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UNEQUAL TREATMENT OR UNEVEN CONSEQUENCE: A CONTENT ANALYSIS OF AMERICANS WITH DISABILITIES ACT TITLE I DISPARATE IMPACT CASES FROM 1992 – 2012

by

Sara Pfister Johnston

A thesis submitted in partial fulfillment of the requirements
for the Doctor of Philosophy degree in
Rehabilitation and Counselor Education
in the Graduate College of The University of Iowa

August 2013

Thesis Supervisor: Professor Vilia M. Tarvydas

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CERTIFICATE OF APPROVAL

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PH.D. THESIS

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This is to certify that the Ph.D. thesis of

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To my husband Bob.

In memory of my mother Jane Pfister, my father-in-law William Johnston, and my sister-in-law Patty Thieme. You are dearly missed.

In memory of Jane Martino, who fought for her rights under Title I of the Americans with Disabilities Act.

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CHAPTER I

INTRODUCTION

> The Americans with Disabilities Act demands that we focus on *people,* not on *disabilities*; that we focus on what they *can* do, not on what they *cannot* do. It is a policy that proclaims independence for people with disabilities – economic, social, and personal. The Act says participation in the mainstream of daily life is an American right (West, 1991, p. xi).

Parry noted that "Title I may be the single most important title of the Americans with Disabilities Act because employment is the key to independence" (1993, p. 57). Previous research by disability scholars on the impact of Title I of the Americans with Disabilities Act of 1990 (hereinafter ADA) in reducing unemployment for people with disabilities is primarily quantitative in nature (see, for example, Bruyère, Erickson, & VanLooy, 2006; Colker, 2005; McMahon, Hurley, West, Chan, Roessler, & Rumrill, 2008; Miller, 1998; Moss, Ullman, Ranney, & Burris, 2005; Shaw, Chan, & McMahon, 2012). In addition, the focus of the research has been on the outcomes of litigation rather than on the process of litigation (Lens, 2003), leaving a gap in the disability literature about the possible extralegal influences on these outcomes and what happens to ADA cases as they make their way through the litigation process (Burris & Moss, 2000).

Chapter 1 of this study describes the statement of purpose and research questions, significance of the problem, historical and conceptual bases for the study, the rationale and significance, statement of purpose, and problem statement of the study. Finally, the terminology used in this study is defined.

Statement of Purpose and Research Question

The purpose of this study was to explore the legal patterns and trends in all publically available U.S. appellate judicial opinions in disparate impact cases decided under the employment provisions (Title I) of the Americans with Disabilities Act from 1992 through 2008. The courts have played an important role in the implementation of the ADA (Percy, 2001). As such, judicial opinions in ADA are a rich source of information about the law's implementation, and therefore served as the unit of analysis

for this study. “Litigation provides important feedback from adjudicatory systems about the appropriateness of specific practices within a statutory framework” (Helms, 2010, p.79).

The objectives of this study were two-fold: First, this study sought to extend the existing quantitative research on the effectiveness of Title I of the ADA in addressing employment discrimination against people with disabilities. To achieve that objective, this study used constant comparative analysis (Strauss & Corbin, 1990) to examine the disability-related characteristics of U.S. appellate court opinions in ADA Title I disparate impact cases. Second, the present study brought the tradition of legal content analysis into the realm of quantitative rehabilitation research and provided a new method for understanding the role of the law in rehabilitation practice. Qualitative research methods often are identified with the social sciences and humanities more generally than with the discipline of law in particular. That is not to say that lawyers do not make use of qualitative research methods in their own practice. Many common law practitioners are unaware that they undertake qualitative empirical legal research on a regular basis; the case-based method of establishing the law through analysis of precedent is in fact a form of qualitative research using documents as source material (Webley, 2010). An additional goal of this research was to improve rehabilitation counseling professionals’ knowledge of and skills in computer-assisted legal research (CLAR).

In the U.S. court system, decisions by “higher” courts are often binding on “lower” courts. For example, decisions made by the U.S. Supreme Court are binding on U.S. appellate and U.S. district courts. Likewise, appellate court decisions not appealed to the Supreme Court are binding on the district courts within the appellate court’s jurisdiction. In legal terms, this is known as setting precedent (Mellinkoff, 1992). Cases that set precedent are important because they often guide decisions in similar future cases and may influence the evolution of law in a particular area (Mellinkoff). This process is referred to as *stare decisis* (from the Latin “to stand by things decided”) (Mellinkoff).

The U.S. appellate courts play a large role in setting precedent because the U.S. Supreme Court reviews so few cases. For this reason, the sample in this study was comprised of U.S. appellate court opinions in disparate impact cases involving ADA Title I cases.

This research examined a small subset of judicial opinions in ADA Title I cases, specifically, disparate impact cases, from the Act's July 26, 1992, effective date through December 31, 2008, after which date the ADA Amendments Act of 2008 became effective (U.S. EEOC, *Questions and answers on the final rule implementing the ADA Amendments Act of 2008,* n.d.).

Disparate impact cases make up a small percentage of the cases decided by U.S. appellate courts under Title I of the ADA. The researcher chose to examine disparate impact cases because their focus is on workplace policies and practices that may affect people with disabilities as a group rather than as individuals (U. S. EEOC, 2008). The group approach, related to the minority group approach in the disability literature, is more closely aligned with the sociopolitical model of disability (Gill, Kewman, & Brannon, 2003; Hahn, 1984).

This research will employ a mixed methods approach in the design and execution of this study for several reasons:

First, appellate court judicial opinions are the phenomenon under study and they would be difficult, if not impossible, to study in a controlled, or laboratory, environment. A naturalistic or qualitative approach was chosen for this study because it considers the case and the contextual factors surrounding the case, thus preserving the uniqueness of each case.

Second, qualitative research is useful if a researcher is examining a topic about which not much is known and the study is exploratory in nature (Patton, 2002). As mentioned, previous research by disability scholars on the impact of Title I of the ADA in reducing unemployment for people with disabilities is primarily quantitative in nature and focuses on the outcomes of litigation rather than the process of litigation. For

example, see Bruyère et al., 2006; Colker, 2005; McMahon, Hurley, West, et al., 2008; Miller, 1998; Moss et al., 2005; Shaw et al., 2012. Very little research has been done on the process of litigation (Falk, 1994; Lens, 2003). This study sought to extend the quantitative research on the impact of Title I of the ADA I in reducing employment for people with disabilities by using content analysis and constant comparative analysis to examine the patterns and trends of litigation in a subset of ADA cases, Title I disparate impact cases.

Third, an advantage of qualitative design and methodology is that it may produce a deeper and richer understanding of the data (Denzin & Lincoln, 2005; Patton, 2002). Therefore, the data generated from this study may: provide scholars and practitioners with more detailed information about the nature of disability-related characteristics contained in judicial opinions; may improve rehabilitation counselors' understanding of the words judges use when writing about disability in ADA Title I cases charged under the theory of disparate impact; and may provide information that will assist rehabilitation counselors in becoming more conversant with the complex relationship between civil rights legislation and its implementation through the court system.

The following research questions and sub-questions guided the study:

1. What are the patterns of litigation in Americans with Disabilities Act (ADA) cases charged under the theory of disparate impact and litigated in U.S. Appellate Courts during the time period between 1992 and 2012?

a) What are the numbers of published and unpublished ADA disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012?

b) What is the distribution of the jurisdictions of the U.S. Appellate Courts in published ADA disparate impact cases?

c) What is the distribution of the titles of the published ADA disparate impact cases litigated in U.S. Appellate Courts: Title I, Title II, Title III, Title IV?

d) What is the number of published U.S. Appellate Court ADA Title I disparate impact cases brought by the Equal Employment Opportunity Commission (EEOC) from 1992 through 2012?

e) What prongs under the ADA's definition of disability are most frequently litigated in published U.S. Appellate Court ADA Title I disparate impact cases: (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment or (iii) is regarded as having such an impairment?

f) What is the fact pattern that gave rise to the dispute in published U.S. Appellate Court ADA Title I disparate impact cases: testing, hiring (qualified), promotion, discharge, or reasonable accommodations?

g) What essential fact elements of disparate impact theory are most frequently in dispute in published U.S. Appellate Court ADA Title I disparate impact cases: existence of practice/policy that wrongfully discriminates against people with disabilities; employer/employee relationship; practice/policy has an adverse effect on people with disabilities; protected status; policy/practice caused harm?

h) What types of defenses are most frequently claimed in published U.S. Appellate Court ADA Title I disparate impact cases: business necessity, job-relatedness?

i) What are the characteristics of the charging parties in ADA Title I disparate impact cases: type of disability, age, gender, race/ethnicity, and socioeconomic status?

j) What are the characteristics of the opposing parties in ADA Title I disparate impact cases: size of business; for-profit, non-profit, public institution; nature of business?

k) What was the basis of the disposition of the cases in ADA Title I disparate impact cases: procedural, substantive, or indeterminate?

l) What patterns and trends in litigation can be identified in published ADA Title I disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012?

2. Based on the subset of data identified in Research Question 1, what themes, in terms of the sociopolitical perspective of disability, can be identified in the judicial opinions of published ADA Title I disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012?

Statement of Purpose

Previous research by disability scholars on the impact of Title I of the ADA in reducing unemployment for people with disabilities is primarily quantitative in nature (see, for example, Bruyère, Erickson, & VanLooy, 2006; Colker, 2005; McMahon, Hurley, West, Chan, Roessler, & Rumrill , 2008; Miller, 1998; Moss, Ullman, Ranney & Burris, 2005; Shaw, Chan, & McMahon, 2012). In addition, the focus of the research has been on the outcomes of litigation rather than on the process of litigation (Lens, 2003), leaving a gap in the disability literature about the possible extralegal influences on these outcomes as ADA Title I cases make their way through the litigation process. Quantitative analysis of outcomes does not "capture the particular ideologies, cultural beliefs, and other qualitative aspects of a decision, which can be as central to its outcome as specific legal rule" (Lens, p. 30). The law is a socio-cultural construct (Krieger, 2003; Liachowitz, 1988; Post, 2003). As such, judges may be subject to extralegal factors surrounding the issues that come before them (Lens, 2003; Post, 2003).

Although disability scholars have charged that judicial interpretation of the ADA has limited the scope and effectiveness of Title I of the ADA (Krieger, 2003), little research has been done on the disability-related characteristics contained within judicial opinions in ADA Title I cases. Courts interpret the ADA through case law. As precedent

is set, the law evolves through a process referred to as *stare decisis* (from the Latin "to stand by things decided") (Gennaioli & Schleifer, 2007; Mellinkoff, 1992; Pyle & Bast, 2011). Therefore, judicial opinions in cases decided later in the ADA's history may reflect both socio-cultural change and legal evolution in the way disability is viewed.

The sociopolitical model of disability asserts that disability is socially constructed (Gill et al., 2003; Hahn, 1984; Percy, 2001). As such, institutions, such as courts, may embody the prevailing socio-cultural view of disability. The sociopolitical model of disability posits that negative societal views of disability may perpetuate discrimination against people with disabilities (Hahn; Percy, 2001). Therefore, proponents of the sociopolitical model suggest that discrimination against people with disabilities can only be addressed by challenging societal assumptions about disability (Hahn; Percy).

This study sought to extend the existing quantitative research by using a mixed methods approach to examine the disability-related characteristics of U.S. appellate court opinions in ADA Title I disparate impact cases.

Problem Statement

The sociopolitical model of disability asserts that disability is socially constructed (Hahn, 1984; Percy, 2001). As such, courts as social institutions are influenced by social and cultural understandings of the phenomena they consider in their decisions (Lens, 2003). Therefore, proponents of the sociopolitical model suggest that discrimination against people with disabilities can only be addressed by challenging societal assumptions about disability (Hahn; Percy). Further research is necessary to examine what type of viewpoints of disability may be reflected in the legal record of decisions on the ADA. The sociopolitical model of disability posits that negative societal views of disability may perpetuate discrimination against people with disabilities (Hahn; Percy), yet it remains to be evaluated the extent to which this model may play a role in legal decisions, or if some other pattern of constructs may emerge.

Significance of the Problem

The Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. Section 12101-12113) has been described as "the most progressive and aggressive piece of legislation passed since the Civil Rights Act of 1964" (Bauer, 1993, p. 40). The ADA was signed into law on July 26, 1990, and was based on previous civil rights legislation, including the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Architectural Barriers Act of 1968. However, the ADA expanded the scope of the preceding legislation by including private business entities (Blanck, Hill, Siegal, & Waterstone, 2004). The new law was significant in that it represented the first time that the U.S. had one comprehensive, overarching policy addressing the civil rights of people with disabilities (West, 1991).

The ADA's passage culminated decades of work by disability rights advocates in their struggle to convince policymakers to view people with disabilities as citizens entitled to full civil rights instead of objects of pity "deserving of public assistance" (Percy, 2001, p. 260). In his July 26, 1990, signing statement, President George H.W. Bush declared that the ADA would:

> ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream. (cited in Tysse, 1991, p. 845)

The ADA was unprecedented in that not only did it incorporate the concept of nondiscrimination, or formal equality, contained in earlier civil rights statutes, but it also included the additional requirement of structural equality, or the accommodation of difference due to disability (Colker, 2009; Hahn, 2003; Krieger, 2003). This meant that in addition to requiring that people with disabilities be treated equally to people without disabilities, the ADA required, in some cases, that people with disabilities be treated differently than people without disabilities in order to achieve equality. The addition of structural equality through accommodation was a new model of civil rights legislation

(Mezey, 2005). Civil rights advocates hoped that the structural equality provisions in the ADA would prove more effective than formal equality had been in addressing discrimination (Colker).

In addition, the drafters intended that the ADA be interpreted broadly in order to cover not only people with visible disabilities, such as mobility, vision, and hearing impairments, but also people with invisible and stigmatized disabilities (e.g., psychiatric disabilities); people with a record of a disability (e.g., cancer); and, finally, people who may be perceived as having a disability (e.g., genetic predisposition) (Krieger, 2003). In sum, although largely based on traditional civil rights statutes, the ADA as enacted went much further in scope than the civil rights legislation that preceded it (Colker, 2005; Hahn, 2003; Krieger, 2003; Mezey, 2005).

The ADA has five sections: Title I, Employment; Title II, Public Entities; Title III, Public Accommodations and Services Operated by Private Entities; Title IV, Telecommunications; and Title V, Miscellaneous. To be protected under the ADA, a person must fall within one of the three definitions of disability (also referred to as the three-prong test): (a) has a physical or mental impairment which substantially limits one or more life activities, (b) has a record of such impairment, or (c) be regarded as having such an impairment (Blanck, Hill, Siegal, & Waterstone, 2004).

Of the five titles of the ADA, Title I is the section most salient to the practice of rehabilitation counseling. Bruyère (2000) suggested that “any discussion of the effectiveness and impact of the ADA must be set in the context of overall employment policy” (p. 23) and noted that federal disability policies concerning employment have the longest history, dating back to the 1920s with the passage of the Smith-Fess Act (Public Law 66-236). In addition, the profession of rehabilitation counseling was established by legislation, the Smith-Fess Act, with the understanding that employment for people with disabilities was not only possible, given advances in medicine and technology, but also a necessary to increase the inclusion of people with disabilities in all aspects of society,

including work (Obermann, 1965). Accordingly, judicial opinions in ADA Title I cases are of specific interest in this study.

Effectiveness of Title I of the ADA in Reducing Employment Discrimination

Over 20 years after its passage, research on the effectiveness of Title I of the ADA remains mixed. Some studies found that the ADA resulted in lower rates of employment among people with disabilities (Acemoglu & Angrist, 2001; DeLeire, 2000; Stapleton & Burkhauser, 2003) while other research found either no change or a modest increase in the employment rate of people with disabilities (Blanck, Schur, Kruse, Schwochau, & Song, 2003; Moss & Burris, 2007). What is clear is that post-ADA, the employment rate for people with disabilities continues to be lower than that of people without disabilities (Fogg, Harrington, & McMahon, 2010). For example, the 2009 employment rate among working age people with disabilities was estimated to be 36% (plus or minus 0.31 percentage points) compared to an estimated 76.8% (plus or minus 0.09 percentage points) of working age people without disabilities (Erickson, Lee, & von Schrader, 2010).

Of additional concern is the fact that employees with disabilities who have sought protection from job discrimination under the ADA have not found relief in court. Indeed, research has shown that employers prevail in over 90% of Title I cases brought under the ADA in trial courts and over 80% of cases at appeal (Bagenstos, 2009; Colker, 2009, 2005). Scholars have posited several reasons for these lopsided results, including the adoption of a textual or plain meaning approach by some judges that has produced a narrow interpretation of the law (Mezey, 2005; Parmet, 2003), the failure of the disability rights movement to convey a unified message about how the law should be implemented (Bagenstos; Shapiro, 1994), and evidence of a backlash against the ADA on the part of both judges and the public (Hahn, 2003; Krieger, 2003).

However, Selmi (2008) suggested that the narrow interpretation of the law may have less to do with a backlash against the law and more to do with the fact that "Congress had few if any specific intentions, and the Supreme Court has effectively filled in the statute based on its own preferences, both ideologically and institutionally, as guided by reigning social norms" (p. 525). In addition, several scholars in both the legal and disability fields have begun to ask whether the law as drafted was simply too far ahead of the prevailing socio-cultural view of disability in general, and disability civil rights in particular (Bagenstos, 2009; Mezey, 2005; Krieger, 20003; Selmi, 2008). Krieger asserted that:

> backlash tends to emerge when the application of a transformative legal regime generates outcomes that diverge too sharply from entrenched norms and institutions to which influential segments of the relevant population retain a strong, conscious allegiance. (p. 341)

However, Selmi cautioned that the courts, specifically the Supreme Court, have played a reactive rather than proactive role in social movements:

> Too frequently, we think of the Supreme Court as apart from, or above, broader social norms or movements, even though we are repeatedly reminded that the Court most commonly mimics rather than transforms social norms. (p. 573)

Other legal scholars have posited that extralegal factors, such as social norms, may influence judicial decision making in cases, including, but not limited to, the ADA (Diller, 2003; Lens, 2003; Post, 2003; Selmi, 2008; Stein & Stein, 2007).

Thus, although there is agreement among scholars that the courts have interpreted the ADA more narrowly than the drafters envisioned (Gostlin, 2003; Moss & Burris, 2007), scholars disagree on the cause or causes of the trend toward narrow interpretation of the Act (Bagenstos, 2009).

Historical and Conceptual Bases for the Study

This section discusses the role that courts have played in the implementation of the ADA, provides a brief history of three U.S. Supreme Court opinions that provided the impetus for the passage of the Americans with Disabilities Act of 2008 (hereinafter ADA

AA), discusses the concept of backlash, and describes the law as a socio-cultural construct.

Historical Bases for the Study

After the ADA was passed in 1990, scholars and disability rights activists expected that the courts would play an active role in advancing the goals of the disability rights movement (Mezey, 2005). Disability advocates had long looked to the courts as the primary mechanism for enacting the sorts of broad-based societal change needed to reduce stigma, prejudice and discrimination against people with disabilities (Bagenstos, 2009; Mezey, 2005; Krieger, 2003). Indeed, in the decades before the ADA became law, scholars noted the increasing importance of the courts in disability policy implementation (Bagenstos; Percy, 1989, 2001).

However, Mezey (2005) noted that after the passage of the ADA, the judicial branch of government became even more instrumental in the policymaking arena. Mezey stated that "judicial implementation of disability rights policy primarily arises out of rulings in lawsuits brought to enforce the ADA of 1990" (p. ix). In addition, the courts began to adopt a textualist approach in interpreting the ADA, which resulted, in some cases, in a very narrow interpretation of the ADA (Bagenstos, 2009; Colker, 2009; Mezey). Textualism refers to "the utility of legislated rules of interpretation, and the capacity of judges to agree on a single set of interpretive rules" (Gluck, 2010, p. 1750), in contrast to "[m]ethodological *stare decisis*—the practice of giving precedential effect to judicial statements about methodology" (p. 1750).

Therefore, after nearly a decade of judicial opinions in ADA cases that overwhelming favored the employer over the employee (Colker, 2009, 2005), disability scholars began to question the proper role of the ADA in changing societal attitudes toward and beliefs about people with disabilities. For example, Scotch (2000b) warned: "Legal protections from discriminatory practice are probably indispensable, but such guarantees cannot be the only strategy toward ending the discrimination and social

exclusion faced by Americans with disabilities" (p. 473). However, Moss and Burris (2007) noted that it is difficult to measure the true impact of any civil rights legislation, including the ADA, and stated:

> Despite widespread perceptions (or assertions) that Title I has not "worked," the empirical picture is fuzzy and mixed. People with disabilities continue to have lower employment rates than other Americans, but whether this is because of or in spite of the ADA is not known. There is evidence that the law improved employment rates for the portion of the disabled population most clearly protected by Title I. Employers know about and are implementing the law but continue to have negative attitudes toward people with disabilities. There is no doubt that the ADA has been narrowly interpreted by courts and imperfectly enforced by administrative agencies and the judicial system. (pp. 472-473)

Legal and disability scholars asserted that, despite questions about its effectiveness, the ADA remains the law of the land, and noted that, to date, there has been no effort to repeal the ADA (Moss & Burris, 2007; Scotch, 2000b). Indeed, after a series of Supreme Court decisions, known as the *Sutton Trilogy (Sutton v. United Airlines, Murphy v. United Parcel Service, and Albertsons v. Kirkingburg*) disability advocates and members of Congress took steps to address the narrow interpretation of the ADA by the courts (Blanck, Hill, Siegal, & Waterstone, 2004).

In the early part of 1999, Senators Harkin and Kennedy, former Senator Bob Dole, and Representatives Hoyer and Owens presented an *amicus curiae* (Latin, "friend of the court") brief prepared by the Disability Rights Education and Defense Fund (DREDF) to the Supreme Court, arguing for a broad interpretation of the ADA in the *Sutton Trilogy* cases. However, ultimately the Supreme Court decisions in these cases resulted in further narrowing of the federal definition of disability (Colker, 2009).

Disability advocates and members of Congress, including some of the original sponsors of the ADA, motivated by the narrow judicial interpretations in the *Sutton Trilogy*, drafted and passed unanimously the ADA Amendments Act of 2008 (P.L. 110-325) (hereinafter ADA AA), which was signed into law on September 25, 2008, by President George W. Bush, and became effective on January 1, 2009. The goal of the

ADA AA was to reinforce Congress's original intent that the law be applied broadly (U.S. EEOC, *Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008,* n.d.).

