, computer/math, architecture/engineering, scientist, social service, legal, education, art/entertainment, healthcare, protective service, farming, construction, repair, and military professions.

Table 3. Impairments of Beneficiaries Whose Goals Include Working

			Main Condition Diagnosis Group Collapsed					Total
			Other	Mental Illness	Cognitive Disability	Muscular/ Skeletal	Sensory Disorders	
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. Rates of Survival at Initial Resolution Stage

Initial Resolution Stage	Survived	Settled	Other Positive Outcome	Negative Outcome	In Progress
Summary Judgment for Employer Denied	75	59	4*	10	2
Motion to Dismiss for Employer Denied	20	11	(1) [#]	1	7
Appellate Court Reversed Summary Judgment in Employee's Favor	3	3	0	0	0
Employee's Motion for Summary Judgment Denied	2	1	1 ⁺	0	0
Employee's Motion for Reconsideration Granted	1	1	0	0	0
Employee's Motion to Amend Complaint Granted	1	1	0	0	0
Summary Judgment Denied for Employer re: Rehab Act (but Granted re: ADA because state actor)	1	1	0	0	0
Employee's Motion for Summary Judgment Granted	1	0	0	1	0
Jury Verdict for Employee	2	0	2 [§]	0	0
Totals	106	77	7 / (8) [#]	12	9
Survival at Initial Resolution	37.1%				
Settlement Rate		72.6%			
Total Positive Outcomes			79.3%		

Notes:

Other positive outcomes:

* Two cases resulted in jury verdict for the employee after the employer's motion for summary judgment was denied; one case resulted in a judgment for the employee after survival of the employer's motion for summary judgment and a hung jury; one case resulted in a jury verdict for the employee after the employer's motion for summary judgment was denied (this case is still in the courts on employer's motion for a new trial and judgment as a matter of law).

⁺ Jury verdict for the employee after the employee's motion for summary judgment was denied.

[§] One case survived as a jury verdict for the employee; in one case, the parties stipulated to damages after a jury verdict for the employee was opposed by the employer and remanded for determination of front pay and other damages.

[#] Not counted in total "other positive outcomes result" because this case was settled on the regarded as disabled prong after the employer's motion to dismiss was denied, so the employee would not have been entitled to reasonable accommodations.