Disability scholars maintained that the passage of the ADA in 1990, and Congress's reaffirmation of its intent through the passage of the ADA AA in 2008, represented a commitment on the part of society, though its legislative and policymaking institutions, to address societal discrimination against people with disabilities (Moss & Burris, 2007; Percy, 2001). Moss and Burris (2007) asserted that "the ADA stands as a long-term commitment to integrating people with disabilities into the mainstream of American life" (p. 243), and concluded that in the future:

> [t]he agencies, courts, lawyers, and employers responsible for fulfilling the U.S. Congress's promise can do better and do more, but only in the context of a broader social change in attitudes about and behavior toward people with disabilities. (p. 473)

Other scholars (e.g., Blanck, 2001; Clark & Crewe, 2000; Hahn, 2003; Kennedy & Olney, 2001; Krieger, 2003; Scotch, 2000b) concurred with Moss and Burris (2007) on the need to "do better and do more" (p. 473) to change negative societal attitudes about people with disabilities that may limit the effectiveness of the ADA. However, an ongoing challenge to researchers, policymakers, and practitioners is defining and operationalizing what doing better and doing more would look like in practice.

Conceptual Bases for the Study

As it became clear that the courts were interpreting the ADA more narrowly than disability advocates and Congress had envisioned, disability scholars and advocates began to address the question of how best to focus their efforts to change societal attitudes about people with disabilities. Scotch (2000b) noted that the way people view the ADA is shaped largely by how they view disability in general, and asserted that the legal system "has become the primary arena for challenges to the ADA's broad focus and underlying assumptions" (p. 213).

"Backlash" against the ADA

Other disability scholars and advocates concurred with Scotch (2000b) that it may be the courts that are the sticking point in reducing discrimination against people with disabilities. Diller (2003) suggested that judges may simply be unable and unwilling to apply a civil rights approach to the claims of people with disabilities filed under the ADA. He argued that:

> the pattern of narrow and begrudging interpretations of the ADA derives from the fact that the courts do not fully grasp, let alone accept, the statute's reliance on a civil rights model for addressing problems that people with disabilities face. (p. 65)

Some scholars purported that a backlash against the ADA has emerged, not only in the public discourse about the ADA, but also among the judges who are charged with interpreting the law (Hahn, 2003; Krieger, 2003; O'Brien, 2001). The ADA backlash literature noted that the ADA has, in some instances, ironically, increased the prejudicial attitudes toward people with disabilities that it was designed to eliminate (Bruyère, 2000; Colker, 2005; Hahn; Krieger). These scholars noted that it should come as no surprise that the law, the courts, and the judges themselves may reflect societal attitudes about disability (Hahn, 1991, 1984; Krieger, 2003; Percy, 2001). Scholars further asserted that the law and the institutions charged with implementing and enforcing the law, such as the courts, are human constructions (Liachowitz, 1988). As such, the law and legal institutions influence and are influenced by prevailing socio-cultural norms (Hahn; Lens, 2003; Liachowitz; Percy; Yanow, 1996). In addition, there is often a lag between statutory change and attitudinal change, as reflected in this phrase coined by sociologist William Graham Sumner, "Stateways cannot change folkways" at the time of *Plessy v. Ferguson* (1896, cited in Bem, 1970, p. 1).

The Law as a Socio-cultural Construct

> A legal tradition [...] is not a set of rules of law [...] rather it is a set of deeply rooted, historically conditioned attitudes about [...] the proper organization and operation of a legal system. The legal tradition relates the legal system to the culture of which it is a partial expression. (Merryman, 1969, p. 2)

The law is a socio-cultural construct (Krieger, 2003; Percy, 2002; Liachowitz, 1988). As such, judges may be subject to extralegal factors surrounding the issues that come before them (Diller, 2003; Lens, 2003; Post, 2003; Selmi, 2008; Stein & Stein, 2007). Post stated that courts work "within the web of cultural understandings that it shares with the society that it serves" (p.77).

Sociopolitical Model of Disability

"All too often, the way we see the problem is the problem" (Harper, 1991, p. 534).

Disability policy is informed and influenced by the prevailing socio-cultural view of disability (Hahn, 1991). Religious views, economic and social conditions, and medical advances all inform society's view of disability (Scotch, 2000a).

People with disabilities have always been with us. What have changed slowly over the centuries are the approaches and services provided to these diverse groups of individuals - from isolation within family units and segregation within institutions to inclusion in the various communities and activities of modern life (Drake, 2001; Johnston & Helms, 2008). Indeed, quality of life for people with disabilities is intertwined with public policy designed and implemented at the federal, state, and local levels. For people with disabilities, public policy determines not only where they live and work, but also how socially isolated or integrated they are within society (Drake, 2001; Percy, 2001; Schriner, 2005).

Throughout history, societies have attempted to understand and explain disability as a social construct (Drake, 2001; Liachowitz, 1988). Within the past century, three primary explanations, or models, of disability have emerged within the scholarly literature: medical, economic, and sociopolitical (Blanck, Hill, Siegal, & Waterstone, 2004; Riggar & Maki, 2004; Schriner, 1995; Scotch, 2000a;). Models of disability espouse a particular view of disability, which shapes the design and implementation of disability policy (Schriner, 2001; Scotch). For example, vocational rehabilitation

incorporates an economic model of disability, with its focus on work and economic self-sufficiency (Obermann, 1965). Social Security Disability Income (SSDI) reflects a medical model of disability, which sites the problem within the individual with the disability, specifically a bodily condition (Mudrick, 1997). Therefore, SSDI requires recipients to obtain certification from a doctor as to the severity of their disability to be eligible for benefits under SSDI (Berkowitz, 1987).

In contrast, the sociopolitical model of disability is based on a civil rights approach to disability policy (Hahn, 1984, 1985, 1991) and was patterned after the Civil Rights Act of 1964, which advanced the civil rights of racial minorities and women. The core beliefs of the sociopolitical model of disability include the right and responsibility to have input into legislation and public policy, the right to access public and private programs and buildings, and the belief that disability is part of a diverse society and should not be treated as an abnormality or solely as a medical condition that needs to be ameliorated (Hahn).

In addition, the sociopolitical model of disability views people with disabilities as a minority group which experiences stigma, prejudice, and discrimination by the majority, similar to other minority groups, such as ethnic and racial minorities and women (Gill, 2001; Hahn, 1985, 1984, 1991). Thus, the sociopolitical model is often referred to as the "minority group perspective" of disability (Gill; Hahn). Under this approach, disability is a characteristic that merits the protection of civil rights legislation, if people with disabilities are viewed as a minority group and if disability as a construct is viewed through the lens of the sociopolitical model rather than through the lens of the medical or economic models (Hahn).

Sociopolitical Model of Disability and the ADA

One of the outcomes of the shift to the sociopolitical model of disability on the part of the disability rights community was the passage of the ADA in 1990 (Krieger, 2003). With the passage of the ADA, the disability rights community was "successful at

changing the terms of public discussion about disability" (Mudrick, 1997, p. 54). The goal of public policy under the ADA is the protection of the civil rights of people with disabilities as a minority group experiencing disadvantage and discrimination:

> In other words, the presence of a chronic condition is not the major factor affecting the employment experience of people with disabilities; inaccessible transportation systems, inaccessible buildings, inaccessible workplace facilities, and discriminating employers are (Mudrick, p. 54).

The passage of the ADA was a decades-long effort on the part of people with disabilities, disability advocates and scholars, and rehabilitation professionals to influence policymakers to shift policy design and implementation from a medical to a sociopolitical or minority group model of disability (Bagenstos, 2009; Krieger, 2003; Mezey, 2005). Krieger outlined the role of the minority group perspective of disability in the design of the ADA:

> Congress wrote the minority group model of disability into the ADA's preamble, making abundantly clear its position that…people with disabilities should be viewed as a suspect class entitled to the highest level of Fourteenth Amendment protection. (p. 12)

Indeed, the language of the Findings and Purposes sections of the ADA used the language of the sociopolitical or minority group model of disability as defined by Hahn (1984) and Gill et al. (2003):

> The Congress finds that individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society. (42 U.S.C. Section 12101)

However, policy as designed is often very different from policy as implemented (Biggs & Helms, 2007; Lipsky, 1980; Yanow, 1996, 2000). As mentioned, when the courts began to rule on ADA cases, disability advocates and scholars became concerned about the narrow textualist approach that judges were taking in deciding ADA cases (Bagenstos, 2009; Krieger, 2003; Mezey, 2005). In addition, disability scholars noted that the implementation of the law through interpretation by the courts, rather than following

the sociopolitical or minority group approach employed in the drafting of the law, was instead using an "N of 1" approach to disability, with a focus on whether or not the plaintiff met the definition of disability (Bagenstos; Colker, 2009; Krieger, Mezey). Krieger maintained that the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett* (531 U.S., 2001, p. 356) demonstrated a "clear, judicial rejection of, one might say a judicial backlash against, the minority group model of disability" (p. 12). However, it is important to note that while the theory of backlash appears in the disability literature, the legal community and the courts have not yet embraced this concept. The legal community and the courts view ADA case law through a different lens (Bagenstos).

Re-Conceptualizing the Sociopolitical Model of Disability

However, other scholars asserted that the focus on backlash may obscure other reasons for the courts' reluctance to view the law through the lens of the sociopolitical model of disability (Asch, 2001; Bagenstos, 2009; Selmi, 2008; Stein & Stein, 2007). For example, Selmi noted that "without a broader social movement, without broader public involvement in the legislative process, the statute the Court has reconstructed may be the best we can expect" (p. 575). Selmi asserted that the ADA experienced difficulty at both the design and implementation stages, and suggested that:

> a social movement devoted to increasing public awareness about disabilities and the many ways in which our society is constructed based on a limited norm of ability might also have affected the normative vision the Supreme Court brings to its interpretive task. (p. 573)

In addition, disability scholars have begun to question whether the sociopolitical model of disability is "inadequate to the task of affording people with disabilities the conditions to turn legal rights into realities" (Asch, 2001, p. 391). To that end, Selmi (2008) and other scholars (Bagenstos, 2009; Colker, 2009; Stein & Stein, 2007; Percy, 2000) have argued that civil rights legislation, such as the ADA, cannot and should not be

the only means used to bring about equality for people with disabilities. For example, Stein and Stein asserted:

> The efficacy of any law depends on considerations beyond its mere existence. This is especially true for civil rights laws seeking to prevent discrimination against a targeted group; legislation needs to transform society's institutional structures and attitudes towards marginalized individuals if they are to be treated equally. Because the ADA does not account for exogenous affects, the civil and political rights of disabled Americans, including those contained in the ADA, are far from protected. (p. 1204)

In addition, Stein and Stein recommended that people with disabilities and disability advocates increase their participation in the civil rights process, including collaborating with policymakers responsible for the design and implementation of public policies affecting their quality of life:

> This will ensure a sense of ownership among those citizens targeted by the process. Including disabled persons [sic] also makes it more likely that the policies enacted will accurately reflect their social conditions, and have greater impact on their daily lives. (p. 1240)

Rationale and Significance

Scholars in the fields of law, disability, and public policy find themselves at an important crossroads. The passage of the ADA AA represented a recommitment to the civil rights approach in remedying societal discrimination against people with disabilities. However, at the time this study was conducted, the ADA AA was too new to have produced a volume of case law large enough to determine if the reforms have had the desired effect of broadening judicial interpretation of the law.

In addition, disability scholars are examining the limits of the ability of courts to implement the goals of civil rights legislation (Bagenstos, 2009; Colker, 2009). Disability scholars also have begun to question the usefulness of the sociopolitical model of disability as a way to conceptualize and describe disability. Indeed, there is a call for a new language of disability that replaces "the minority group model with language that speaks of disability as a form of human variation and that calls for a universal design and universalizing of disability" (Asch, 2001, p. 399). This re-examination of the

sociopolitical model of disability may facilitate interdisciplinary scholarship among scholars working in related fields, such as technology and accommodations (Walls, Hendricks, Dowler, Hirsh, Orslene, & Fullmer, 2002), disability studies (Asch, 2001), law and public policy (Stein & Stein, 2007; Watson, 1992), disability employment policy and labor relations (Bruyère, 2000; Bruyère, Johnson, & Reiter, 2010) and rehabilitation counseling (Tarvydas & Maki, 2012).

Importance of Interdisciplinary Research

Suggestions for future research on the ADA and other issues facing people with disabilities include a call for more interdisciplinary research among scholars in the fields of law, public policy, rehabilitation counseling, and disability studies. For example, scholars in the fields of law and public policy have called for increased communication and collaboration among scholars in the design and implementation of disability policy to improve civil rights protections for people with disabilities (Friedman, 2006; Schriner, 1995, 2001; Stein & Stein, 2007). In addition, legal scholars have called for an interdisciplinary approach to the study of legal cases to enrich scholarly and practical understanding of the role of law in understanding and addressing complex social policy issues (Burris & Moss, 2000; Cane & Kritzer, 2010; Friedman, 2006). For example, Cane and Kritzer (2010) suggested that legal phenomena be understood in both normative terms and as social practices. Friedman noted that "there are a set of pressing questions about legal institutions that cry out today for sound interdisciplinary study" (p. 261). Within the field of rehabilitation counseling, there is a similar call for increased interdisciplinary research on the ADA. For example, Bruyère stated, "a valid analysis of the ADA requires an interdisciplinary perspective" (2000, p. 19).

The importance of interdisciplinary research was further underscored by Popper: "We are not students of some subject matter, but students of problems. And problems may cut right across the borders of any subject matter or discipline" (1963, p. 88). A multifaceted problem, such societal discrimination against a particular group of people, is

often termed a wicked problem, in the language of public policy, meaning that there are no clear policy solutions to the problem. Wicked problems benefit from an interdisciplinary approach, using multiple methods of analysis, to gain insight into the nature of the problem (Biggs & Helms, 2007).

Friedman (2006) noted that scholars interested in conducting interdisciplinary research in the area of case law should focus on the content of the opinions rather than simply the case outcomes. He asserted that focusing only on the outcomes of cases may misrepresent the work of the courts. Friedman purported that it is the content of the opinions that provides a window into the reasons judges made the legal decisions they did in particular cases. Burris and Moss (2000) concurred and stated that "thinking about how to assess Title I demonstrates the need to draw upon all these divergent approaches within our own disciplines, as well as for general interdisciplinary cross-fertilization" (p. 21).

To improve understanding about the impact of Title I of the ADA on advancing the civil rights of people with disabilities, Blanck and Weighner (1997) called for interdisciplinary research similar to the research conducted after the passage of *Brown v. Board of Education* in 1964, which examined the connection between attitudes about race and behavior to enhance the predictability of discriminatory behavior.

Role of Rehabilitation Counseling in the ADA and ADA AA

The rehabilitation counseling profession has a long history of calling for more research and practice skills in disability legislation and policy (Bruyère, 2000; Burton, 1979; McCrone, 1991; Tarvydas & Cottone, 1991; Schriner, 1995, 2001). Indeed, shortly after the ADA was passed, McCrone noted that "federal disability-related policy, legislation, and advocacy skills are the weak links in many otherwise excellent training programs in rehabilitation counseling" (1991, p. 16). McCrone further stated that "federal disability policy and legislation define rehabilitation practice" (p. 16) and asserted that:

> To a large degree, the success of the Americans with Disabilities Act will depend on the quality of vocational rehabilitation services in preparing 'qualified' people with disabilities for work and ADA protections. There is too much energy, too many good ideas and too much at stake in the professional rehabilitation community to leave federal legislative advocacy to the lobbyists. (p. 19)

More recently, Bruyère (2000) asserted that rehabilitation professionals are an integral component in the successful implementation of Title I of the ADA:

> A minimum contribution is in being able to inform persons with disabilities about their ADA rights, and employers about their responsibilities under Title I. Additionally, the contribution of rehabilitation service delivery providers has become increasingly important. Service providers have a part to play in the implementation of disability employment policy at the local level. Being able to understand the interplay of federal policies at the state and local levels is gaining ever-increasing importance, particularly with new work-force development and state welfare reform legislation that affects services to persons with disabilities. (p. 26)

The value of rehabilitation professionals in ADA Title I litigation was noted by Lee (2003) who found that plaintiffs in ADA Title I cases "who have presented evidence, particularly through the use of vocational experts," about accommodations that will allow them to perform the essential functions of the job have been more successful than plaintiffs who argue for elimination of the portions of the job they can no longer perform (p. 26). In addition, studies conducted about the profession of rehabilitation counseling (Chan et al., 2003; Leahy, Muenzen, Saunders, & Strauser, 2009) identify "legislation or laws affecting individuals with disabilities" (Leahy et al., p. 102) as an area of practice that practitioners rate as important and an area of practice that they use frequently.

Thus, to ensure that rehabilitation counselors have the knowledge, skills, and awareness to practice competently and ethically when working with clients who may require information about their rights under the ADA, more research in the area of laws and legislation is needed. Specifically, information about judicial decision making under Title I of the ADA may lead to a more comprehensive and realistic understanding on the part of rehabilitation counselors about the process of litigation, and increase counselors' abilities to inform clients of their rights under the ADA. Finally, it is important to note

that currently he goals of the ADA AA at this stage are primarily political, as cases brought under the ADA AA have not yet been tested in court (Maki & Tarvydas, 2012).

The Sociopolitical Model in Rehabilitation Counselor Education and Practice

For more than two decades, rehabilitation scholars, educators, and practitioners have embraced the sociopolitical model of disability with its emphasis on consumer empowerment and disability identity, and its focus on advancing the civil rights of people with disabilities (Bruyère, 2000; Kosciulek, 1999; Maki, 2012; Maki, McCracken, Pape, & Scofield, 1978; Schriner, 1995; Tarvydas & Cottone, 1991).

Since the 1970s, rehabilitation counselors increasingly have been required to develop skills in advocacy, not only to act on behalf of consumers who are unable to advocate for themselves, but also to provide education and training to consumers so that consumers may act as self-advocates (Burton, 1979; Liu & Toporek, 2004; Tarvydas & Cottone, 1991). In addition, the 2010 Commission on Rehabilitation Counselor Certification (CRCC) Code of Professional Ethics outlined new standards for practice for rehabilitation educators, students, and practitioners in the area of advocacy, including advocacy in the area of civil rights, legislation, and public policy that affect clients' choices about their education, employment, and ability to live independently in the community. Indeed, rehabilitation counselors have an ethical obligation to become informed and involved in the policy design and implementation process, in particular when policies being debated at the local, state, and national levels determine how scarce resources will be allocated to consumer programs and services:

> Therefore, steps should be taken to clarify, to inform, and to influence this debate in the arena of public policy and societal attitude. Consumer advocacy is an ethical responsibility of rehabilitation counselors. (Tarvydas & Cottone, 1991, p. 16)

Thus, to ensure that rehabilitation counselors have the knowledge, skills, and awareness to practice competently and ethically in the area of the ADA, more research in

the area of law and ethics is needed (Tarvydas & Cottone, 1991). More detailed information about what happens in the courtroom may lead to a more comprehensive and realistic understanding of how the law works, and increase rehabilitation counselors' abilities to inform clients of their situations and rights under the ADA so that they can make truly informed decisions regarding their options and choices.

This research seeks to improve rehabilitation professionals' knowledge of the way in which judges approach ADA Title I cases by examining U.S. appellate court judicial opinions in disparate impact cases decided under Title I of the ADA. The results of this research may improve the design and development of disability policy; offer better understanding of the sociopolitical model of disability in practice; provide input for education and outreach programs for judges on disability issues; and inform rehabilitation education, practice, and service delivery in the area of civil rights legislation affecting people with disabilities, specifically the ADA (Bruyère, 2000; Burton, 1979; Chan, Leahy, Saunders, Tarvydas, Ferrin, & Lee,, 2003; Leahy, Muenzen, Saunders, & Strauser, 2009; McCrone, 1991; Schriner, 1995, 2001; Tarvydas & Cottone, 1991).

A substantial record of quantitative research has established that judicial interpretation of Title I of the ADA has not met the expectations of the disability community or the Congress. However, our knowledge about judicial interpretation of Title I of the ADA is largely based on analysis of the outcomes of litigation rather than on the process of the litigation.

The present study brought the tradition of legal content analysis into traditional quantitative rehabilitation research and provided a new method for understanding the role of the law in rehabilitation practice. It also may provide practitioners with an understanding of the manner in which language used by policymakers is interpreted by the courts, which may, in turn, inform and improve the development of public policies and practices which serve people with disabilities.

Definitions

The terms used in the research questions in this study are defined in the Glossary (Appendix F).

Summary

Chapter 1 of this study described the purpose of the study and the research questions, the statement of purpose and problem statement, the significance of the problem, historical and conceptual bases for the study, and the rationale and significance. Finally, the terminology used in this study was defined. The chapter described sociopolitical model of disability and its relationship to the ADA. The concept of backlash was described and the interdisciplinary nature of research on disability and the law was described. Chapter 2 provides the conceptual and historical bases for the study, and the theoretical guidance for the study. Specifically, Chapter 2 describes the concepts of the sociopolitical perspective of disability, which provided the conceptual basis for the study. Chapter 2 provides information about the United States courts system and its role implementing civil rights legislation, specifically the ADA. Chapter 2 explains the legal theory of disparate impact, which provided context for the research questions. Finally, the chapter presents an overview of the qualitative paradigm that provided theoretical guidance for the study.

CHAPTER II

LITERATURE REVIEW

This chapter describes the concepts of the sociopolitical perspective of disability, including the related concepts of the minority group approach, disability culture, and the disability rights movement. The sociopolitical perspective of disability provided the conceptual basis for the study. The chapter next provides information about the legislative history of the Americans with Disabilities Act and the legal theory of disparate impact, which provide context for the research questions. Third, the chapter provides an overview of the qualitative research studies conducted on Title VII disparate impact cases and Title VII sexual identity, gender, and race/ethnicity cases. Finally, the chapter presents an overview of the qualitative paradigm that provided theoretical guidance for the study.

This study was both exploratory and interdisciplinary in nature. Therefore, the researcher cast a wide net when conducting the literature search in this study in order to encompass several bodies of literature and it encompassed several disciplines. The literature was divided into primary and related disciplines. The literature was first reviewed in the areas of law, public policy, and rehabilitation education and counseling. Finally, to ensure the completeness of the literature review, an additional literature review was conducted on the literature in the following related disciplines: education, sociology, social work, health care, political science, and business.

The databases used in conducting the literature search included Academic Search Elite, EBSCOhost, ERIC Collection, JSTOR, PsycARTICLES, and Sage Journals Online; public databases Google and Google Scholar; and legal databases Fastcase and Westlaw. Electronic searches were conducted through The University of Iowa Main Library and Law Library, and The University of Wisconsin-Madison Memorial Library and Law Library.

Finally, the databases and search terms used to review the literature were: “ADA” AND “Disability” AND “Title I”; “ADA” AND “Disability” AND “Disparate Impact”; “ADA” AND “Research” AND “Title I”. Additional search terms were “Disparate Impact” and “ADA” and “Judicial Opinions”; “ADA” AND “Disparate Impact” AND “Title I” AND “Judicial Opinions”; and “ADA” AND “Appellate Court” AND “Disparate Impact” AND “Employment”.

No studies that examined ADA disparate impact cases, or, more specifically, ADA Title I disparate impact cases were located. The search located one quantitative study that examined Title VII disparate impact cases (Willborn, 2000), one qualitative study that examined Title VII gender discrimination cases (Lens, 2003), and one qualitative study that examined judicial decision-making in gay rights cases (Falk, 1994). The researcher also identified several studies that conducted quantitative analyses of special education litigation (Barker, 2011; Helms, 2010; Hill, Martin, & Nelson-Head (2011).

Conceptual Bases for the Study

The sociopolitical model of disability asserts that disability is socially constructed (Hahn, 1984; Gill et al., 2003; Percy, 2001). As such, institutions, such as courts, may embody the prevailing socio-cultural view of disability. The sociopolitical model of disability posits that negative societal views of disability may perpetuate discrimination against people with disabilities (Hahn; Percy). Therefore, proponents of the sociopolitical model suggest that discrimination against people with disabilities can only be addressed by challenging societal assumptions about disability (Hahn; Percy). It is beyond the scope of this study to include a full literature review of the disability studies literature; therefore, this chapter provides a brief introduction to the disability studies literature to provide background for the study. It is important to note that a significant portion of the literature review contains writings that chronicle a political and social movement – the disability rights movement. As such, there is often a blurring of the lines between

academic scholarship and the reporting of the goals, activities and progress of the disability rights movement.

The Sociopolitical Perspective of Disability

Four words -- "It's environment, not biology" (Molsberry, 1994) -- can be used to describe a paradigm shift in the way disability is perceived by Western culture. For most of the 20th century, disability was viewed as a biological difference that required a person to change or adapt to his/her disability in order to function normally within society (Gill, Kewman, & Brannon, 2003; Rubin & Roessler, 2001). This view of disability has been referred to as the medical model, although it is important to note that two other models of disability, the moral and the economic models, also site the locus of the disability within the individual rather than within society (Gill, 2001; Rubin & Roessler). Under this view of disability, disability policy and service delivery systems are under no pressure to advocate for attitudinal or environmental changes in public policy or social norms (Rubin & Roessler). Further, because disability was treated as an individual problem, it could be an isolating experience. Persons with disabilities were placed in segregated school systems and work environments, and many lived in institutions rather than at home or in the community. Vash (2003) observed the isolating effects of the rehabilitation process during an internship at the Rancho Los Amigos Medical Center:

> I was horrified by what I saw as a result of yanking catastrophically disabled people out of their social milieus and sending them off to a rehab hospital too far away for family and friends to visit. (p. 116)

The combined forces of models that viewed disability as biological and "treatment" as a segregated and individual process ensured that persons with disabilities would remain isolated, powerless, poor, and dependent on government benefits programs and charity. That was the case until persons with disabilities organized to form the disability rights movement, which was modeled after the civil rights movement and the women's movement whose members consisted of similarly disenfranchised groups of people (Gill, Kewman & Brannon, 2003; Longmore, 2003; Rubin & Roessler, 2001).

The Independent Living Movement

The origin of the disability rights movement can be traced to the success of an earlier organizational effort on the part of persons with disabilities called the independent living movement. This movement emphasized increased participation on the part of people with disabilities in the decisions affecting their lives and decreased reliance on experts, such as medical professionals. A key to the movement's success was its ability to provide peer support, advocacy, information, and referrals, all from community-based, rather than hospital-based settings, known as centers for independent living (CIL). The first CIL was started in Berkley, California, in 1971; today there are over 200 CILs in the United States (Longmore, 2003; Rubin & Roessler, 2001; United States Society and Values, USIA, 1999).

The ability of persons to successfully organize around independent living issues motivated persons with disabilities to address civil rights issues. This grassroots effort involved protests, sit-ins, and demonstrations on college campuses and in government buildings in an effort to bring disability issues, such as inaccessible public buildings, to the public's attention. During the 1970s, several key pieces of disability rights legislation were signed into federal law. The new laws were based on the same concepts of autonomy and participation that founded the independent living movement (Blanck, 2000; Rubin & Roessler, 2001; USIA, 1999). Finally, in 1990 persons with disabilities achieved full access to civil rights through the enactment of the Americans with Disabilities Act (ADA) in 1990. This bipartisan piece of legislation was modeled after the Civil Rights Act of 1964, prohibits discrimination in employment and public accommodations on the basis of disability, and further guarantees that persons with disabilities will not be segregated, excluded, or treated in a different manner than persons without disabilities (Blanck).

However, despite the best intentions of the legislation, the ADA did not end discrimination against people with disabilities. More than 15 years after its enactment,

people with disabilities continue to experience high rates of unemployment, social isolation, and difficulties with access to public accommodation (Krieger, 2003; Mezey, 2005). The ongoing problems in these areas are attributed to ignorance and lack of awareness about disability on the part of the public. Although legislation may give persons with disabilities equal status under the law, longstanding societal misconceptions about disability may be difficult to remedy in a courtroom (Longmore, 2003; USIA, 1999).

Longmore (2003) suggested that legislation such as the ADA is only the first step toward the goal of disability rights. The next step may require persons with disabilities to become clear about what it means to be a person with a disability in today's world. In other words, persons with disabilities should begin "a quest for collective identity" (p. 57).

Disability Identity

> Deviations from an ideal imposed by self or others create problems of identity that the student must understand in terms of the ideal – and understand differently depending on the relation of the deviation to the ideal. (Goffman, 1961, p. 325)

Goffman (1961) wrote about the concept of identity, both individual and group identity, in persons who are considered deviants from a societal ideal (e.g., prisoners, persons with disabilities, and inpatients at mental institutions). Goffman (1961) recognized that persons with disabilities are ostracized members of society. In a later work, Goffman (1963) discussed the four requirements for deviant group identity. First, group members share a common history and culture. Next, membership is conveyed through lineage. Third, members are loyal to the group, and, fourth, the group is composed of disenfranchised members of society. Goffman (1963) briefly considered the deviant group as a healthy response to ostracization by normal society, but then quickly dismissed it as yet another way for deviant members to call attention to their differences from mainstream or ideal members of society.

Gill (2001) stated that Goffman and other theorists working in the same vein (e.g., Davis, 1961, and Scott, 1969) with their emphasis on stigma management kept the focus on the individual with the disability, and did not challenge society's role as an agent of stigma. Further, the responsibility to change rests with the disability so as to reduce the discomforting feelings relating to disability experienced by normal members of society (Gill, 2001). Disability identity, according to Goffman (1963), does not lead to empowerment or social change.

Social theorists such as Goffman wrote about disability from the view of an outsider. Although theoretical approaches may serve to describe disability in a scientific way, they provide little in the way of describing the experience of disability. In fact, although there are many studies that portray the disability experience as negative, fraught with feelings of isolation, depression, and hopelessness, there is very little research on the positive experience of disability (Gill, 2001). In fact, this bias is so common in disability research that studies reporting positive feelings associated with disability are seen as unusual or aberrant. For example, in what's been described as the disability paradox, researchers found that persons with moderate to serious disabilities reported a good or excellent quality of life, despite experiencing a level of disability that persons without disabilities rated as difficult and undesirable (Albrecht & Devlieger, 1999).

Scholars in psychology, specifically Beatrice Wright, a social psychologist who trained under Kurt Lewin, examined the social psychology of disability. Wright's work (1983) was groundbreaking for two reasons. First, Wright's concept of value transformation served to challenge the negative view about the *individual* experience of disability; and, second, her work acknowledged that disability is experienced *collectively*; that is, all persons with disabilities share a devalued status that is imposed upon them by the majority group (Wright, 1960). Wright's work is revolutionary in that disability is viewed as a complex process influenced by individual, cultural, and political factors (Gill, 2001).

Wright (1983) focused attention on the group identity of persons with disabilities by removing and deemphasizing the role of the individual and encouraging greater understanding of the cultural forces that shape the hostile and discriminatory environment in which people with disabilities live. Further, Wright (1983) stated that viewing disability from a social rather than individual basis prevents "spread," (pp. 120-124) which refers to the tendency people without disabilities have to overlook the other qualities of a person with a disability and view the person's disability status as his or her sole identity.

Minority Group Identity

Like other minority groups, persons with disabilities have found that "group identity and cultural affiliation mediate the effects of social devaluation in minority populations" (Gill, 1995, p. 1). For example, the sharing of cultural rituals, folklore, and history binds people together. Through writing, humor, and art, people with disabilities are able to create a record of their history; through sharing similar experiences and a shared language (e.g., "crip," "supercrip," "medical model"), persons with disabilities are able to communicate with each other in a way that is different from persons without disabilities (Gill). It is in these ways that people with disabilities are similar to other minority groups.

However, people with disabilities may find that although they choose to identify themselves from a minority group perspective, existing definitions of diversity have not been constructed to include disability. For example, in a survey of 100 *Fortune 500* companies, Ball, Monaco, Schmeling, Schartz, and Blanck (2005) found that disability was included in only 42% of the diversity policies of the companies surveyed. In fact, the omission of disability from diversity categories occurs often enough that it has been the subject of an editorial (McInnes, 2004) as well as contained in publications produced by the Department of Labor's Office of Disability Employment Policy (U.S. Department of Labor, 2004).

Also, unlike other minority groups, persons with disabilities struggle with issues related to the construction of disability that do not map neatly onto the minority group model. For example, Gill (2001) identified four disability-related differences that separate the disability experience from that of other minority groups: First, people with disabilities continue to be recipients of charity and viewed as helpless dependents. Thus, rather than being the recipients of overt and angry epitaphs, people with disabilities may instead provoke feelings in persons without disabilities ranging from pity to disgust, none of which may be expressed openly. Second, race, ethnicity, disability, and gender are all social constructs; however, disability alone contains a link to the physical world in that many people with disabilities experience pain, undergo medical procedures, and take medication. Third, disenfranchised groups of people find comfort and support in sharing their devalued status with their families. This may not be true for people with disabilities who may feel misunderstood and isolated within their own families. Fourth, unless persons with disabilities view difference as central to their day-to-day existence, people with disabilities may not internalize their minority status in the same way that other minority groups do as a result of belonging to a community that is strongly aware of its devalued status. The following passage written by Gill sums up the ambiguity of the disability experience as it pertains to minority group status:

> To be irrationally disdained by others, to feel it every day of your life, and to share that experience with both intimates and a substantial community are clearly horrible. That is the reported social experience of many minority people in encounters with the dominant culture. On the other hand, to be silently, smilingly dismissed as someone pathetic and strange and encounter dismissal even in cultural milieu you call your own is confusing and dispiriting. That is the standard social experience of disabled people in the nondisabled world they inhabit. (p. 366)

Disability Culture

When discussing the emergence of a disability culture, it is important to note that culture includes not only shared oppression but also shared beliefs and values. These values and beliefs may be expressed in shared art, humor, language, or writing that

provide both historical context and a method of communication between current members and subsequent generations. What is extraordinary is that elements of shared culture are present wherever people with shared ideas, values, and world views congregate, even if it is under conditions of extreme poverty and oppression (Gill, 1995, 2001).

Importance of Disability Culture

A strong disability community that takes pride in its culture is able to unite to fight its devalued status in society (Gill, 1995). The development of a disability culture is valuable for several reasons. First, a strong sense of culture and community motivates members to take action against oppressive attitudes and biases. Next, culture provides unity, which minimizes differences, maximizes support, and emphasizes common values and beliefs. Third, a strong sense of culture facilitates communication between group members and defines the group to others. Finally, an organized and strong community encourages the participation of new members and conveys a sense of belonging and acceptance (Gill).

Core Values of Disability Culture

Shared values are imperative to the development of group identity and group culture, including disability culture (Gill, 1995; 2001). Members must be aware of the values and beliefs they hold in common because they form the framework for the development of the group's identity. To endure, disability culture will need to share certain core values. The most important shared value is an acceptance of difference, whether the difference is race, gender, ability, or socioeconomic status. Other important values are cooperation and an acceptance of interdependence, tolerance for the unpredictable, the ability to laugh in the face of oppression, and skill in multitasking and in planning around disability contingencies. The ability to decipher latent meanings and confusing social messages is also important, as is developing a flexible and creative approach to living life with a disability (Gill).

In sum, disability culture shares in common with other minority group cultures the following three factors: (a) inherent differences between the minority group and the majority group, (b) a devalued status within society, and (c) a method of conveying the culture's beliefs and values to other members and to the majority group. The value of a strong disability culture lies not only in its ability to engender feelings of belonging in its members, but also in its ability to challenge oppressive policies and practices that affect the well-being of its members (Gill, 1995; 2001). The next section will examine the role of disability culture in disability policy and service delivery systems, specifically rehabilitation counseling research and practice.

Disability Culture within the Rehabilitation Counseling Profession

Goffman (1961) wrote of his time researching group identity at St. Elizabeth's Hospital, a residential care facility for persons with mental illness:

> The world view of a group functions to sustain its members and expectedly provides them with a self-justifying definition of their own situation and a prejudiced view of non members, in this case, doctors, nurses, attendants, and relatives. (p. 56)

In the view of many members of the disability community, the above description of the division between persons receiving services and the staff providing those services is unfortunately still a part of many of the current rehabilitation service delivery systems (Buchanan, 1999). Rehabilitation service delivery systems developed over a long period of time and may contain elements of several models of disability, which represent different, and often, conflicting societal views of disability (Hahn, 1985, 1991). For example, many agencies and programs may have been put in place long before concepts such as consumer choice and self-determination were developed (Schriner, 1995). The current service delivery system consists of programs developed under the medical model of disability and the economic model of disability, two models that emphasize the individual nature of disability; the moral model of disability, which usually takes the form of charitable activities; and programs based on the environmental or social model of

disability which include the role of socio-cultural influence on disability. Put another way, "the sheer incongruence of the assortment is instructive; it indicates our collective ambivalence about disability and those who experience it" (Schriner, p. 330).

The move by persons with disabilities to create a strong disability culture also influences disability policy and service delivery systems in several important ways (Hahn, 1985; 1991). First, the potential of persons with disabilities to be a significant political voting block exists. For the reasons enumerated above, this has not happened on a national level, but has happened within school districts and among segments of the disability population (Schriner, 1995). Second, rehabilitation counselors, already working with decreased agency and government budgets, need to be prepared for a shift in the way services are delivered. In essence, rehabilitation counselors who will be best prepared to meet the changes brought about by the convergence of the emerging disability culture and the continued cuts in service delivery systems will be those who have a knowledge base in disability policy (Schriner) and are competent in advocacy and multicultural counseling techniques (Liu & Toporek, 2004).

In examining the role of disability policy in rehabilitation counselor curriculum, Schriner (1995) concluded, "Several themes are present in the development, reform, and implementation of disability policy" (p. 330). These themes include (a) strengthening the civil rights protections put into place by the ADA through the use of service delivery programs, (b) increasing the emphasis on consumer control within service delivery systems, (c) increased collaboration between service delivery systems to stretch funding, and (d) continued emphasis on the self-sufficiency of persons with disabilities through targeted government programs and initiatives that emphasize work not benefits. Rehabilitation counselors will need to understand the program structures and eligibility requirements of dozens of programs on the local, state, and federal levels, and, in addition, know when to refer clients to other agencies or set up collaborating relationships with partner agencies (Schriner, 1995). Incorporating the four themes into

practice may require a more collaborative, advocacy-based relationship with clients, which better supports the provision of services based on self-determination and choice (Liu & Toporek, 2004).

Liu and Toporek (2004) stated that in order to competently and ethically provide advocacy-based counseling to clients, rehabilitation counselors need a firm understanding of what advocacy-based counseling is and where to obtain the necessary knowledge and skills. Although the concept of advocacy-based counseling is not new to rehabilitation counseling, there is unfortunately no "how-to" book on methods to effectively employ advocacy-based counseling in practice. However, the multicultural counseling literature has developed the knowledge base necessary to examine traditional counseling theories, practice, and training for cultural biases. This literature may be applied effectively in rehabilitation counseling practice to reduce the bias inherent in any existing structure or agent of that structure toward a minority group member (Liu & Toporek).

To be culturally sensitive, a rehabilitation counselor must be aware of his/her biases, the worldview of his/her client, and be able to implement culturally appropriate interventions (Liu & Toporek, 2004). To achieve competence in advocacy and multicultural counseling techniques, rehabilitation counselors should take part in supervised training sessions that will build on existing counseling skills and increase awareness of socioeconomic and multicultural issues affecting their clients (Liu & Toporek). In addition to acquiring the necessary techniques, counselors must realize that advocacy-based counseling may put them in the position where they are advocating against their own agency in their efforts to advocate for the client (Liu & Toporek). In a situation involving possible disability discrimination in the workplace, counselors may find themselves in a potentially adversarial position with an employer. Counselors need to be aware that advocacy spans a continuum from the individual client to the systems level, including the court system. Because effective advocacy may require the counselor to take a stand that may be unpopular with his/her coworkers, supervisors, and perhaps

the majority culture, counselors must be aware of possible ethical issues and conflicts, and consult their professional code of ethics for guidance (Tarvydas, 1991; Tarvydas & Maki, 2012).

In conclusion, understanding the sociopolitical perspective of disability, specifically the minority group approach, provides the rehabilitation counselor with a richer and more complete understanding of the issues facing the clients he/she works with. This knowledge will in turn increase the counselor's rapport with clients as well as increase his/her ability to effectively advocate not only for individual clients but also for changes in disability policy and service delivery systems. In this way, it may be possible for rehabilitation counselors to engage in what Vash (2003) calls "right work" (p. 118):

> We had better all start working hard on better understanding ourselves as well as 'the other' if we want to see how much farther human consciousness can evolve. Those of us in counseling and other psychological fields need to take the lead in these endeavors – because we can. (p. 118)

Disability Rights Movement in Great Britain and the United States

> The disability rights movement is an inherently political movement – based on a consciousness about how a "normal" environment creates obstructions for those who do things differently. Focusing on the nature of different physical and mental impairments, they argue, only confuses the issue that disability rights are civil rights *and* human rights. (Huemann, 1993)

Although a complete history of the British school of disability is beyond the scope of this study, it is important to note that there are important differences between the British and the United States schools of disability (O'Brien 2001). For example, the British school emphasizes the universality of disability, and the role of people with disabilities in the context of the broader human rights movement (O'Brien). The British school has traditionally focused on the social aspects of disability, which sites the locus of disability within society and the environment, not within the individual (Oliver, 1983, 1990). The primary goal is removing social barriers that prevent the full inclusion of people with disabilities in society (Oliver; Shakespeare & Watson, 2002). The United

States school of disability drew on the work of the British School and its focus on the social aspects of disability but added a civil rights component (Hahn, 1984).

Since the 1960s, the United States increasingly has viewed disability as a civil rights issue, and people with disabilities as an oppressed minority group, similar to other oppressed minority groups (Gill, 1995; Hahn, 1984). O'Brien (2001) noted that the disability rights movement evolved more slowly than other civil rights movements in the United States for three reasons: First, the movement was hampered by members' reliance on programs and services that were based in a medical model of disability rather than on self-determination and choice. Second, the movement was slow to mobilize members for a variety of factors, including heterogeneity of disability, social and physical isolation of people with disabilities, and the reluctance of many people with disabilities to publically admit their disability because of the societal stigma attached to disability status (O'Brien). Finally, the heterogeneous nature of disability created many splinter groups, such as the Deaf community, who developed a distinct Deaf culture (O'Brien).

Despite these organizational problems, a national disability rights movement did coalesce during the 1970s. The movement is held together by a sociopolitical vision that most people with disabilities share. Simi Linton (1998) stated: "We are all bound together, not by the list of our collective symptoms but by the social political circumstances that have forged us as a group" (cited in O'Brien, 2001, p. 13).

Indeed, a major goal of the disability rights movement in the United States has been the focus on the development and implementation of civil rights legislation, such as Section 504 of the Rehabilitation Act, and the ADA (Bagenstos, 2009). Interestingly, the passage of Section 504 of the Rehabilitation Act was an unanticipated consequence of the policy-making process. Drafters in the congressional offices responsible for the legislation included the language in Section 504, not intending for it to become the cornerstone for future disability rights legislation (O'Brien). After Section 504 became law, the U.S. Department of Health, Education, and Welfare (HEW) came under pressure

from the disability rights movement to draft regulations to implement Section 504, and the courts came under pressure to enforce it (O'Brien; Scotch & Berkowitz, 1990). However, despite pressure from disability rights groups, "both HEW and the courts maintained leeway in their respective interpretations to soften the effect of disability rights on employers" (O'Brien, p. 6). Over a decade later, drafters of the ADA would encounter the same balancing act between the rights of people with disabilities and the rights of employers (Bagenstos, 2009).

One stumbling block to advancing disability rights within the workplace is that people with disabilities are a heterogeneous rather than a homogenous group, which makes the implementation of policy-based or minority group civil rights legislation difficult because of the broad range of disabilities and the fact that many people with disabilities are not born with a disability but acquire one later in life (Bagenstos, 2009). The heterogeneous nature of disability may cause confusion and mistrust in the workplace.

For example, disability scholars note that the heterogeneous nature of disability may create friction in a workplace culture that prizes standardization and efficiency (Mezey, 2005; O'Brien). The hierarchical management structure, the focus on profits, and the competitive rather than collaborative nature of nature of most workplaces are potential sources of friction and competition among groups of workers (O'Brien). Workers with disabilities who require accommodations to perform their jobs may be perceived by management and their co-workers to be receiving special treatment (Bagenstos, 2009) creating another possible source of friction. For example, O'Brien notes that "it is not the cost of the accommodations, but its precedent-setting capacity insinuating an element of need that is foreign in the American workplace" (p. 5).

O'Brien (2001) notes that the laws governing the workplace in the United States are unique in that they are based on the employment-at-will doctrine:

> Employment-at-will explains the hierarchical nature of the American workplace. Employee needs are not factored into the equation. As long as needs do not interfere with the ability to maximize profits, an employer remains indifferent to them. Civil rights laws mitigate employment at will. Employers view accommodations as leverage given to employees to negotiate work conditions. The only other means of providing employees with bargaining leverage is unionization. Bargaining in the union context takes place at specifically scheduled times. Bargaining in the accommodations context can occur at any time (O'Brien, 2001, p. 5).

Despite the fact that Congress passed the ADA with bipartisan support, many disability scholars claim that the ADA's implementation by the courts has protected the rights of employers over the rights of people with disabilities:

> However, employers have turned to the federal judiciary, which has enfeebled the employment provisions. Employers and the courts have viewed the ADA as a zero-sum threat that must be thwarted. The courts' focus on accommodations and mitigating measures indicate that the courts view the ADA as a threat to the employer's right to manage the workplace. (O'Brien, 2001, p. 9)

Other disability scholars have claimed that the courts' overwhelming tendency to side with employers in ADA Title I cases represents societal backlash against the ADA (Krieger, 2003). Scholars writing in the ADA backlash literature also posit that the plaintiff's lack of success under Title I of the ADA is due to the courts' insistence on viewing disability through the medical model rather than a minority-group or rights-based model (Krieger). Hahn stated that a society's views on disability inform its disability policy and service systems (1984). O'Brien noted that courts' views on accommodations incorporate negative societal views of disability:

> These values have been expressed by employers, federal court judges, and Supreme Court justices, who characterize workplace requests for accommodation as either an excuse for not wanting to conform to workplace rules or as the means to overturn the supposedly rightful hierarchy between employers and employees (p. 9).

O'Brien (2001) and others (Bagenstos, 2009; Mezey, 2005) have stated that the extensive involvement of the federal courts in implementing the ADA is exceptional. Shapiro (1994) noted that after the ADA was passed, disability rights groups mistakenly believed that ceding the majority of control over the ADA's implementation to the courts would further the goals of the ADA as a civil rights statute. Bagenstos concurred with

Shapiro, and added that the inability of the disability rights movement to convey a cohesive message about disability to the American public may have inadvertently turned the public against the movement. However, Bagenstos also noted that:

> Underenforcement (and misdirected enforcement) has certainly contributed to the ineffectiveness of the ADA in achieving its core goals of the disability rights movement. But even if it were perfectly enforced, the statute could not achieve those goals. That is because of the limited nature of antidiscrimination law (p. 128).

Bagenstos (2009) and other scholars (see, for example, Asch, 2001; Shakespeare & Watson, 2002; Stein & Stein, 2007) have suggested that civil rights statutes have a limited role to play in advancing the rights of people with disabilities in the workplace. Indeed, Bagenstos has suggested that although intentional discrimination remains a barrier to the employment of people with disabilities, other societal barriers, such as lack access to transportation, assistive technology and health insurance are often greater barriers to employment. Bagenstos and others (Asch, Shakespeare & Watson, Stein & Stein) suggested that disability be viewed as a normal part of the human experience, and called for a renewed focus on the removal of environmental barriers to increase the inclusion of people with disabilities into all segments of society, including the workplace.

Sociopolitical Perspective of Disability Framework

The researcher incorporated the literature on the sociopolitical perspective of disability, the minority group approach, disability culture, and the British and United States disability rights movement into a framework for analysis of the judicial opinions of published ADA Title 1 disparate impact cases litigated in U.S. Appellate Courts from 1992 to 2012. The substantive components and sub-components are included in the framework. This framework was used to guide the coding for Research Question 2. A schematic diagram of the Framework is attached as Appendix C.

Historical Bases for the Study

> I propose that we… initiate strong civil rights laws and comprehensive empowerment-oriented policies that will enable people with disabilities, in every nation, to achieve their productive potential (Justin Dart, 1994).

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 made it unlawful for an employer to limit, segregate, or classify his employees in any way that would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of "a particular characteristic or characteristics like race or sex" (Grossman, 2010).

In 1971, in *Griggs v. Duke Power Co.,* the Supreme Court interpreted this language to prohibit not just intentional discrimination, but disparate impact discrimination as well. At issue in that particular case were the requirements that a candidate for certain low-skill jobs must have a high school diploma and must achieve a certain score on an aptitude test, requirements that had disqualified a disproportionate number of Black applicants for new positions and internal transfers, despite the requirements' possessing no obvious connection to job performance.

The Supreme Court held in *Griggs* that employers could not rely on hiring criteria that imposed a demonstrable negative impact on a protected class of workers and yet were not justified by business necessity. The Court concluded that targeting discriminatory consequences — not just discriminatory motives — was part of Congress' purpose in enacting Title VII.

Although later Supreme Court decisions narrowed the scope of disparate-impact liability, Congress amended Title VII in 1991 to restore the initially broader scope. It added a provision that expressly prohibits disparate-impact discrimination. Under the current statute, an employer is liable if "a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity" (Title VII). A *prima facie* case is thus presented by a plaintiff who can show "use of an employment practice that produces a disparate impact

(proof of which causes the burden to shift to the employer for proof of job-relatedness and business necessity)" (Title VII).

Elements of Disparate Impact Claims

Disparate impact exists where an employer uses legitimate employment standards that, despite apparent neutrality, work a heavier burden on a protected class than on other employees (*Fitzpatrick v. City of Atlanta* 2 F.3d 1112, (1993)). A Title VII disparate impact claim includes four elements: (a) plaintiff (employee) must identify specific employment practice or policy that caused alleged disparate impact; (b) plaintiff must show that employer used the employment practice or policy; (c) plaintiff must prove that he/she as a member of a protected class experienced an adverse or disproportionate impact caused by employment practice or policy (usually through the use of statistics); and (d) to rebut a charge of disparate impact, the defendant (employer) must demonstrate that the employment practice or policy in dispute is both job-related and consistent with business necessity. Plaintiff may then offer a surrebuttal, which is a response to the defendant's rebuttal, by showing that an alternative, less discriminatory practice or policy was available and the employer refused to use it. It is important to note that if the company is small in size, it may not be possible to show through the use of statistics that the employer's policy or practice has a disparate impact on an employee.

Elements of Disparate Treatment Claim

Disparate treatment exists where an employer intentionally treats some people less favorably because of race, color, religion, sex, or national origin. Under Title VII, a disparate treatment claim includes the following elements: The plaintiff (employee) must first make a *prima facie* case, which means that (a) plaintiff belongs to protected class, (b) plaintiff applied for a job for which the defendant was seeking applicants, (c) plaintiff was qualified, (d) plaintiff was denied the job, and (e) the position remained open and employer continued to seek applicants. If the Plaintiff makes his/her case, the Defendant (employer) must "articulate some legitimate, nondiscriminatory reason for the

employee's rejection" (for example, more work experience). It is up to the plaintiff to then show that the reason offered by the defendant is false and is a pretext to hide discrimination.

Disparate Treatment under ADA

Congress adopted the language of previous civil rights statutes in the drafting of the ADA (Mezey, 2005). Therefore, the same mechanisms outlined above for Title VII disparate treatment cases apply for disparate treatment cases charged under the ADA. Disparate treatment involves intentional discrimination.

Disparate Impact under ADA

Congress adopted the language of previous civil rights statutes in the drafting of the ADA (Mezey, 2005). Therefore, the same mechanisms outlined above for Title VII disparate impact cases apply for disparate impact cases charged under the ADA, with the exception that the plaintiff need only show that the unintentional discrimination affected him or herself, not an entire group.

U.S. Court System

The United States court system is unique in its commitment to openness and transparency:

> With certain very limited exceptions, each step of the federal judicial process is open to the public . . . [a]n individual citizen who wishes to observe a court in session may go to the federal courthouse, check the court calendar, and watch a proceeding . . . [t]he right of public access to court proceedings is partly derived from the Constitution and partly from court tradition. By conducting their judicial work in public view, judges enhance public confidence in the courts, and they allow citizens to learn first-hand how our judicial system works (United States Courts, *Federal Courts and the Public*, n.d.). In addition, with few exceptions (e.g., cases involving minors) the court records, including case files, are available to the public for review. "Anyone may review the pleadings and other papers in a case by going to the clerk of court's office and asking for the appropriate case file. (United States Courts, *Federal Courts and the Public*, n.d.)

The U.S. federal district courts serve as trial courts for the federal court system and have jurisdiction to hear federal cases in both criminal and civil suits. Cases are presented before a federal judge and typically are decided by a jury. There are 94 federal

judicial districts. Each state has at least one district. The 94 districts are divided into 12 regions, referred to as circuits (United States Courts, n.d.).

If the employee or employer is unsatisfied with the outcome of the case at the district court level, an appeal may be filed with the U.S. court of appeals. There are 12 appellate courts, one for each region or circuit. Each of the 94 district courts is assigned to one U.S. court of appeals. Each appellate court hears appeals from the district courts within its circuit. A panel of three judges presides over the trial, and the court makes a decision on the appeal based on the case established at the U.S. district court level. The judges do not receive additional evidence or hear testimony from witnesses, and there is no jury. Attorneys from both sides present their arguments in a written format, known as a brief. In some cases, the court may ask the attorneys to present oral argument on specific issues. Oral argument is typically a brief, structured conversation between the panel of judges and each attorney (United States Courts, n.d.).

Based on the argument presented, the appellate court may decide to affirm or overrule the U.S. district court decision. The court also may recommend that the case be reviewed *en banc*, which means that the case is heard by the full set of judges (up to 11) who preside over the appellate court that hears the case. In most cases, the appellate court decision is the final decision in the case. Although either party has the right to ask the U.S. Supreme Court to review the case, the Supreme Court is not required to grant that review. The Supreme Court may agree to hear a case if the case involves an important and significant legal principle (United States Courts, n.d.).

Decisions made by the Supreme Court are binding on U.S. appellate and district courts. Likewise, appellate court decisions not appealed to the Supreme Court are binding on district courts within each appellate court's jurisdiction. In legal terms, this is known as setting precedent (Mellinkoff, 1992). Cases that set precedent are important because they often guide decisions in similar future cases and may influence the evolution of law in a particular area (Mellinkoff, 1992). This process is referred to as *stare decisis* (from

the Latin "to stand by things decided"). Although the limits of precedent are broad rather than precise, Mellinkoff noted, "precedent is followed, distinguished, criticized, overruled, sometimes forgotten or overlooked, but seldom completely ignored" (1992, p. 495). The U.S. appellate courts play a large role in setting precedent because the U.S. Supreme Court reviews so few cases. For this reason, the sample in this study comprised U.S. appellate court opinions in disparate impact cases involving ADA Title I cases.

The Courts and the ADA

The courts have played an important role in the implementation of the ADA (Percy, 2001). As such, judicial opinions in ADA are a rich source of information about the law's implementation, and therefore served as the unit of analysis in this study. Individuals who believe they have been discriminated against in the workplace on the basis of disability are allowed, under the ADA's regulations, to seek redress in the U.S. federal court system.

The Equal Employment Opportunity Commission and the ADA

Employment discrimination is covered under Title I of the ADA. The United States Equal Employment Opportunity Commission (EEOC) is charged with enforcing the ADA, so an employee must first file a complaint with the EEOC. After an investigation, the EEOC makes a determination on the merits of the case. The EEOC may issue a Notice of the Right to Sue, which allows the employee to bring a lawsuit against his/her employer in U.S. federal district court, or the EEOC may file the lawsuit on behalf of the employee (U.S. EEOC, n.d.).

Eleventh Amendment Cases

Title VII and the ADA are both governed by the provisions of the Eleventh Amendment. The Eleventh Amendment controls who has access to court and is also referred to as sovereign immunity. The *Garrett* case was pivotal in that it determined that private citizens cannot sue governmental agencies and institutions for money, which reduced access to the courts by individuals. The judicial and political effect of *Garrett*

was that the number of cases dropped after the decision. It is important to note that under the ADA, most Eleventh Amendment cases would come in under Title II, which governs public programs and services.

Theoretical Guidance

The law is a socio-cultural construct (Krieger, 2003; Liachowitz, 1988; Post, 2003). As such, judges may be subject to extralegal factors surrounding the issues that come before them (Lens, 2003; Post, 2003). As precedent is set, the law evolves through a process referred to as *stare decisis* (from the Latin "to stand by things decided") (Gennaioli & Schleifer, 2007; Mellinkoff, 1992; Pyle & Bast, 2011). Therefore, judicial opinions in cases decided later in the ADA's history may reflect both socio-cultural change and legal evolution in the way disability is viewed. The law and legislation such as the Americans with Disabilities Act (ADA) are social constructions; therefore, the methodological paradigm that guided this study was social constructivism (Gergen, 1985).

This research will employ mixed methodology (Patton, 2002, p. 250). Qualitative research is defined simply as an examination of phenomena in a natural setting as opposed to an experimental, or controlled, setting. The goal of qualitative research is to increase understanding about the phenomena under study within a specific context (Hoepfl, 1997). In contrast, quantitative research, or logical positivism, tests hypothetical research questions using experimental methods and quantitative analysis (Hoepfl, 1997). It is important to note that these two approaches are distinct research paradigms. The nature of the research question and the methods chosen to examine the question are deeply connected to the choice of paradigm. Qualitative research rejects three concepts that underlie the quantitative research paradigm: reliability, validity and generalizability (Finlay, 2006; Ponterotto, 2005).

Reliability is a measure of the consistency of the method of data collection. For example, a scale is reliable if it measures the weight of an object consistently over several

attempts. Qualitative research by contrast asserts that events cannot be exactly duplicated; therefore, the study will be different each time the study is conducted. Unlike design studies that can be replicated in the future by other researchers, qualitative research examines data within the context in which they occur (Finlay, 2006).

Research has internal validity if the researcher is able to isolate the variable of interest successfully and eliminate or control variables extraneous to the study. A particular type of internal validity is construct validity, which evaluates how well the research measures what it was designed to measure. For example, "do story problems designed to measure a student's math ability actually measure mathematical ability rather than reading ability?" This concept assumes that the construct under study can be measured objectively. Qualitative researchers do not accept the assertion that there is one universal objective reality. Rather, qualitative research assumes that reality is subjective and may vary from person-to-person and culture-to-culture. Qualitative research asks the question, "Whose reality does the research seek to examine?" Therefore, qualitative research asserts that all research has a subjective component that cannot be eliminated (Finlay, 2006).

Research is considered to have external validity, or, in other words, to be generalizable, if the results from a study done on a random sample of the population can be extrapolated to the wider population. Finlay (2006) explained:

> Qualitative researchers do not seek to extrapolate statistically findings from a specified sample to the wider population. Instead, they are concerned to show that findings *can* be transferred and *may* have meaning or relevance if applied to other individuals, contexts and situations. Thus, qualitative researchers may well celebrate the richness and depth of data that can be obtained from just one participant who has been purposely approached. Qualitative researchers argue that the experimental concern to obtain a large randomised representative sample misses their point entirely (p. 320)

This researcher chose to use a mixed methods approach to examine the ADA disparate impact cases in this study for several reasons:

First, appellate court judicial opinions are the phenomenon under study and they

would be difficult, if not impossible, to study in a controlled, or laboratory, environment. Appellate court judicial opinions are crafted by judges in response to written or oral legal argument by attorneys representing the parties in a specific case. It would be difficult to separate the elements of the court case from the contextual factors that gave rise to the case. A naturalistic or qualitative approach was chosen for this study because it considers the case and the contextual factors surrounding the case, thus preserving the uniqueness of each case.

Second, qualitative research is useful if a researcher is examining a topic about which not much is known and the study is exploratory in nature (Patton, 2002). As mentioned, previous research by disability scholars on the impact of Title I of the ADA in reducing unemployment for people with disabilities is primarily quantitative in nature and focuses on outcomes rather than the process of litigation (see, for example, Bruyère, Erickson, & VanLooy, 2006; Colker, 2005; McMahon, Hurley, West, Chan, Roessler, & Rumrill , 2008; Miller, 1998; Moss, Ullman, Ranney, & Burris, 2005; Shaw, Chan, & McMahon, 2012). Very little research has been done on the process of litigation (Lens, 2003). This study sought to extend the quantitative research on the impact of Title I of the ADA I in reducing employment for people with disabilities by providing a qualitative analysis of judicial opinions in a subset of ADA Title I cases.

Third, an advantage of qualitative design and methodology is that it may produce a deeper and richer understanding of the data (Denzin & Lincoln, 2005; Patton, 2002). Therefore, the data generated from this study may provide scholars and practitioners with more detailed information about the nature of disability-related characteristics contained in judicial opinions. In addition, the results of this study may inform rehabilitation education and practice by improving rehabilitation counselors' understanding of the words judges use when writing about disability in ADA Title I cases charged under the theory of disparate impact. This study also may provide information to rehabilitation

counselors that may allow them to become more conversant with the complex relationship between disability policy and its implementation through the court system.

Summary

Chapter 2 provided the conceptual and historical bases for the study, and the theoretical guidance for the study. Specifically, Chapter 2 described the concepts of the sociopolitical perspective of disability, which provided the conceptual basis for the study. Chapter 2 provided information about the United States courts system and its role implementing civil rights legislation, specifically the ADA. Chapter 2 explained the legal theory of disparate impact, which provided context for the research questions. Finally, the chapter presented an overview of the qualitative paradigm that provided theoretical guidance for the study. Chapter 3 of this study describes the methodology used in this study, the research questions, the study sample, and explains how the cases in the study were gathered and analyzed. Ethical considerations and trustworthiness are also discussed.

CHAPTER III

METHODOLOGY

Introduction

> Our case material is a gold mine for scientific work. It has not been scientifically exploited. In law we cannot institute suits to test judicial behavior as the physicists make experiments to test the behavior of matter. But each case is a record of judicial behavior. (Oliphant, 1928, p. 229)

This chapter provides the epistemological and methodological foundations for the study. The chapter describes the research design, the role of the researcher, data collection, data analysis, and trustworthiness of the study.

> Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. (Chief Justice Berger, *Griggs v. Duke Power Co*., 401 U.S. 424 [1971])

The purpose of this research was to examine the patterns and themes of litigation in Americans with Disabilities Act (ADA) disability discrimination cases charged under the theory of disparate impact. Specifically, this study used Computer Assisted Legal Research (CALR) to identify and review all U.S. Appellate Court ADA disparate impact cases as reported by Westlaw, a commercial electronic case law reporting system owned by Thomson Reuters. The researcher chose disparate impact cases as the unit of analysis for this study for three reasons:

First, after the passage of Title VII of the Civil Rights Act of 1964, and more specifically after the 1971 U.S. Supreme Court decision in *Griggs v. Duke Power Co.,* policy-based litigation has been viewed by the courts as an effective means of addressing the often "harder-to-reach embedded norms that require job and policy modifications" to ensure the participation of minority groups in society, including the workplace (Stein & Waterstone, 2006, p. 860). The drafters of the ADA incorporated the provisions and remedies of Title VII into the ADA, which included disparate impact theory and policy-based remedies. The researcher acknowledges the relationship between Title VII and the

ADA; however, an examination of Title VII literature and case law is outside the scope of this study.

Second, policy-based litigation treats appellants as members of a protected class. This approach reflects the minority group approach to disability described in the sociopolitical perspective of disability, which the theoretical framework that guided this study. Disparate impact cases address "systemic discrimination or policies that have a disparate impact on a protected class" (*EECO v. Randstad*, 685 F.3d 433, 440).

Finally, the theory of disparate impact is used to address discrimination that occurs through the application of a facially neutral policy or procedure; therefore, there is no need for the plaintiff to show intentional discrimination on the part of a covered business or government agency (Stein & Waterstone, 2006). Removing intentional discrimination from the equation provides an opportunity for rehabilitation professionals to learn more about policies and procedures that may be unintentional barriers to inclusion, including employment, for people with disabilities.

ADA Title I Disparate Impact Cases

Additional analyses were conducted on a subset of the ADA disparate impact cases: Title I, or employment cases. The researcher chose to perform additional analyses on this subset of cases because of the recalcitrant nature of high unemployment rates for people with disabilities (see, for example, Blanck, 2000; Bruyère, 2000; DeLeire, 2000; O'Brien, 2001; Stapleton & Burkhauser, 2003) and the dismal record of plaintiff victories under Title I of the ADA (Bagenstos, 2009; Colker, 2009, 2005; Lee, 2003). Scholars have noted that "barriers in the modern workplace are more deeply embedded in unstated cultural norms and manifest in more nuanced modes of discrimination" (Stein & Waterstone, 2006, p. 861); therefore, "altering workplace hierarchies whose bases are harder to discern" (p. 861) may have a greater impact on reducing the unemployment rate for members of minority groups, including people with disabilities. Examining ADA

Title I disparate impact cases in more depth may provide information on the role of policy-based litigation as a remedy for disability discrimination in the workplace.

The study includes all reported cases that originated under the ADA of 1990 and were litigated between 1992 and 2012. Cases that originated under the ADA Amendments Act of 2008 are not included in this study.

Research Questions

The following research questions and sub-questions guided the study:

1. What are the patterns of litigation in Americans with Disabilities Act (ADA) cases charged under the theory of disparate impact and litigated in U.S. Appellate Courts during the time period between 1992 and 2012?

a) What are the numbers of published and unpublished ADA disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012?

b) What is the distribution of the jurisdictions of the U.S. Appellate Courts in published ADA disparate impact cases?

c) What is the distribution of the titles of the published ADA disparate impact cases litigated in U.S. Appellate Courts: Title I, Title II, Title III, Title IV?

d) What is the number of published U.S. Appellate Court ADA Title I disparate impact cases brought by the Equal Employment Opportunity Commission (EEOC) from 1992 through 2012?

e) What prongs under the ADA's definition of disability are most frequently litigated in published U.S. Appellate Court ADA Title I disparate impact cases: (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment?

f) What is the fact pattern that gave rise to the dispute in published U.S. Appellate Court ADA Title I disparate impact cases: testing, hiring (qualified), promotion, discharge, or reasonable accommodations?

g) What essential fact elements of disparate impact theory are most frequently in dispute in published U.S. Appellate Court ADA Title I disparate impact cases: existence of practice/policy that wrongfully discriminates against people with disabilities, employer/employee relationship, practice/policy has an adverse effect on people with disabilities, protected status, policy/practice caused harm?

h) What types of defenses are most frequently claimed in published U.S. Appellate Court ADA Title I disparate impact cases: business necessity, job-relatedness?

i) What are the characteristics of the charging parties in ADA Title I disparate impact cases: type of disability, age, gender, race/ethnicity, and socioeconomic status?

j) What are the characteristics of the opposing parties in ADA Title I disparate impact cases: size of business; for-profit, non-profit, public institution; nature of business?

k) What was the basis of the disposition of the cases in ADA Title I disparate impact cases: procedural, substantive, or indeterminate?

l) What patterns and trends in litigation can be identified in published ADA Title I disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012?

2. Based on the subset of data identified in Research Question 1, what themes, in terms of the sociopolitical perspective of disability, can be identified in the judicial opinions of published ADA Title I disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012?

For over three decades, disability scholars, advocates, and rehabilitation professionals have recommended the use of the sociopolitical perspective of disability in the design of disability policy and in rehabilitation education and practice (Hahn, 1984;

Percy, 1989; Riggar & Maki, 2004; Schriner, 1995; Tarvydas & Maki, 2012). Proponents of the sociopolitical model suggest that discrimination against people with disabilities is most effectively addressed by employing a minority group approach to challenge negative societal views about disability (Hahn; Percy). More research on ADA disparate impact cases could inform disability scholars and advocates about the role of policy-based or class-action litigation in addressing disability discrimination.

Rehabilitation professionals have a role to play in the implementation of the ADA. Bruyère (2000) noted that "a minimal contribution is in being able to inform persons with disabilities about their ADA rights, and employers about their responsibilities under Title I" (p. 26). Role and function research on rehabilitation counselor practice conducted by Chan, Leahy, Saunders, Tarvydas, Ferrin, & Lee (2003) and Leahy, Muenzen, Saunders, and Strauser (2009), identified legislation that affects people with disabilities as an area of practice that counselors rate as important, and an area that they use frequently. Therefore, additional research in the area of laws and legislation may be beneficial to rehabilitation education and practice. Specifically, research about the process of litigation in ADA cases may lead to a more comprehensive and realistic understanding on the part of rehabilitation counselors about the courts' role in implementing the ADA.

In sum, this study may benefit rehabilitation research, education, and practice by providing information about how computer-assisted legal research (CALR) may be used to increase rehabilitation professionals' understanding of ADA case law, and, more specifically, the process of litigation. This research may also benefit rehabilitation practice by providing information that may improve counselors' abilities to inform clients of their rights under the ADA, and facilitate counselors' efforts to consult with employers on the development of non-discriminatory workplace policies and procedures.

Research Design

This study used a two-step approach to analyze the data relevant to the research questions and sub-questions. First, the researcher employed content analysis (Hall & Wright, 2008) to identify and characterize patterns and trends of litigation in all reported U.S. Appellate Court ADA cases charged under the theory of disparate impact from 1992 through 2012. Cases were analyzed chronologically, and variables included number of published and unpublished cases, distribution of jurisdiction, distribution of ADA titles, EEOC involvement, case fact patterns, and characteristics of charging and opposing parties. The law evolves through precedent, which means that the decisions in earlier cases influence the decisions in later cases with similar fact patterns (Mellinkoff, 1992). As the law evolves, cases whose decisions have not been overturned or remanded by a higher court (the appellate courts for the district courts; and the U.S. Supreme Court for the appellate courts) form a body of law on a specific legal issue (Maltz, 1988). Frequency analyses were conducted on this data.

Second, the researcher identified a subset of the ADA disparate impact cases analyzed in the first step: Title I, or employment discrimination cases. Constant comparative analysis (Strauss & Corbin, 1990) was used to identify and characterize patterns and themes of the judicial opinions in the Title I disparate impact cases. The researcher developed a framework for analysis based on a review of the literature on the sociopolitical perspective of disability to guide the analysis of the judicial opinions in the subset of disparate impact cases.

Appropriateness of Qualitative Methodology

This study employs a mixed methods approach to examine the ADA disparate impact cases in the study sample. Qualitative research is defined simply as an examination of phenomena in a natural setting as opposed to an experimental, or controlled, setting. The goal of qualitative research is to increase understanding about the phenomena under study within a specific context (Hoepfl, 1997). In contrast, quantitative

research, or logical positivism, tests hypothetical research questions using experimental methods and quantitative analysis (Hoepfl, 1997).

This research examines disparate impact cases, which are a subset of cases litigated under the ADA. The ADA is part of the larger network of public laws and policies that govern the lives of people with disabilities (Schriner, 1995). Yanow (1996) argued that the traditional approach to policy design and evaluation, which relies on quantitative tools and techniques, ignores the human element inherent in all public policy. Yanow posited that gaps between policy design and implementation may be due to differences in stakeholder perceptions about the nature of the problem the policy is designed to solve. Ignoring contextual factors in policy design, implementation, and evaluation may lead to unanticipated or unintended consequences. To account for differences in perception and values among the various stakeholders involved in the policy design, implementation, and evaluation process, Yanow called for more qualitative research in the field of public policy.

Rationale for Choosing Qualitative Methodology

This researcher chose to use qualitative methodology in the design and execution of this study for several reasons:

First, U.S. Appellate Court ADA disparate impact cases are the phenomenon under study. Litigation would be difficult, if not impossible, to study in a controlled, or laboratory, environment. Following Yanow (1996), a naturalistic or qualitative approach was chosen for this study because it considers the contextual factors unique to each case.

Second, qualitative research is useful if a researcher is examining a topic about which not much is known, and when the study is exploratory in nature (Patton, 2002). As mentioned, previous research by disability scholars on the effectiveness of the ADA is primarily quantitative in nature (see, for example, Bruyère, Erickson, & VanLooy, 2006; Colker, 2005; McMahon et al., 2008; Miller, 1998; Moss, Ullman, Ranney, & Burris, 2005; Shaw, Chan & McMahon, 2012), and focuses on the outcomes of litigation. Very

little research has been done on the process of litigation (Lens, 2003). This study seeks to extend the quantitative research on the ADA by conducting a qualitative analysis of judicial opinions in a subset of ADA cases: U.S. Appellate Court disparate impact cases.

Third, an advantage of qualitative research is that it may produce a deeper and richer understanding of the data (Denzin & Lincoln, 2005; Patton, 2002). Therefore, the data generated from this study may provide scholars and practitioners with more detailed information about why judges make the decisions they do in U.S. Appellate Court ADA disparate impact cases.

Finally, this study sought to address the call for more balance between outcome and process research on the ADA. For example, Burris and Moss stated that research on Title I of the ADA must:

> be assessed by the study of outcomes, but its effectiveness can be improved only by the study of the process through which the outcomes are achieved, including how it influences the knowledge, attitudes, and beliefs of people with disabilities and their employers. (2000, p. 21)

In sum, studies that analyze case outcome data provide information about "what" decisions courts have made in ADA cases. This study sought to extend the previous research by providing insight into "how" and "why" courts made the decisions they did.

Role of Researcher

Qualitative research posits that it is the researcher him or herself that is the instrument (Patton, 2002), in contrast to quantitative research, which "depends on careful instrument construction" (p. 14) to ensure construct validity. Another difference between quantitative and qualitative research is the importance of replication. Each qualitative research study is unique; therefore, it is not possible to replicate a qualitative study. Thus, the credibility of qualitative research depends on the researcher's individual skill set, knowledge, competence, and life circumstances (Patton).

> Although there are guidelines in the literature, each project is unique and ultimately the individual researcher must determine how best to proceed. Reflexivity is thus considered essential, potentially facilitating understanding of

> both the phenomenon under study and the research process itself. (Watt, 2007, p. 82)

Scientific inquiry, whether quantitative or qualitative, seeks to reduce bias (Patton, 2002). Human beings are susceptible to bias, and this researcher is no exception. To reduce bias, the researcher kept a reflexive journal throughout the research study design, execution, and data analysis (Patton).

Reflexive Journal

Completing a reflexive journal serves several purposes. First, the process of recording and reflecting on the research topic and process "creates a means for continuously becoming a better researcher" (Watt, 2007, p. 82) and reflects the developmental nature of the qualitative research process (Glesne & Peshkin, 1992). Second, the reflexive process highlights not only what the researcher sees but also what the researcher may be missing due to the researcher's biases and assumptions. Reflection allows the researcher to identify thoughts and behaviors that may be influencing the results of the study. Finally, writing down thoughts and feelings throughout the research creates a permanent record of the research, which, upon review, may generate ideas for future research (Watt).

This researcher's reflexive journal took the form of notes, e-mails, and entries in a personal calendar that documented the researcher's experiences throughout the course of the study. The researcher reviewed the reflexive journal periodically throughout the study as a way to monitor researcher bias, evaluate growth as a qualitative researcher, record the evolution of the study from concept to execution, and gain perspective about the study as a whole rather than a sum of its parts (Glesne & Peshkin, 1992; Watt, 2007). Concerns about researcher bias that arose during the study were relayed to the researcher's dissertation chair and academic advisor, Dr. Vilia Tarvydas, and shared with peer reviewers Dr. Nashae Julian, Dr. Lori Magnuson, and Dr. Christine Urish. The researcher planned to keep the reflexive journal to refer to for additional research ideas or to use as a reference in the writing of future manuscripts about this study.

Self-Examination

The researcher completed a self-examination exercise to monitor and reduce researcher bias. The exercise increased the researcher's awareness of the impact of researcher bias on the study, and prompted the researcher to mitigate researcher bias throughout the study (Watt, 2007). The researcher self-examination exercise involved answering the following questions:

> What do I know? How do I know what I know? What shapes and has shaped my perspective? With what voice do I share my perspective? What do I do with what I have found? (Patton, 2002, p. 66)

Data Collection

This study examined all reported U.S. Appellate Court ADA disparate impact cases that met the study selection criteria. The data set used in this study comprised 174 ADA disparate impact cases litigated in U.S. Appellate Courts.

Case Selection

The cases were selected through a search of the Westlaw electronic legal research database. Fastcase, a subscription-based electronic legal research database, was used as a secondary source to ensure that no cases were missed. In addition, after the cases were identified by Westlaw, the researcher used several non-subscription-based, publically available electronic legal research databases to download and review the text of the cases included in the study: Cornell Legal Information Institute (LII), ADA Case Law Database, Findlaw, and Garland.

The following paragraphs describe the rationale for the selection of U.S. Appellate Court cases, database selection, legal reporters, and the search terms used to identify the cases.

Rationale for Selecting U.S. Appellate Court Cases

The courts have played an important role in the implementation of the ADA (Metzey, 2005; Percy, 2001). Therefore, ADA case law is a rich source of data about the law's implementation. The ADA is a U.S. federal law. Therefore, individuals who

believe they have been discriminated against on the basis of disability are allowed, under the ADA's regulations, to seek redress in the U.S. federal court system. The U.S. federal court system includes U.S. district courts and appellate courts, and the U.S. Supreme Court.

The U.S. federal district courts serve as trial courts for the federal court system and have jurisdiction to hear federal cases in both criminal and civil suits. Cases are presented before a federal judge and are typically decided by a jury. There are 94 federal judicial districts. Each state has at least one district. The 94 districts are divided into 11 regions, referred to as circuits. Each of the 94 district courts is assigned to one U.S. Court of Appeals (Edwards & Nordin, 1980; Nygren, 2011).

If either party to the case is unsatisfied with the outcome of the case at the district court level, an appeal may be filed with the U.S. Court of Appeals. Each appellate court hears appeals from the district courts within its circuit. A panel of three judges presides over the trial, and the court makes a decision on the appeal based on the case established at the U.S. district court level. The judges do not receive additional evidence or hear testimony from witnesses, and there is no jury. Attorneys from both sides present their arguments in a written format, known as a brief. In some cases, the court may ask the attorneys to present oral argument on specific issues. Oral argument is typically a time-limited, structured conversation between the panel of judges and each attorney (Edwards & Nordin, 1980; Nygren, 2011).

Based on the argument presented, the appellate court may decide to affirm or overrule the U.S. district court decision. The court may also recommend that the case be reviewed *en banc,* which means that the case is heard by the full set of judges (up to 11) who preside over the appellate court that hears the case. In most cases, the appellate court decision is the final decision in the case. Although either party has the right to ask the U.S. Supreme Court to review the case, the Supreme Court is not required to grant that

review. The Supreme Court may agree to hear a case if the case involves an important and significant legal principle (Edwards & Nordin, 1980; Nygren, 2011).

District courts are sometimes referred to as "lower" courts and appellate courts as "higher" courts to reflect the relative authority of their decisions. For example, decisions made by the U.S. Supreme Court are binding on U.S. appellate and district courts. Likewise, appellate court decisions not appealed to the Supreme Court are binding on district courts within the appellate court's jurisdiction. In legal terms, this is known as setting precedent (Mellinkoff, 1992). Cases that set precedent are important because they often guide decisions in similar future cases and may influence the evolution of law in a particular area. This process is referred to as *stare decisis* (from the Latin "to stand by things decided"). Although the limits of precedent are broad rather than precise, Mellinkoff noted that "precedent is followed, distinguished, criticized, overruled, sometimes forgotten or overlooked, but seldom completely ignored" (p. 495). The U.S. Appellate Courts play a large role in setting precedent because the U.S. Supreme Court reviews so few cases. For this reason, the unit of analysis for this study was appellate court cases.

Database Selection

This study used computer-assisted legal research (CALR) to identify the cases analyzed in this study. CALR is a form of legal research that employs electronic database technology. Electronic legal research databases compile legal information and court records into a searchable format to save legal researchers time and improve accuracy. Electronic legal databases exist in both public and subscription-based formats. This study used both publically available and subscription-based electronic legal research databases to identify and review cases that met the study criteria.

Westlaw and Fastcase were the subscription-based electronic legal research databases used in this study. Westlaw is owned by Thomson Reuters. Westlaw and LexisNexis are two of the most widely used commercial electronic databases for legal

research, in both U.S. law schools and in legal practice. Fastcase, a subscription-based electronic legal research database, which is owned by Fastcase.com, Inc., and headquartered in Washington, D.C., was used as a secondary database. Fastcase was searched in addition to Westlaw to ensure that no cases had been missed. Fastcase was chosen as the secondary database for two reasons: convenience and database search options. Fastcase is available at no charge to the researcher through the Wisconsin State Law Library and through her former employer, Textnet. Thus, the researcher could access the database from the law library or from her laptop computer. Fastcase features additional search options and data display; for example, unlike Westlaw, Fastcase allows customized searches and compiles search results algorithmically, meaning that the results are presented in order of importance.

The publically available electronic legal research databases used in this study were identified through a Google search using the search terms ADA" AND "Research" AND "Title I"; and "Disparate Impact" AND "ADA" AND "Judicial Opinions"; and through a literature review of studies that conducted content analyses of U.S. District and Appellate Court and U.S. Supreme Court cases (see, for example, Barker, 2011; Hall & Wright, 2008). The researcher identified four publically available legal research databases (Cornell LII, ADA Case Law, Findlaw, and Garland), as well as the databases available on the individual U.S. Appellate Court websites.

The researcher searched the subscription-based and publically available electronic legal research databases and found that all databases contained U.S. Appellate Court cases. However, some databases offered faster and more detailed search options than others. In addition, the Westlaw and Fastcase databases have the capability to search all 11 U.S. Appellate Court cases within a single search, whereas the ADA Case Law, Cornell LII, and the U.S. Appellate Court databases require that each U.S. Appellate Court be searched individually. In addiction, subscription-based electronic legal research databases, such as Westlaw, Lexis-Nexis, and Fastcase, include proprietary citation

systems within search results; publicly available electronic legal research databases present only the text of the cases. Findlaw and Garland were used to view the text of the individual cases and were searched using the case title of each individual case.

Case Reporters

The researcher chose Westlaw to identify the cases that comprised the sample in this study. Westlaw, along with LexisNexis, is one of the most widely used subscription-based electronic databases for legal research in both U.S. law schools and legal practice. One advantage of using electronic legal databases such as Westlaw is their ability to compile large amounts of court records in a searchable format to save legal researchers time and improve accuracy (Hall & Wright, 2008). Subscription-based electronic legal research databases also provide proprietary citation systems within the search results. However, there is a lack of standardization across databases; for example, Westlaw uses KeyCite and LexisNexis uses Shepards, respectively, as citation systems.

The cases contained in both Westlaw and LexisNexis electronic legal research databases are drawn from published print volumes, known as reporters (Nygren, 2011). Reporters contain all cases decided by courts within a particular jurisdiction and are printed in chronological order. Reporters are either official or unofficial. The only official reporters are those published by government entities. The U.S. Supreme Court and the highest court in each state publish official reporters (Nygren, 2011). All other reporters are published by private companies and are referred to as unofficial reporters, even though the case information they contain is gathered directly from the courts (Nygren, 2011). Private, proprietary-based reporters are organized by either jurisdiction or topic. Westlaw and Lexis-Nexis produce both printed reporters and electronic legal research databases based on the printed version of the reporter. Fastcase offers only an electronic legal research database. Each of the private, subscription-based companies exercises editorial control over what is contained in the published unofficial reporters and in the

online legal research databases. Therefore, not every case is included in the reporters (Gerken, 2004).

In addition, judges may decide not to release certain cases for publication. These “unpublished” cases are not precedential and cannot be cited as such. Approximately 80% of federal court of appeals cases are unpublished, but this varies by court. For example, every U.S. Supreme Court case is published (Gerken, 2004). ThomsonWest, the publishing arm of Westlaw, includes unpublished cases in its online legal research database and compiles them in its *Federal Appendix* reporter. This study included both published and unpublished cases in the initial data set. It is important to note that there may be material differences between published and unpublished cases.

All reported cases (published and unpublished) are included in the Westlaw search results. This means that some cases appear multiple times in the search results if there were multiple decisions for one lawsuit. For example, both “lower” or trial court and “higher” or appellate court decisions are reported in the search results as separate cases but are actually part of one lawsuit. For purposes of data analysis in this study, cases that appear multiple times are grouped together and treated as one lawsuit, and only the appellate court decision(s) in those cases were analyzed.

Database Search Terms

The following procedure guided the search of the Westlaw electronic legal research database to identify the cases used in this study. First, the parameter “Federal” was chosen in the Westlaw database (Westlaw Classic) to limit the search to all federal cases. Next, the researcher selected the parameter “All Feds” to capture all published and published cases at the U.S. Appellate Court level and to eliminate cases at the district court level. Third, the researcher used the following advanced search terms: "Americans with Disabilities Act" & "Title I" & "Disparate Impact" and “Date: Between 1992 and 2013,” which resulted in a sample of 174 cases. The researcher then conducted a series of narrower searches in Westlaw using the search terms “Americans with Disabilities Act”

& “Disparate Impact” and setting the advanced search to specific portions of the case: opinions and synopses. Finally, the researcher searched by the Westlaw KeyCite for disparate impact: 78 Civil Rights; 78I Rights Protected and Discrimination in General; 78k1016 Handicap, Disability or Illness; 78k1223 Disparate Impact. The narrower searches resulted in an additional 14 cases. Therefore, the number of cases in the initial dataset was 188. Appendix F contains a list of the 188 cases in the sample by case name, case number, and year of appellate court decision.

Technical assistance on using the Westlaw database was provided by research librarians employed by the Wisconsin State Law Library and The University of Wisconsin-Madison Law Library.

Data Storage

The researcher used the Westlaw electronic legal research database to identify and compile the cases that comprised the sample in this study. The cases were downloaded from Westlaw and saved on the researcher’s laptop computer as PDF and Microsoft Word text documents for purposes of data analysis. The downloaded cases contained the case title, the case number, the text of the case, including the judicial opinion, and identifying information about the court and the panel of judges that heard the case. PDF and Microsoft Word documents containing the case name, number, and the text of the cases were compiled into Microsoft Excel databases and Word tables. All case information and documents related to the analysis of the cases were stored on the researcher’s computer during the course of the study.

Ethical Considerations

The researcher took the following steps to ensure that the study followed ethical procedures: First, the researcher contacted The University of Iowa, Institutional Review Boards (IRB) and Human Subjects Office about the study and completed a Human Subjects Research Determination application per IRB requirements. The IRB issued a determination on July 18, 2012, that the study was not human subjects research and

therefore did not require IRB review and approval. The cases in this study are public record; therefore, the identity of the parties to the cases is publically available. Second, the researcher completed a reflexive journal and a researcher self-examination exercise to identify and monitor research bias that may affect the study design and analysis, and took steps to mitigate any bias (Patton, 2002). Finally, the researcher employed triangulation, peer review, and documentation of the research process, and provided rich description of the data to reduce researcher bias, improve transparency, and strengthen the trustworthiness of the study (Anfara, Brown, & Mangione, 2002).

Data Analysis

Qualitative analysis typically begins with inductive analysis as the researcher identifies patterns and themes within the data, a process referred to as coding (Patton, 2002). After the coding is complete, the researcher may use deductive analysis to develop formal hypotheses or theories about the relationships between the patterns and themes (Patton, 2002). Patterns are descriptive findings that describe a characteristic of the data; themes combine patterns into categories (Patton, 2002).

Inductive and Deductive Analysis

> *Inductive analysis* involves *discovering* patterns, themes, and categories in one's data. Findings emerge out of the data, through the analyst's interactions with the data, in contrast to *deductive analysis* whether the data are analyzed according to an existing framework. (Patton, 2002, p. 453)

This study used both inductive and deductive analysis to answer the research questions and sub-questions. The study used a two-step approach to analyze the data relevant to the research questions and sub-questions:

First, the researcher employed content analysis (Hall & Wright, 2008) to identify and characterize patterns and trends of litigation in all reported U.S. Appellate Court ADA disparate impact (DI) decided between 1992 and 2012. The study analyzed cases that were brought under ADA Titles I, II, III, or any combination of the three titles. The ADA DI cases were analyzed chronologically, from the oldest to the most recent case, to

track the evolution of the ADA through the federal appeals process from 1992 through July 2012. Variables analyzed included number of published and unpublished cases, distribution of U.S. Appellate Court jurisdictions, and distribution of ADA titles. Frequency analyses were conducted on the data.

Second, additional analyses were conducted on a subset of the ADA DI cases: Title I or employment discrimination cases. Variables analyzed included EEOC involvement, ADA definitional requirements (also referred to as prongs), elements of disparate impact cases, characteristics of charging and opposing parties, case dispositions, and case outcomes. Frequency analyses were conducted on these data. Constant comparative analysis (Strauss & Corbin, 1990) was used to identify and characterize patterns and themes of the judicial opinions in the ADA Title I DI cases. The researcher developed a framework for analysis based on a review of the literature of the sociopolitical perspective of disability to guide the analysis of the judicial opinions in the subset of disparate impact cases.

The analysis related to Research Question 1 and its sub-questions will be addressed in the first part of this section. The results of the analysis related to Research Question 2 will be addressed in the second part of this section.

Research Question 1

The use of the content analysis method in legal research is a time-honored tradition, dating back to Cicero (Smits, 2012). Hall and Wright (2008) noted that content analysis "resembles the classic scholarly routine of reading a collection of cases, finding common threads that link the opinions, and commenting on their significance" (p. 2) and suggested that "content analysis makes legal scholarship more consistent with the basic epistemological underpinnings of other social science research" (p. 2). In the social sciences, content analysis refers to "any qualitative data reduction and sense-making effort that takes a volume of qualitative material and attempts to identify core consistencies and meanings" (Patton, 2002, p. 453). Skillful application of content

analysis requires "pattern recognition, or the ability to see patterns in seemingly random information" (Boyatzis, 1998, p. 7). Using content analysis to analyze text or documents, or, in this case, legal cases, involves selecting a set of documents, reading the documents in a systematic manner, recording the consistent features in each document, and drawing inferences about the documents' purpose and meaning (Krippendorff, 2004; Patton, 2002).

The researcher chose to use content analysis because the method combines the analytical process of legal research with the methodological rigor of social science research. The former informs case selection and variables, and the latter informs the conclusions drawn about the relationships among the variables (Evans, McIntosh, Lin, & Cates, 2007).

Conventional content analysis is deductive, meaning that the categories and themes develop through the review and coding of data. Directed content analysis applies an existing theory to a new context (Hsieh & Shannon, 2005; Humble, 2009). This study used directed content analysis to examine ADA disparate impact cases. The legal theory of disparate impact guided Research Question 1 and its sub-questions. The sociopolitical perspective of disability guided Research Question 2.

Refining the Initial Sample

Successful qualitative data analysis requires careful and efficient management of large volumes of data (Patton, 2002). The goal is to condense the data in a manner that preserves the thickness and richness of the data, provides transparency of the data analysis process, and condenses the data for presentation in summary format, such as tables, graphs, and charts.

The unit of analysis in the study was individual legal cases. The initial study sample contained 188 cases. The researcher downloaded the search results in Westlaw that generated the initial sample and saved it as a PDF document on her computer. The search results contained summaries of each case. The researcher viewed each of the 188

summaries in Westlaw and entered the following variables into the spreadsheet for each case:

- case name;
- case number;
- year of decision;
- published or unpublished status (Y/N);
- appellate court that heard the case (circuit number);
- EEOC charging party (Y/N);
- ADA Title (I, II, III or IV); A
- DA theory (disparate impact; disparate treatment; reasonable accommodation; combination of theories);
- other claims (Title VII; ADEA); and,
- case outcome.

After all the variables for each case were entered into the Excel database, the researcher reviewed the cases in the initial sample and eliminated cases that fell outside the scope of the study. Cases were eliminated for the following reasons: criminal not civil action, case origin or decision date outside the study parameters, not an ADA case, and not an ADA disparate impact case. For example, the courts treated several cases in the initial sample as reasonable accommodations cases and not disparate impact cases (see, for example, *Bates v. UPS; Morton v. UPS;* and *EEOC v. Humiston-Keeling*). The implications of the choice of theory (reasonable accommodations, disparate impact, or disparate treatment theory) in ADA Title I cases will be discussed in Chapter 5. The review of cases generated a study sample of 64 ADA unpublished and published disparate impact cases brought under Titles I, II, or III of the ADA. There were no Title IV cases.

Analysis of 64 ADA Disparate Impact Cases

The researcher first analyzed the 64 ADA disparate impact cases comprising the initial sample to answer Research Question 1 sub-questions a), b), and, c). Variables analyzed included:

- number of published and unpublished ADA disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012,
- distribution of the jurisdictions of the U.S. Appellate Courts, and
- distribution of the titles of the published ADA disparate impact cases litigated in U.S. Appellate Courts (Titles I, II, III, IV).

The data used to answer Question 1, sub-questions a), b), and c) was extracted from the Excel database, and displayed in Word tables. Frequency analyses were conducted on this data.

Analysis of 20 ADA Title I Disparate Impact Cases

The focus of the study was on ADA Title I disparate impact (DI) cases. Cases with other claims (e.g., Title VII, Eleventh Amendment cases) and charged under a combination of legal theories (e.g., disparate treatment, reasonable accommodations) were included only if the initial review of the case indicated that the ADA disparate impact claim was addressed separately in the lawsuit. The researcher analyzed each case, using Westlaw KeyCites, case synopses, summaries, and opinions, to determine if the appellate courts decided the ADA Title I DI claims in these cases separately.

One case in the study, *Dalton v. Subaru*, 141 F.3d 667 (1998), is a class action case that was later decertified. In the *Dalton* case, there are nine individual plaintiffs; each plaintiff's case was decided on an individual basis.

The nature of the federal appeals process means that several cases appear in the data set more than once. For example, there are two cases in the data set where EEOC is the charging party (plaintiff). One case, *EEOC v. Kronos,* has 2010 and 2012 decisions. The 2012 decision deals with procedural issues concerning costs and confidentiality

orders. The 2010 decision deals with the substantive or factual issues of the case, so the researcher chose to analyze the 2010 decision for this study.

In addition, one case in the study, *Hernandez v. Hughes,* 298 F.3d 1030 (2002) was appealed by the respondent, Hughes Missile Systems, to the U.S. Supreme Court where it became *Raytheon v. Hernandez*, 540 U.S. 44 (2003). U.S. Supreme Court cases were not included in the study sample; therefore, the *Raytheon* case was not analyzed. However, the Supreme Court's decision in *Raytheon* was precedential, and required the appellate court to retry the case, where it became *Hernandez v. Hughes*, 362 F. 3d 564 (2004). Thus, the researcher made the decision to analyze the 2004 case.

The researcher reviewed each decision in multiple-decision cases, and made a decision, based on the procedural history of the cases, on how to proceed with analysis. Appendix A displays all the cases in the 23 ADA Title I DI cases with footnotes explaining how these cases were treated in the analysis. Duplicate decisions were removed from the sample, leaving a final sample of 20 ADA Title I DI cases.

To answer Research Question 1, sub questions d) through l), the researcher first downloaded and saved electronic copies (PDF format) of the text of each of the 20 ADA Title I DI cases in the study sample. Next, the researcher printed a hard copy of each of the 20 ADA Title I DI cases. The printed copies of the cases contained the Westlaw KeyCites, headnotes and summaries, along with the text of the judicial opinion. The researcher next read each case, beginning with the oldest case (1996) and ending with the most recent case (2012). Finally, the researcher created a handwritten worksheet for each case in order to organize and manage the data for Research Question 1 and its sub-questions.

The worksheet contained the case name, year of the decision, appellate court circuit, author of the opinion (and any concurring or dissenting opinions), notes about the substantive and procedural issues in the case, as well as the case outcome (Nygren, 2011). The worksheet also included demographic information about the plaintiffs and

defendants, including gender, race/ethnicity, age; employment information, such as work history, position title, and duties. The researcher kept the printed copies of the 20 ADA Title I DI cases and their corresponding worksheets together in file folders. There was a file folder for each case.

The researcher used the worksheets and the case information in the Excel database to answer Question 1, sub-questions d) through l). Variables analyzed included:

- number of cases brought by the Equal Employment Opportunity Commission;
- prongs under the ADA's definition of disability most frequently litigated;
- fact pattern that gave rise to the dispute;
- essential fact elements of disparate impact theory most frequently in dispute;
- defenses most frequently claimed;
- characteristics of the charging parties;
- characteristics of the opposing parties;
- disposition of the cases: procedural, substantive, or indeterminate; and,
- case outcomes

The data used to answer Question 1, sub-questions a), b) and c) was contained in the worksheets and the text of each of the 20 ADA Title I DI cases in the study sample. The data for each sub-question were displayed in Word tables. Frequency analyses were conducted on these data.

Research Question 2

The second step in the analysis was the qualitative analysis of the judicial opinions in the 20 ADA Title I disparate impact (DI) cases. The researcher employed constant comparative analysis (Strauss & Corbin, 1990) to identify and characterize patterns and themes of the judicial opinions in the study sample.

Constant Comparative Analysis

The constant comparative analysis method described by Strauss and Corbin (1990) was used to identify patterns and themes within data. Constant comparative

analysis uses both within case and across-case analysis. There are four steps to the constant comparative analysis method: (a) code each incident in the data in as many themes and patterns as possible, in a process known as open coding; (b) compare each coding incident with the previous incident; (c) reduce the data to categories and subcategories; and (d) identify concepts and the relationships between categories and concepts.

This study analyzed text in the form of legal cases and used a theoretical model, the sociopolitical perspective of disability, to guide the analysis. Ryan and Bernard (2003) stated that analyzing text to identify themes and link the themes to theory requires several steps: (a) identifying themes and subthemes, (b) combining themes based on commonalities and importance, (d) building theme hierarchies and codebooks, and (d) linking themes to theoretical models (p. 85). The codebook developed during the analysis of the cases related to Research Question 2 is contained in Appendix E.

Sociopolitical Perspective of Disability Framework

To answer Research Question 2, the researcher first developed a framework for analysis based on a review of the literature of the sociopolitical perspective of disability. After the initial framework was complete, three members of the researcher's dissertation committee reviewed the framework and provided suggestions and feedback. This review enhanced the study's trustworthiness. The researcher revised the framework based on the feedback from her committee members. The purpose of the framework was to provide theoretical guidance for the coding of the judicial opinions in the 20 ADA Title I disparate impact (DI) cases in the study sample.

Coding the 20 ADA Title I Disparate Impact Cases

The themes, their categories and subcategories, and the relationships among themes were identified in the following manner:

First, the researcher used the Sociopolitical Perspective of Disability Framework (Appendix C) to guide the initial coding. The framework contains two components and

six subcomponents. Each component and subcomponent in the framework was defined, based on a review of the literature on the sociopolitical perspective of disability. The definitions are contained in the Codebook for Qualitative Analysis (Appendix E).

The researcher next assigned a color code for each of the six subcomponents in the framework. There were six colors in total, one color for each of the six subcomponents in the framework. The researcher read the text of the judicial opinions in each case and highlighted the text using used the colored markers. During the initial coding phase, the framework guided the coding and text was grouped into the six subcomponents. Ryan and Bernard (2003) noted that this type of "metacoding" (p. 99) is suitable for "a fixed set of data units (paragraphs, whole texts, pictures, etc.) and a fixed set of a priori themes" (p. 99). The researcher used the metacoding technique to determine which components of the framework were present in the text of the judicial opinions in the 20 ADA Title I cases. Thus, categories identified during the initial coding were theory-driven or deductive (Hsieh & Shannon, 2005; Ryan & Bernard, 2003; Zhang & Wildemuth, 2009).

In the second round of coding, the researcher examined the sections of text that did not fit under the framework and used a data-driven or inductive process to identify new categories and subcategories in the text (Hsieh & Shannon, 2005). The researcher took notes throughout the process as the patterns, themes, and categories were identified. The notes were used to construct a Codebook (Appendix E). After each of the 30 cases was coded, the researcher reviewed the Codebook for overlaps and commonalities. This analysis produced four distinct themes.

Finally, the researcher compared the theory-driven categories to the data-driven categories and identified relationships among them (Ryan & Bernard, 2003). The Concept Map (Appendix D) displays each of the four themes, their categories and subcategories, and the relationships among them (Daley, Conceicao, Mina, Altman, Baldor, & Brown, 2010).

Trustworthiness

This section describes the strategies and procedures used during the study to organize the research process and provide transparency about the decisions made throughout the research process. Clear and transparent procedures strengthen the study's trustworthiness and provide sufficient detail to allow the research to be critiqued and evaluated by others (Anfara, Brown, & Mangione, 2002).

Qualitative research is often criticized as being methodologically sloppy (Anfara, Brown, & Mangione, 2002) which threatens its usefulness and legitimacy. Beginning in the 1980s, qualitative researchers called for more standardization in the methodology employed in qualitative research studies (Anfara et al). Lincoln and Guba (1985) described strategies that qualitative researchers could employ to strengthen the trustworthiness of their research. For example, employing member checks strengthens credibility, providing a "thick description" of the data strengthens transferability, including peer review strengthens dependability, and incorporating reflexivity throughout the study strengthens confirmability (for the complete list of strategies, see Anfara et al., p. 30).

Triangulation

To improve the trustworthiness of qualitative research, researchers employ a strategy known as triangulation (Patton, 2002). "Triangulation strengthens a study by combining methods" (Patton, p. 247). More specifically, triangulation is a strategy employed to strengthen a study's credibility, dependability, and confirmability (Anfara, Brown, & Mangione, 2002). There are four types of triangulation: (a) data triangulation, (b) investigator triangulation, (c) theory triangulation, and (d) methodological triangulation (Denzin, 1978). This study employed methodological triangulation to answer Research Questions 1 and 2. Inductive and deductive analysies were used to analyze the cases in the study sample.

To answer Research Question 1, the researcher used content analysis (Hall & Wright, 2008) to identify the patterns and trends of litigation in the ADA disparate impact cases that comprised the study sample. Frequency analyses were conducted on the data.

To answer Research Question 2, the researcher used constant comparative analysis (Strauss & Corbin, 1990) to identify themes, categories and subcategories in the 20 ADA Title I DI cases. Four themes were identified in the 20 ADA Title I DI cases: (a) Accommodations; (b) Workplace Culture, Norms, and Policies; (c) Judicial Process; and (d) Policy Space. Each of the themes contained two or three categories and several subcategories.

The four themes, their categories and subcategories, and the relationships among themes were identified in the following manner: First, the researcher used the Sociopolitical Perspective of Disability Framework (Appendix C) to guide the initial coding. Thus, categories identified during the initial coding were theory driven or deductive (Hsieh & Shannon, 2005; Ryan & Bernard, 2003). In the second round of coding, the researcher examined the sections of text that did not fit within the framework and used a data-driven or inductive process to identify new categories and subcategories in the text (Hsieh & Shannon, 2005). Finally, the researcher compared the theory-driven categories to the data-driven categories and identified relationships among them. The Concept Map (Appendix D) displays each of the four themes, their categories and subcategories, and the relationships among them (Daley et al., 2010). Methodological triangulation served to capture both process and outcome information within the cases used in the analysis (Burris & Moss, 2000).

Additional Strategies to Strengthen Trustworthiness

Several additional strategies were employed by the researcher to strengthen the study's trustworthiness: First, to improve the study's transferability, the researcher provided a thick description of the data and developed a Codebook (Appendix E) that

contained the codes, the definitions of the codes, and sample text from the study sample to provide an example of each code (Anfara, Brown, & Mangione, 2002). Second, the researcher kept a reflexive journal throughout the research process to monitor and mitigate researcher bias, which strengthened the study's confirmability. Third, the researcher kept process notes during the analysis to provide details about the decisions that were made throughout the collection and analysis of the data, which provided transparency about the research process and strengthened the study's transparency (Anfara et al.). Fourth, the researcher asked Drs. Christine Urish, Lori Magnuson, and Nashae (Nikki) Julian, three doctoral colleagues of the researcher, to serve as peer reviewers; they were not involved in this study and had completed qualitative dissertations at The University of Iowa, College of Education, Department of Rehabilitation and Counselor Education. All three accepted. Peer review served as a check for researcher bias (Patton, 2002). The three peer reviewers in this study provided feedback on the components and subcomponents of the Sociopolitical Perspective of Disability Framework for Analysis (Appendix C) and provided additional feedback throughout the study on the coding, themes, and relationships developed through the analysis of the 20 ADA Title I DI cases. Finally, the researcher consulted with Dr. Lelia Helms, the dissertation committee's legal expert, on the variables used to answer Research Question 1 and its sub-questions. The researcher developed a framework for analysis based on a review of the literature of the sociopolitical perspective of disability. After the initial framework was complete, the researcher asked Dr. Vilia Tarvydas, Dr. Dennis Maki, and Dr. Susanne Bruyère, three dissertation committee members with knowledge of the literature on the sociopolitical perspective of disability, to review the initial framework and to provide suggestions and feedback on the components and subcomponents in the framework. The researcher revised the framework based on the feedback from her committee members.

The researcher took several steps to provide transparency about the procedures used throughout the collection and analysis of the data. First, raw data from the cases were compiled into tables for analysis and were made available as appendices to the study. Second, the researcher constructed a codebook containing the patterns, themes, and categories that emerged from the data analysis, which is included as Appendix E of the study. Third, the researcher provided examples of coded text which informed the development of the concepts, categories, sub-categories, and relationships depicted in the Concept Map (Appendix D).

Summary

This chapter provided the epistemological and methodological foundations for the study. Specifically, this chapter included a description of the study's methodology, theoretical guidance, sample selection, data collection, methods, procedure, and data analysis. The chapter described the strategies the researcher employed to strengthen the study's trustworthiness, including the strategies used to strengthen the study's credibility, transferability, dependability, and confirmability. The role of the researcher, study limitations, and ethical considerations were also discussed. Chapter 4 discusses the results of the data analysis and presents the four trends, four concepts, and three relationships identified the content analysis and constant comparative analysis conducted on the ADA disparate impact cases that comprised the study sample. Chapter 4 presents examples of coded text from the judicial opinions to provide transparency and illustrate how the text informed the themes and relationships depicted in the Concept Map (Appendix D).

CHAPTER IV

RESULTS

Introduction

> A RIF [reduction in force] is not an open sesame to discrimination against a disabled person. (*Christie v. Foremost Ins. Co.*, 785 F.2d 584, 587 (7th Cir.1986))

The purpose of this research was to examine the patterns and themes of litigation in Americans with Disabilities Act of 1990 (ADA) disability discrimination cases charged under the theory of disparate impact (DI). Specifically, this study reviewed all U.S. Appellate Court ADA DI cases as reported by Westlaw, a commercial electronic case law reporting system owned by Thomson Reuters. Additional analyses were conducted on a subset of the ADA DI cases: Title I, or employment cases. The study included all reported DI cases that originated under the ADA of 1990 and that were litigated between 1992 and 2012. DI cases that originated before July 26, 1992, under the Rehabilitation Amendments Act of 1973, or after January 1, 2009, under the ADA Amendments Act of 2008, were not included in this study. The cut-off date for inclusion in the study was July 31, 2012. The cut-off date was chosen because the researcher received approval for the study from The University of Iowa Institutional Review Board (IRB) on July 18, 2013. Data collection and analysis commenced after IRB approval. Therefore, cases decided after August 1, 2012, were not included in this study.

This study used a two-step approach to analyze the data relevant to the research questions and sub-questions:

First, the researcher employed content analysis (Hall & Wright, 2008) to identify and characterize patterns and trends of litigation in all reported U.S. Appellate Court ADA DI cases decided between 1992 and 2012. The analysis examined DI cases that were brought under ADA Title I, Title II, Title III, or any combination of the three titles. The ADA DI cases were analyzed chronologically, from the oldest to the most recent case, to track the evolution of the ADA through the federal appeals process from 1992

through July 2012. Variables analyzed included number of published and unpublished cases, distribution of U.S. Appellate Court jurisdictions, and distribution of ADA titles. Frequency analyses were conducted on the data.

Second, additional analyses were conducted on a subset of the ADA DI cases: Title I or employment discrimination cases. Variables analyzed included EEOC involvement, ADA definitional requirements (also referred to as prongs), elements of disparate impact cases, characteristics of charging and opposing parties, case dispositions, and case outcomes. Frequency analyses were conducted on these data. Constant comparative analysis (Strauss & Corbin, 1990) was used to identify and characterize patterns and themes of the judicial opinions in the ADA Title I DI cases. The researcher developed a framework for analysis based on a review of the literature of the sociopolitical perspective of disability to guide the analysis of the judicial opinions in the subset of disparate impact cases.

The results of the analysis related to Research Question 1 and its sub-questions will be addressed in the first section of this chapter. The results of the analysis related to Research Question 2 will be addressed in the second section of this chapter.

Refining the Initial Sample

The initial study sample contained 188 cases. The search terms used to generate the sample in Westlaw were intentionally broad to ensure that no cases were missed. The researcher reviewed all cases in the initial sample and eliminated cases that fell outside the scope of the study. Cases were eliminated for the following reasons: criminal not civil action, case origin or decision date outside the study parameters, not an ADA case, or not an ADA disparate impact case. For example, the courts treated several cases in the initial sample as reasonable accommodations cases and not disparate impact cases (see, for example, *Bates v. UPS; Morton v. UPS;* and *EEOC v. Humiston-Keeling*). The implications of the choice of theory (reasonable accommodations, disparate impact, or disparate treatment theory) in ADA Title I cases will be discussed in Chapter 5. The

analysis generated a sample of 64 ADA unpublished and published disparate impact cases.

Patterns of Litigation in ADA Disparate Impact Cases

The first research question asked about the patterns of litigation in Americans with Disabilities Act (ADA) cases charged under the theory of disparate impact and litigated in U.S. Appellate Courts between 1992 and 2012. A series of sub-questions were formulated to answer the question.

Published and Unpublished ADA Disparate Impact Cases

The first sub-question asked about the numbers of published and unpublished ADA disparate impact (DI) cases litigated in U.S. Appellate Courts from 1992 through 2012. Table I displays the 64 cases by title and by published and unpublished status. Only published ADA cases were analyzed. The 64 cases are displayed by ADA title (Titles I, II, III; there were no Title IV cases.

Table 1. Published and Unpublished ADA Disparate Impact (DI) Cases

All U.S. Appellate Courts				
	ADA DI	ADA DI	ADA DI	Totals
	Title I	Title II	Title III	
Published[a]	20	25	7	52
Unpublished[a]	5	7	0	12
Totals	25	32	7	64 (N)

[a]Duplicate decisions counted as one case

The second and third sub-questions asked about the distribution of published ADA disparate impact cases across U.S. Appellate Court jurisdictions, and the distribution of the cases by ADA title, respectively. Table 2 displays the distribution of the 52 published ADA disparate impact cases across the 12 U.S. Appellate Court

jurisdictions and across ADA Titles I, II, and III. There were no ADA Title IV cases in the sample of 64 ADA DI cases.

Table 2. Distribution of ADA DI Cases Across U.S. Appellate Courts and Titles

ADA Published Disparate Impact Cases by U.S. Appellate Court Jurisdiction and ADA Title N = 52 (adjusted for duplicates[a])													
ADA DI cases by title	Jurisdiction/Circuit												
	1	2	3	4	5	6	7	8	9	10	11	DC	Total DI cases by title
I	1	0	1	0	1	2	9	2	3	1	0	0	20
II	0	5	2	0	1	4[b]	2	0	6	3	2	0	25
III	1	0	0	1	0	1[b]	0	0	2	2	0	0	7
Total DI cases by U.S. Appellate Court Circuit	2	5	3	1	2	7	11	2	11	6	2	0	52

[a] Duplicate cases counted as one case

[b] *Sandison v. Michigan High School* was brought under both Titles II and II and was counted as two cases.

ADA Title I Disparate Impact Cases

The focus of the study was on ADA Title I DI cases. Cases with other claims (e.g., Title VII, Eleventh Amendment cases) and charged under a combination of legal theories (e.g., disparate treatment, reasonable accommodations) were included only if the initial review of the case indicated that the ADA disparate impact claim was addressed separately in the lawsuit. The researcher analyzed each case using Westlaw KeyCites, case synopses, summaries, and opinions to determine if the appellate courts decided the ADA Title I DI claims in these cases separately.

One case in the study, *Dalton v. Subaru*, 141 F.3d 667 (1998), was a class action case that was later decertified. In the *Dalton* case, there were nine individual plaintiffs; each plaintiff's case was decided on an individual basis.

The nature of the federal appeals process means that several cases appear in the data set more than once. For example, there are two cases in the data set in which EEOC is the charging party (plaintiff). One case, *EEOC v. Kronos,* has 2010 and 2012 decisions. The 2012 decision deals with procedural issues concerning costs and confidentiality orders. The 2010 decision deals with the substantive or factual issues of the case, so the researcher chose to analyze the 2010 decision for this study.

In addition, one case in the study, *Hernandez v. Hughes,* 298 F.3d 1030 (2002) was appealed by the respondent, Hughes Missile Systems, to the U.S. Supreme Court where it became *Raytheon v. Hernandez*, 540 U.S. 44 (2003). U.S. Supreme Court cases were not included in the study sample; therefore, the *Raytheon* case was not analyzed. However, the Supreme Court's decision in *Raytheon* was precedential and required the appellate court to retry the case, where it became *Hernandez v. Hughes*, 362 F. 3d 564 (2004). Thus, the researcher made the decision to analyze the 2004 case.

The researcher reviewed each decision in multiple-decision cases and made a decision, based on the procedural history of the cases, on how to proceed with analysis. Appendix A displays all the cases in the 23 ADA Title I DI cases with footnotes explaining how these cases were treated in the analysis. Duplicate decisions were removed from the sample, leaving a final sample of 20 ADA Title I DI cases.

ADA Title I Disparate Impact Cases with EEOC as Charging Party

The fourth sub-question asked about the number of U.S. Appellate Court ADA Title I DI cases brought by the U.S. Equal Employment Opportunity Commission (EEOC) from 1992 through 2012. The federal government charges the EEOC with promulgating the regulations that govern Title I of the ADA, and with receiving and filing charges concerning potential violations of Title I. There were three EEOC cases in the sample of 20 ADA Title I disparate impact cases. Table 3 displays the EEOC cases.

Table 3. ADA Title I Disparate Impact Cases with EEOC as the Charging Party

Case Name	**Case Number and Year of Decision**	**Other Claims**	**Circuit**
EEOC v. Kronos [a]	694 F. 3d 351 (2012)	Title VII, race	3
EEOC v. Randstad	685F.3d 433 (2012)	Title VII, race	10
EEOC v. Kronos [a]	620 F. 3d. 287 (2010)	Title VII, race	3

[a]Only the 2010 case was analyzed.

Cases with EEOC as the plaintiff represented 10% of the 20 ADA Title DI cases in the study sample. Therefore, cases in which an individual employee was the charging party comprised the majority (90%) of the cases. The EEOC enforces laws that prohibit workplace discrimination, including workplace discrimination against people with disabilities. Therefore, an employee who wishes to pursue an ADA Title I disparate impact claim against his or her employer must first file a complaint with the EEOC. The employee must file the complaint with the EEOC within 180 days of the act of workplace discrimination, or within 300 days if the employee first filed the charge with his or her local or state fair employment practices agency. The EEOC investigates the employee's complaint and issues findings about the results of its investigation. If the findings show that the there is probable cause that workplace discrimination did occur, the EEOC will issue the employee a "right to sue" letter. The employee must wait until he or she receives a "right to sue" letter from the EEOC before filing his or her lawsuit in federal court (Taylor, 2006). Most often, the individual employee will file the complaint in court; however, the EEOC does have the option to file the charge in federal court on behalf of the employee, and, in some cases, the agency exercises that option. The cases represented in Table 3 are cases in which the EEOC filed the lawsuit in federal court against the employer. The implications for ADA Title I DI cases in which the EEOC was a charging party in ADA Title I DI cases will be discussed in Chapter 5.

Making a Prima Facie Case Under the ADA

The ADA prohibits discrimination against a qualified individual with a disability "because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment" (42 U.S.C. § 12112(a)).

The ADA defines who can bring a claim in 42 U.S.C. § 12131(2) and under what legal theories the claim may be brought. In order to prevail under the ADA, the plaintiff must first establish a prima facie case. *Prima facie* is a Latin phrase meaning "on its face." To make a *prima facie* case under Title I of the ADA, an employee must first establish that he or she has a disability as defined by the ADA. Disability is defined as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment" (42 U.S.C. § 12102(2)).

A plaintiff must also demonstrate that he or she is qualified for the position in question. An individual is qualified if he or she "satisfies the pre-requisites for the position" and "can perform the essential functions of the position held or desired, with or without reasonable accommodation" (29 C.F.R. app. § 1630.2(m)).

Finally, under Title I of the ADA, a plaintiff must show that he or she has experienced discrimination in the workplace, and that the discrimination was due to his or her disability. The ADA covers both intentional (disparate treatment) and unintentional (disparate impact) acts of discrimination. Intent is factored into the choice of theory under which the ADA claim is based.

When a plaintiff has established that he or she is a qualified individual with a disability, the next step is to determine under which theory of discrimination the claim should be brought. A qualified individual can base a discrimination claim on any of "three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and, (3) failure to make a reasonable accommodation" (*Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir. 2003)).

This study involved cases that were charged under the theory of disparate impact. The theory or doctrine of disparate impact applies in cases where an employer's facially neutral policies or practices have an unintentional adverse impact on members of a protected group, such as racial/ethnic minorities and women under Title VI of the Civil Rights Act of 1964, and people with disabilities under the ADA. In cases where disparate impact is shown to exist, the charging party is not required to show intentional discrimination, but does need to demonstrate how the policy or practice caused an adverse impact on a protected group.

To rebut a charge of disparate impact, an employer must demonstrate that the policy or policy in question is related to the essential functions of the job or is required for safety or health reasons. The employer's defense to a charge of disparate impact is referred to as the "business necessity" defense. "Although the shorthand reference is the 'business necessity' defense, the defense also incorporates requirements of job relatedness and reasonable accommodation" (*Bates v. UPS* (2007)).

Is important to note that federal courts have expressed some differences in their decisions about which theories of discrimination are allowed under the ADA. These differences influence not only the number and nature of ADA cases filed under the theory of disparate impact, but also the decisions in the cases (Stein & Waterstone, 2006).

Meeting the Definition of Disability Under the ADA

As mentioned, the first part of the prima facie case requires the plaintiff to establish that he or she is a person with a disability. This means that the plaintiff must meet the definition of disability under the ADA. The threshold requirement for coverage under the ADA is that the plaintiff be a "qualified individual with a disability" (42 U.S.C. § 12112(a) (1994)).

The ADA defines disability as "a physical or mental impairment that substantially limits one or more ... major life activities" (42 U.S.C. §12102(2)(A) (1994)):

SEC. 3. DEFINITIONS.

As used in this Act:

(2) Disability. --The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

The three definitions of disability defined in Section 3 of the ADA are commonly referred to as “prongs.” Congress first formulated the three-prong definition of disability in the Rehabilitation Act Amendments of 1974 as:

> any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment [(Pub. L. No. 93-516, Section 111(a)(6), 89 Stat. 2-5 (1974) (codified at 29 U.S.C. Section 706 (8) (B)].

The fifth sub-question in this study asked about the prongs under the ADA’s definition of disability that are most frequently litigated in published ADA Title I DI cases. Table 4 indicates whether or not the employees bringing the suits in the cases in the study sample met the definitional burden, and, if so, under which prong of the definition.

It is important to note that factual issues, such as whether or not the plaintiff has met the definition of disability under the ADA, may or may not be at issue at the appellate court level. Therefore, several cases in the ADA Title I DI data set do not contain information about whether or not the plaintiff made his or her *prima facie* case. In other cases, the court notes that elements of the prima facie case have been met or are in dispute. Finally, several of the cases are procedural in nature, meaning they deal with issues such as timeliness and venue, rather than the specific facts in the case.

Table 4. ADA Definition of Disability at Issue in ADA Title I Disparate Impact Cases

ADA Definitional Prongs	**Number of Plaintiffs**		**Percentage**	
Met Definition	Yes	No	Yes	No
Prong 1 (Has a disability)	12[a]	8[b]	43%	29%
Prong 2 (Record of disability)	2	0	7%	0
Prong 3 (Regarded as disabled)	0	0	0	0
Not addressed in appellate court case	5	0	18%	0
In dispute in district court case	1	0	3%	0
Totals (N = 28 plaintiffs)	20	8	71%	29%

[a] Includes 2 plaintiffs from *Dalton* case

[b] Includes 7 plaintiffs *Dalton* case

Employer Policies in Dispute

The sixth sub-question asked about the fact pattern that gave rise to the dispute in published Title I U.S. Appellate Court ADA disparate impact cases: testing, hiring (qualified), promotion, discharge, or reasonable accommodations (e.g., reassignment; transfer). Table 5 displays the six types of employer policies in dispute in the 20 ADA Title I DI cases by number and percentage of cases.

Table 5. Employer Policies in Dispute in ADA Title I Disparate Impact Cases

Employer Policy in Dispute	**Number of Cases**	**Percentage**
Selection Criteria (hiring or promotion)	8	40%
Temporary Leave Policies [b]	1	5%
Job Performance Measures or Rules of Conduct	3	15%
Transfer or Reassignment [b]	3	15%
One-strike rule (no re-hire)	2	10%
Seniority System (CBA[a])[b]	3	15%
Total	20	100%

[a]Collective Bargaining agreement

[b]Includes requests for reasonable accommodations

Elements of Disparate Impact Theory in Dispute

The seventh sub-question asked about the essential fact elements of disparate impact theory that are most frequently in dispute in published U.S. Appellate Court ADA Title I disparate impact cases: existence of practice/policy that wrongfully discriminates against people with disabilities, employer/employee relationship, effect of practice/policy has an adverse effect on people with disabilities, protected status, or policy/practice caused harm.

As mentioned, the theory or doctrine of disparate impact applies in cases where an employer's facially neutral policies or practices have an unintentional adverse effect on members of a protected group, such as racial/ethnic minorities and women under Title VI of the Civil Rights Act of 1964, and people with disabilities under the ADA. In cases where disparate impact is shown to exist, the charging party does not need to show intentional discrimination, but does need to demonstrate how the policy or practice caused an adverse impact on a protected group. To rebut a charge of disparate impact, an employer must demonstrate that the policy or policy in question is related to the essential functions of the job or is required for safety or health reasons. The employer's defense to a charge of disparate impact is referred to as the "business necessity" defense. "Although the shorthand reference is the 'business necessity' defense, the defense also incorporates requirements of job relatedness and reasonable accommodation" (*Bates v. UPS* 2007).

There are four elements in a disparate impact claim. To make a Title VII prima facie claim of disparate impact discrimination, an employee must first specify the policy or practice and show that the employer uses the policy. Next the employee must demonstrate that the policy in question has a disparate impact on a protected group (as defined under Title VII) and demonstrate that there is a causal relationship between the policy and the disparate impact. Under the ADA, the standard is slightly different. The employee need only show that the policy has an adverse impact upon him or herself rather than on a group (Americans with Disabilities Act of 1990, § 102(b)(3, 6), 42

U.S.C.A. §12112(b)(3, 6); Civil Rights Act of 1964, §703(k)(1)(A)(i), 42 U.S.C.A. §2000e-2(k)(1)(A)(i)).

Of the 20 ADA Title I DI cases, 15 cases plead or requested to plead a DI case. Thirteen of the 15 cases had their DI claim heard by the appellate court. Ten of the 13 cases failed to meet elements one, two, or three. Three of the 13 DI cases heard by the appellate courts contained all four elements of disparate impact theory (*Belk v. Southwestern Bell; Lopez v. Pacific Marine; Hernandez v. Hughes).* Of the three, only the *Belk v. Southwestern Bell* case made it to the employer rebuttal stage. The appellate court in *Belk* remanded the case to district court for re-hearing on the employer's business necessity defense. In the *Lopez* case, the court ruled that the plaintiff did not produce evidence to support the DI claim. The *Hernandez* case was heard on remand from the U.S. Supreme Court. The appellate court in the *Hernandez* case rejected the plaintiff's DI claim as not the proper theory for the fact scenario, following U.S. Supreme Court precedent. Appendix B contains the U.S. Appellate Court rulings on the four elements of disparate impact for each of the 13 cases that had a DI claim heard by the appellate court.

As mentioned, of the 20 ADA Title I DI cases in the sample, plaintiffs in 15 cases plead or requested to plead a DI case. Thirteen of the 15 cases had their DI claim heard by the appellate court, as discussed above. In the remaining two cases, the court determined that the plaintiffs had waived their DI claim, because although the DI claim was mentioned in the plaintiffs' briefs, the claim was neither developed nor substantiated (*Matthews v. Commonwealth; Rivera-Garcia v. Sistema*). Five of the cases (*Kennedy v. Chemical Waste; Douglas v. CYA; Erickson v. Board of Governors; EEOC v. Randstad; EEOC v. Kronos*) were decided on procedural issues, so a DI claim was not plead or argued in these cases. The *Erickson v. Board of Governors* case did not survive an Eleventh Amendment challenge by defendants. Three cases were reversed or remanded for further proceedings at the district level (*Douglas v. CYA; EEOC v. Randstad; EEOC v. Kronos*) and their current status is unknown. The *Douglas* case was an Eleventh

Amendment case that was decided in favor of the plaintiff; the two EEOC cases were administrative subpoena cases that were decided in favor of the plaintiff. The final case was the oldest case (1996). The court in *Kennedy v. Chemical Waste* ruled that the plaintiff's case was not timely, and commented in dicta that disparate impact theory does not apply to bona fide seniority systems under Title VII and the ADA.

Employer Business Necessity Defenses

The eighth sub-question asked about the employer defenses that are most frequently claimed in published U.S. Appellate Court ADA Title I disparate impact cases. Only the *Belk* case made it this far in the process. In the *Belk* case, the employer, Southwestern Bell, appealed the district court's refusal to instruct the jury on business necessity. The appellate court agreed with Southwestern Bell and remanded the case to district court for jury instructions on business necessity. Southwestern Bell's business necessity defense concerned job-related safety issues for the customer service technician position for which Belk had applied.

Characteristics of Charging Parties

The ninth sub-question asked about the characteristics of the charging parties: type of disability, age, gender, race/ethnicity, and socioeconomic status in published U.S. Appellate Court ADA Title I. Age, race/ethnicity, and socioeconomic status were rarely reported in the text of the cases. Disability status and gender were reported in each of the 20 ADA Title I DI cases. Table 6 displays the number and overall percentage of the disability types represented in the cases.

Table 6. Distribution of Disability Types in ADA Title I Disparate Impact Cases

Disability	**Number**	**Percentage**
Physical	12	60%
Cognitive	1	5%
Psychiatric	2	10%
Sensory	3	15%
Substance Abuse	2	10%
Totals	20	100%

Table 7 displays the distribution of male and female charging parties in the 20 ADA Title I DI cases that comprised the sample in the study.

Table 7. Gender of ADA Title I Disparate Impact Claimants

Gender	Number	Percentage
Male	15	75%
Female	5	25%
Totals	20	100%

Characteristics of Employers

The 10th sub-question asked about the characteristics of the employer or respondent parties of the 20 ADA Title I DI cases that comprised the sample in this study. Title I of the ADA covers employers with 15 or more employees. Entities covered by Title I include private for-profit and non-profit employers; public employers, such as state and local governments; and labor unions. Table 8 reports the number and type of employers who were parties to the 20 ADA Title I DI cases that comprised the sample in the study.

Table 8. Employer Characteristics in ADA Title I Disparate Impact Cases

Employer Characteristics	Number	Percentage
Insurance	1	5%
Public Schools and Universities	1	5%
Other Government Agencies and Programs (police)	2	10%
Manufacturing	6	30%
Transportation	3	15%
Retailing	3	15%
Employment Agency	1	5%
Utilities (electric, telephone)	3	15%
Totals	20	100%

Case Disposition

The 11th sub-question asked about the basis for the disposition of the cases (procedural, substantive, or indeterminate) in published U.S. Appellate Court ADA Title I DI cases. There are two types of issues in a legal case: procedural and substantial. Procedural issues guide the process of the litigation itself and include the concepts of due process and fairness. Procedural issues involve issues other than the facts of the case, such as venue, standing, and timeliness issues (Nygren, 2011). For example, a plaintiff in an ADA Title I case who does not file his or her claim within 300 days of the alleged instance of workplace disability discrimination may lose his or her case due to statute of limitations or timeliness issues.

Substantive issues concern the specific legal issues involved in a case. Cases decided on substantial issues are decided on the material facts of the case (Nygren, 2011). Courts determine material facts based on the type of law that applies to the case. For example, in ADA cases, one factual issue is whether or not the plaintiff is a qualified person with a disability. In Title I disparate impact cases, the factual issue is whether or not the plaintiff is able to provide evidence that meets the four elements required in an ADA disparate impact case.

Procedural law governs the process of substantive law. For example, a plaintiff in an ADA Title I DI case may have met the substantive requirements in an ADA Title I DI case (a qualified individual with a disability whose case meets the four elements of a disparate impact case under the ADA); however, the plaintiff may lose in court on a procedural issue if he or she did not file his or her claim within the period of time specified in the statute of limitations for ADA Title I cases.

Because procedural law governs the process of substantive law, it is possible for a case to be decided on both procedural and substantive issues. Cases may be appealed on procedural, substantive, or a mix of procedural and substantive issues. The case

disposition may also be indeterminate, which means that the court did not make a ruling on the legal issue or the legal issue was waived.

Table 9 displays the results of the disposition analysis on the 20 ADA Title I DI cases included in the study sample.

Table 9. Disposition Type in ADA Title I DI Cases

Disposition Type	Number	Percentage
Procedural	5	25%
Substantive	10	50%
Procedural and Substantive	3	15%
Indeterminate (waived)	2	10%
Totals	20	100%

Each case in the sample of ADA Title I DI cases involved an employer and an employee (or an agency representing the employee, as in cases where EEOC is the plaintiff). The plaintiffs in the 20 ADA Title I DI cases contained in the sample were employees or employee representatives (such as the EEOC); the defendants were employers. Cases may be decided in favor of the plaintiff, the defendant, or, in cases with multiple individual plaintiffs, the decision may be split. Table 10 displays the ADA Title I DI cases by party prevailing.

Table 10. U.S. Appellate Court Decisions in ADA Title I DI Cases

Decision in Favor of:	**Number**	**Percentage**
Employee (plaintiff)	5	25%
Split (multiple plaintiffs: 2 plaintiffs won; 7 lost)	1	5%
Employer (defendant)	12	60%
Indeterminate (waived)	2	10%
Total	20	100%

The type of disposition (substantive, procedural, or indeterminate) and the prevailing party in the cases are important not only to the specific parties involved in the cases but also to the practice of law more generally. Each decision in an individual ADA Title I DI case in the study sample contributes to the body of law governing discrimination in the workplace; specifically, the discrimination involves facially neutral workplace policies and procedures that have a disparate impact on people with disabilities. Cases involving the same or similar legal issues that were decided earlier in time have an impact on cases litigated years, or, in some situations, decades, later. This process is referred to as precedent (Nygren, 2011). The role of precedent in the disposition and outcomes of the 20 ADA Title I DI cases in the study sample will be discussed in Chapter 5.

The final sub-question asked about what patterns and trends in litigation can be identified in published ADA Title I disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012. This question will be discussed in Chapter 5.

Themes in Judicial Opinions in ADA Title I Disparate Impact Cases

> Reasonable accommodation cannot be stretched to provide superseniority to employees who lost their seniority due to disability years, even decades, before the ADA (*Kennedy v. Chemical Waste*, 79 F.3d 49 (1996)), Judge Richard Posner).

The second step in the analysis was the qualitative analysis of the judicial opinions in the 20 ADA Title I disparate impact (DI) cases. The researcher employed constant comparative analysis to identify and characterize patterns and themes of the judicial opinions in the study sample. This section of the chapter describes the coding process and nomenclature, presents the themes and categories, provides examples of coded text from the study sample to illustrate each theme and its categories, and describes the Concept Map (Appendix D).

To answer Research Question 2, the researcher first developed a framework for analysis based on a review of the literature of the sociopolitical perspective of disability. After the initial framework was complete, three members of the researcher's dissertation committee reviewed the framework and provided suggestions and feedback. This provided an audit trail for triangulation purposes and enhanced the study's trustworthiness. The researcher revised the framework based on the feedback from her committee members.

Sociopolitical Perspective of Disability Framework

The purpose of the framework was to provide theoretical guidance for the coding of the judicial opinions in the 20 ADA Title I disparate impact (DI) cases in the study sample. Each component and subcomponent in the framework was defined based on a review of the literature of the sociopolitical perspective of disability. The definitions of the components and subcomponents are contained in the Codebook (Appendix E).

The framework contains two components and six subcomponents:

Component 1, "Social Aspects," contains three subcomponents: "1.A Environment"; "1.B Identity"; and "1.C Empowerment."

Component 2, "Political, Legislative, and Policy Aspects" contains three subcomponents: "2.A Minority Group Approach (United States)"; "2.B Civil Rights Legislation (United States)"; and "2.C Disability as a Global Construct."

The framework is entitled the Sociopolitical Perspective of Disability Framework. The framework is in the form of a schematic diagram presented in Appendix C. The framework informed the coding of the judicial opinions in the 20 ADA Title I DI cases in the study sample. After coding was complete, the researcher incorporated both the theoretical components of the framework and the coding data from the analysis of the judicial opinions into the Concept Map (Appendix D). Thus, the Map combines the theory with the data.

Concept Map

After coding was complete and the categories and themes in the cases were identified, the researcher created a Concept Map. The Map incorporated the sociopolitical perspective of disability framework, and the themes, categories, and subcategories identified in the data analysis of the 20 ADA Title I DI cases in the study sample. The Map depicts relationships among the themes and categories. The Map is depicted as a schematic diagram in Appendix D (Daley et al., 2010). The next sections describe each of the four quadrants (themes) contained in the concept map, and the categories, subcategories, and relationships among the themes.

Categories, Themes, and Relationships

The researcher used constant comparative analysis to identify themes, categories and subcategories in the 20 ADA Title I DI cases. Four themes were identified in the 20 ADA Title I DI cases: (a) Accommodations; (b) Workplace Culture, Norms, and Policies; (c) Judicial Process; and (d) Policy Space. Each of the themes contained two or three categories and several subcategories.

The four themes, their categories and subcategories, and the relationships among themes were identified in the following manner: First, the researcher used the Sociopolitical Perspective of Disability Framework (Appendix C) to guide the initial coding. Thus, categories identified during the initial coding were theory driven or deductive (Hsieh & Shannon, 2005; Ryan & Bernard, 2003). In the second round of coding, the researcher examined the sections of text that did not fit within the framework and used a data-driven or inductive process to identify new categories and subcategories in the text (Hsieh & Shannon, 2005). Finally, the researcher compared the theory-driven categories to the data-driven categories and identified relationships among them. The Concept Map (Appendix D) displays each of the four themes, their categories and subcategories, and the relationships among them (Daley, Conceicao, Mina, Altman, Baldor, & Brown, 2010).

Theme 1: Accommodation

The Accommodation theme incorporates both theory-driven and data-driven references to accommodations. The theme is theory driven in that it incorporates two subcomponents "1.A. Environment (1.A.1. Accessibility and inclusion)" and "2B. Civil Rights Legislation (2.B.1 Anti-discrimination legislation)" from the framework (Appendix C). This theme reflects the disability rights movement's goals of improving access to the built environment (e.g., curb cuts, motion-activated lighting) and increasing inclusion in the social environment, including education and work, for people with disabilities (Huemann, 1993). The literature on the sociopolitical perspective of disability posits that accommodations increase access to the built and social environments for people with disabilities (Heumann, 1993). The literature also asserts that anti-discrimination laws are an important strategy in addressing societal discrimination, including workplace discrimination, against people with disabilities (Hahn, 1984, 1985).

The theme is data driven in that it includes references in the text of the judicial opinions to the requirement that governmental agencies and private businesses covered under the Rehabilitation Amendments Act of 1973 (Rehab Act) and the ADA must provide reasonable accommodations to qualified persons with disabilities. Theme 1 contains three categories: 1A) "Legal Requirement"; 1B) "Environment"; and, 1C) "Theory and Data Interaction."

Category 1A "Legal Requirement" is data driven. The category is data driven because it includes references in the text of the judicial opinions to the term "reasonable accommodation(s)." There are two subcategories in Category 1A1, "Rehab Act" and 1A2, "ADA." The subcategories are data driven because they include references in the text of the judicial opinions to the requirement that governmental agencies and private businesses covered under the Rehabilitation Amendments Act of 1973 (Rehab Act) and the ADA must provide reasonable accommodations to a qualified person with a disability.

Category 1B “Environment” is theory driven in that it incorporates subcomponent “1.A Environment” from the framework (Appendix C). The category contains two subcategories, “1B1, Inclusion” and “1B2, Access.” The subcategories are also theory driven and were incorporated from subcomponent “1.A Environment”(1.A.1 Accessibility and Inclusion)” in the framework (Appendix 3).

Category 1C “Theory and Data Interaction” is theory driven. This category is theory driven in that it incorporates the use of the term “accommodation(s)” in the literature on the sociopolitical perspective of disability (see, for example, Hahn, 2003). The category encompasses the different meanings of the word “accommodation(s)” that the researcher identified during both the literature review and the analysis of the judicial opinions in the study sample. The meaning of the word “accommodation(s)” differs depending upon the context in which the word is used. For example, the courts, scholars and practitioners in the fields of ADA law, disability studies, and rehabilitation, as well as members of the disability rights movement, all use the term “accommodation(s)”; however, each group defines and uses the term in a different way.

Theme 2: Workplace Culture, Norms, and Policies

This theme incorporates both theory-driven and data-driven references to the workplace. The theme includes intangible factors, such as culture and norms, and tangible factors, such as written policies, procedures, and legislation that govern the employer/employee relationship. It is data driven because it includes references in the text of the judicial opinions to workplace rules, behavior, and expectations.

The theme is theory driven in that it incorporates three subcomponents from the framework (Appendix C). The first subcomponent is “1.A Environment (1.A.2. Attitudes).” The literature on the sociopolitical perspective of disability asserts that people with disabilities experience prejudice and discrimination in the workplace due to societal stigma and negative attitudes toward people with disabilities (Goffman, 1963; Wright, 1983).

The second subcomponent is “2.A. Minority Group Approach (2.A.2 Public Policy)” from the framework (Appendix C). The literature on the sociopolitical perspective of disability posits that a society’s view of disability is reflected in the design and implementation of its public policy, programs, and services, particularly those that serve people with disabilities (Hahn, 1984, 1985; Schriner, 1995).

The third subcomponent is “1C. (Empowerment)” from the framework (Appendix C). The literature on the sociopolitical perspective of disability states that people with disabilities have the right to make choices about the programs and services that affect their quality of life. Choice empowers individuals and allows them to maximize their potential (Kosciulek, 1999).

Theme 2 contains three categories: 2A) “Environment”; 2B) “Company-Specific Policies”; and, 2C) “Public Policies Governing the Workplace.”

Category 2A “Environment” is theory and data driven. The category is theory driven in that it incorporates subcomponent “1.A Environment (1.A.2. Attitudes)” from the framework (Appendix C). The category has one subcategory, “2A1, Attitudes (latent and expressed),” which is data driven. The subcategory is data driven because it includes references in the text of the judicial opinions to statements and behavior of employers or coworkers about employees with disabilities.

Category 2B “Company-Specific Policies” is data driven and incorporates the policies and procedures unique to a specific employer or job. Category 2B contains two subcategories.

The first subcategory is “2B1, Contractual (CBA, BFOQ)” which refers to legal contracts and agreements between the employer and labor unions (collective bargaining agreements) and characteristics or attributes that are necessary to the normal operations of a business (bona fide occupational qualifications). This category is data driven in that it includes references in the text of the judicial opinions to contractual agreements or job qualifications and requirements specific to a particular business or a specific job.

The second subcategory “2B2, Rules, policies, and procedures (written and unwritten),” is also data driven and refers to references in the text of the judicial opinions to the materials companies use to hire, train, promote, discipline, and discharge employees; examples are written and unwritten policies on absenteeism, tardiness and sick leave; job and position descriptions; and retirement and health care polices.

Category 2C “Public Policies Governing Workplace” is theory and data driven. The category is theory driven in that it incorporates the subcomponent “2.A. Minority Group Approach (2.A.2 Public Policy)” from the framework (Appendix C). The category is data driven because it includes references in the text of the judicial opinions to specific state and federal policies that govern the employer/employee relationship and the operations of the workplace.

The category contains two subcategories, “2C1, Local, State, Federal” and “2C2, Legal Compliance versus Maximizing Potential.” The first subcategory, “2C1, Local, State, and Federal,” is data driven because it includes references in the text of the judicial opinions to specific policies at the local, state, and federal levels of government; examples are worker’s compensation (state) and the Family and Medical Leave Act (federal).

The second subcategory, “2C2, Legal Compliance versus Maximizing Potential” is theory driven and data driven. The subcategory is theory driven in that it incorporates subcomponent “1C. (Empowerment)” from the framework (Appendix C). The category is data driven because it includes references in the text of the judicial opinions about the court’s duty to consider the rights of each party affected by the litigation; examples are the employer, the non-disabled employees, and the qualified person with a disability.

Theme 3: Judicial Process

This theme incorporates both theory- and data-driven references to the law and the process of litigation, including judicial decision making. This theme is theory driven in that it incorporates subcomponent “2B. Civil Rights Legislation” (“2.B.1. Anti-

discrimination legislation" and "2.B.2 Implementation") from the framework (Appendix C). The literature on civil rights legislation posits that anti-discrimination laws are an important strategy in addressing societal discrimination, including workplace discrimination, against people with disabilities (Hahn, 1984, 1985). However, the implementation of the law may be inconsistent with the original intent of the legislation (Colker, 2009; Hahn, 2003; Krieger, 2003).

The theme is data driven in that it includes references in the text of the judicial opinions to the content of the law (legislative history, statutes, regulations, and case law) and to the process of law (judicial decision making, testimony, argument). Theme 3 contains two categories: A) "What the Statute Says," and B) "What the Statute Doesn't Say."

3A. The first category "What the Statute Says" is data driven and includes references in the text of the judicial opinions to the ADA's legislative history, statutory and regulatory language, and case law. This category encompasses the courts' references to the language of the statutes and regulations, often referred to informally or colloquially as "the document on its face." The category has four subcategories.

Subcategories "3A1, Legislative history"; "3A2, EEOC Regulations (Title I)"; "3A3, Statutory language"; and "3A4, "Case law (U.S. Supreme Court precedent)" explain the types of information judges use to guide them in filling in the gaps between what the statute says and what the statute doesn't say. The four types of information include excerpts and direct quotations from the ADA's legislative history, the ADA statutes, regulations (such as the EEOC regulations governing the implementation of Title I), and citations of prior cases that dealt with similar legal or procedural issues.

3B. The second category "What the Statute Doesn't Say" is data driven and includes references in the text of the judicial opinions to methods and strategies the courts use to make decisions about legal issues about which there is no clear direction in the

statutes, existing case law, or regulations governing the implementation of the law. The category has four subcategories.

Subcategories “3B1, Analogy or Hypothetical”; “3B2, Evidence” “3B3, Dicta”; and “3B4, Case law (Appellate Court precedent)” explain the types of information judges use to guide them in filling in the gaps between what the statute says and what the statute doesn’t say. The four types of information include analogies and hypothetical examples that explain a legal point or a decision; evidence or testimony from the record in the district court case and appellate and defendant briefs filed in the appellate case; dicta, which is judicial commentary that has no legal weight; references to testimony by witnesses during the district court trial and briefs submitted by the parties at the appellate court trial; and citations of prior appellate cases that dealt with similar legal or procedural issues.

Theme 4: Policy Space

This theme incorporates both theory-driven and data-driven references to policy space. Policy space refers to a group of policies that share a similar focus or purpose (Biggs & Helms, 2007). The shared policy space or focus among civil rights legislation is the design and implementation of legislation that will advance and protect the civil rights of minority group populations who have experienced societal discrimination, such as racial/ethnic groups, women, and people with disabilities. The theme is theory driven in that it also incorporates four subcomponents from the framework (Appendix C):

The first subcomponent is “2B. Civil Rights Legislation” (“2.B.1.Anti-discrimination legislation” and “2.B.2.Implementation”) from the framework (Appendix C). The literature on civil rights legislation posits that anti-discrimination laws are an important strategy in addressing societal discrimination, including workplace discrimination, against people with disabilities (Hahn, 1984, 1985). However, the implementation of the law may be inconsistent with the original intent of the legislation (Colker, 2009; Hahn, 2003; Krieger, 2003).

The second subcomponent is “2C. Disability as a Social Construct” (“2.C.1.Definition of disability”) from the framework (Appendix C). The literature on the sociopolitical perspective of disability states that the definition of disability is linked to the eligibility requirements set out in the public policies and programs that comprise disability policy in the United States, including disability employment policy (Percy, 1989; Schriner, 1995; Scotch & Berkowitz, 1990).

The third subcomponent is “1.A. Environment (“1.A.1. Accessibility and inclusion)” from the framework (Appendix C). The literature on the sociopolitical perspective of disability posits that accommodations increase access to the built and social environments for people with disabilities (Huemann, 1993).

The fourth subcomponent is “2A. Minority Group Approach” (“2.A.1. Identity politics and oppression”) from the framework (Appendix C). The literature on the sociopolitical perspective of disability describes the role of grassroots disability rights organizations in raising awareness about societal discrimination against people with disabilities, and the process of rallying diverse disability groups in the United States around a common political cause (Hahn, 1984, 1985) The literature details the efforts of coalitions comprised of policymakers and members of grassroots disability rights organizations in the development and passage of Section 504 of the Rehabilitation Act Amendments of 1973 and the ADA (Percy, 1989; Scotch & Berkowitz, 1990).

Theme 4 is data driven because it includes references in the text of the judicial opinions to the ADA as a civil rights law, definitions of disability under the ADA, and the role of accommodations as civil rights for people with disabilities under the ADA. The theme includes references in the text of the judicial opinions to how the exercise of the right to accommodations operates in the workplace; examples are the effect of accommodations and the accommodations process on employers and non-disabled employees.

Theme 4 has three subcategories: 4A) “Component of U.S. Civil Rights Legislation”; 4B) Definition of Disability"; and, 4C) “Accommodations.”

Category 4A “Component of U.S. Civil Rights Legislation” is both theory and data driven. The category is theory driven because it incorporates two subcomponents from the framework (Appendix C): “2B. Civil Rights Legislation” (“2.B.1.Anti-discrimination legislation” and “2.B.2.Implementation”) and “2A. Minority Group Approach” (“2.A.1. Identity politics and oppression”). The category is data driven because it includes references in the text of the judicial opinions to the ADA’s relationship to other civil rights legislations, such as the Rehab Act and Title VI of the Civil Rights Act of 1964.

Category 4A has two subcategories, 4A1 “Modeled on Title VII and Rehab Act” and 4A2 “Political and cultural factors.” The first subcategory is data driven because it includes references in the text of the judicial opinions that compare and contrast the ADA to other civil rights legislation (Title VII and the Rehab Act). The second subcategory is theory driven in that it incorporates subcomponent “2A. Minority Group Approach” (“2.A.1. Identity politics and oppression”) from the framework (Appendix C).

Category 4B “Definition of Disability" is theory and data driven. It is theory driven in that incorporates subcomponent “2C. Disability as a Social Construct” (“2.C.1.Definition of disability”) from the framework (Appendix C). The category is data driven because it includes references in the text of the judicial opinions to the definition of disability within the statutes, policies, programs, and services that comprise U.S. disability policy, including disability employment policy.

Category 4B has two subcategories. Subcategory 4B1 “U.S. versus Global constructs” is theory driven in that it incorporates subcomponent “2C. Disability as a Global Construct” (“2.C.1.Definition of disability”). This subcategory represents the fact that public policy is contextual (Yanow, 2000). For example, U.S. disability policies put

in place to address disability discrimination may define disability differently than do disability discrimination policies in other countries.

Subcategory 4B2 “Eligibility” is data driven. The subcategory is data driven because it includes references in the text of the judicial opinions to the definition of disability within the statutes, policies, programs and services that comprise U.S. disability employment policy An example in this category is the ADA’s “eligibility” requirements, that is, that a person must be a qualified individual with a disability to be protected under the ADA and to be allowed to proceed with a legal claim under the ADA.

Category 4C) “Accommodations” is theory driven in that it incorporates the subcomponent “1.A. Environment (“1.A.1. Accessibility and inclusion)” from the framework (Appendix C). The category has two subcategories, both of which are theory driven.

The first subcategory 4C1 “A social good (inclusion)” incorporates the literature on the sociopolitical perspective of disability, which links accommodations to increased levels of participation in society for people with disabilities (Hahn, 2003). The second subcategory 4C2 “A policy solution (legal requirement)” reflects the fact that the accommodations requirements contained in both the Rehab Act and the ADA represent a policy solution to the policy problem of disability discrimination.

Relationships Among the Categories and Themes

There were three relationships identified in the analysis of the 20 ADA Title I DI cases in the study: gap-filling, weighing and balancing, and maintaining status quo versus effecting social change.

Gap-filling includes references in the text of the judicial opinions to the process courts engage in when making decisions in cases where information is missing or incomplete. For example, the court may state that there is no case law that relates to the instant case so it has relied on the language in the legislative history of the law in making its decision.

Weighing and balancing includes references in the text of the judicial opinions to statements courts make about the factors that influence their decision-making process. For example, courts may state that they must balance the requirement that a business covered by the ADA accommodate a qualified employee with a disability with the requirements of the collective bargaining agreement.

Maintaining status quo versus effecting social change includes references in the text of the judicial opinions to statements the courts make about the rights of one group against the rights of another group. For example, courts may state that the ADA does not allow the employee with a disability to request an accommodation that will infringe upon the rights of workers protected under a collective bargaining agreement.

The themes, the theory-driven and data-driven categories, subcategories, and the relationships among the categories and themes are contained in the Concept Map (Appendix D).

Coding Nomenclature

After the coding was complete, the researcher incorporated both the theoretical components of the framework (theory driven) and the coding data from the analysis of the judicial opinions (data driven) into the Concept Map (Appendix D). The codes and their definitions are contained in the Codebook for Qualitative Analysis (Appendix E).

The themes, categories, and subcategories codes that evolved from the data analysis were labeled follows:

Theme 1. Accommodations.

CODE 1A: Legal Requirement.

CODE 1A1: Rehab Act.

CODE 1A2: ADA.

Theme 2. Workplace Culture, Norms, and Policies.

CODE 2A: Environment.

CODE 2A1: Attitudes (latent and expressed).

CODE 2B: Company Specific Policies.

CODE 2B1: Contractual (CBA; BFOQ).

CODE 2B2: Rules, policies, and procedures (written and unwritten).

CODE 2C: Public Policies Governing Workplace.

2C1: Local, State, and Federal.

2C2: Legal compliance versus maximizing potential.

Theme 3. Judicial Process

3A. What the Statute Says.

3A1. Legislative history

3A2. EEOC Regulations

3A3. Statutory language

3A4. Case law (U.S. Supreme Court cases).

3B. What the Statute Doesn't Say.

3B1. Analogy or hypothetical

3B2. Evidence.

3B3. Dicta.

3B4. Case law (Appellate Court cases).

Theme 4. Policy Space

4A. Component of U.S. Civil Rights Legislation.

4A1. Title VII and Rehab Act.

4B. Definition of Disability.

4B2. Eligibility.

Relationships among themes and categories were labeled as follows: GF denotes "gap-filling," W&B denotes "weighing and balancing," and MSQESC denotes "maintaining status quo versus effecting social change."

Coding Examples

Legal cases are narrative stories that have a beginning, middle, and end. Although the cases in the study sample are similar in that they are all ADA Title I disparate impact cases, the fact scenarios are unique. The themes and relationships found in the case are indicated at the beginning of the example. The codes for the categories, subcategories, and relationships are inserted within the text of the judicial opinions to provide transparency, and preserve context and meaning. The codes are displayed in bolded text within brackets. The coded case examples are presented in chronological order, in the order they were coded, beginning with the oldest case and ending with one of the newest cases in the sample. The original formatting of the opinions has been maintained where possible.

Example 1. This case includes Themes 2, 3, and 4, components of those themes, and the Relationship gap-filling process.

> Kennedy's second argument takes off from the fact that Title VII as amended in 1991 **[4A1]** allows an employee "injured by the application of the [employer's] seniority system" **[2B1]** to measure the period of limitations from the date of that application, which in this case would be 1994, when Kennedy was laid off. 42 U.S.C. § 2000e-5(e)(2). **[3A3].** This provision, Kennedy contends, was incorporated into the ADA along with the rest of Title VII's provisions regarding limitations periods **[4A1].** But the provision is applicable only to "a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter [i.e., Title VII]," **[4A1]** and Kennedy does not claim that the defendants' seniority system discriminates against disabled persons or anybody else. **[3B2]** He argues, however, that this qualification in Title VII--the limitation to intentionally discriminatory schemes--was not taken into the ADA. Title VII contains an exemption for bona fide seniority systems. 42 U.S.C. § 2000e-2(h) **[4A1].** The purpose is to prevent the use of the "disparate impact"

approach to challenge seniority systems, and thus to confine Title VII challenges to seniority systems that intentionally discriminate on one or more of the grounds forbidden by the statute. *Pullman-Standard v. Swint*, 456 U.S. 273, 276-77, 102 S.Ct. 1781, 1783-84, 72 L.Ed.2d 66 (1982); *Banas v. American Airlines*, 969 F.2d 477, 481 n. 5 (7th Cir.1992). **[3A4; 3B4]** The qualification limiting the new statute of limitations to intentionally discriminatory seniority systems is merely a recognition that those are the only systems that can be challenged under Title VII. There is, the argument continues, no exemption in the ADA for bona fide seniority systems. Therefore disparate impact must be a basis for challenging seniority systems under the ADA (an issue, however, on which there is as yet no appellate ruling) **[3B3],** and so the qualifier "intentionally discriminatory" would have no function in the ADA and so should be deemed not to have been brought over into it. **[GF]** This is an ingenious argument **[3B3],** but we think it more likely that no part of the provision of Title VII relating to an extended period for challenging a loss of (or due to) seniority was taken into the ADA. **[GF]** But Kennedy should not feel that he has been robbed of a good suit by a technicality, and not only because statutes of limitations are not technicalities but serve important social purposes. **[3B3]** *Galloway v. General Motors Service Parts Operations*, supra, 78 F.3d at 1165, and cases cited there. **[3B3]** He has no case. **[3B3]** There is nothing discriminatory about Chemical Waste Management's seniority system. If you are removed from a union position, for whatever reason, you lose the seniority accrued in that position; seniority does not vest. **[2B1]**. Moreover, Kennedy was not removed from his truck driver's position in 1988 in violation of the ADA; the ADA hadn't been enacted yet (it was enacted in 1990 and became effective in 1992). **[3A1]** Nor was there anything discriminatory about his removal because of multiple sclerosis, for he does not question either the doctor's judgment that he could not continue in the job or the bona fides of

Chemical Waste Management in acting on that judgment. **[3B2]** The notion of reasonable accommodation cannot be stretched to the point of requiring the provision of superseniority to disabled employees who lost their seniority on account of disability years, perhaps decades, before the Americans With Disabilities Act was passed. **[3B3]** Suppose Kennedy had worked for Chemical Waste Management from 1930 to 1940, and been laid off in 1940 because he was disabled. If he recovered and was rehired in 1980, and then laid off in 1995, we do not think any court would listen to his argument that the company was obliged to restore to him the 10 years of seniority that he had accrued between 1930 and 1940, any more than it would listen to an argument that he should be given a bonus that he had been denied in 1932 because of his disability. **[3B1]** (*Kennedy v. Chemical Waste,* 79 F.3d 49 (1996).

Example 2. This case includes Themes 1, 2, 3, and 4, and the Relationships gap-filling process, weighing and balancing, and maintaining status quo versus effecting social change.

Terry Eckles filed suit against his employer, Consolidated Rail Corporation ("Conrail"), and the local and national offices of his union, United Transportation Union ("the Union"), alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. Eckles demanded certain "reasonable accommodations" under the ADA for his epilepsy, **[1A1]** which the parties agree would have required infringement of the seniority rights of other employees under the collective bargaining agreement between Conrail and the Union. **[MSQESC]** The district court granted summary judgment for the defendants, finding that the ADA did not require as a "reasonable accommodation" actions that would violate a bona fide seniority system at the expense of other employees. **[3B2]** While we recognize the difficulty of the task of integrating the requirements of the ADA with seniority rights under a collective bargaining agreement, we agree with the

conclusions of the district court's careful and thoughtful opinion, and we affirm. **[W&B]** While the text of the ADA does not provide much support for Eckles' position, neither does it decisively answer the question of whether "reasonable accommodation" can require that the otherwise valid seniority rights of other employees be trumped. **[GF]** Thus we look also to the background of the ADA's "reasonable accommodation" concept and the legislative history of the ADA. **[3A1]** As we noted in *Vande Zande v. State of Wis. Dep't of Admin.,* 44 F.3d 538, 542 (7th Cir.1995), the term "reasonable accommodation" in the ADA was apparently borrowed from the regulations issued by the Equal Employment Opportunity Commission ("EEOC") in implementation of the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. See 29 C.F.R. § 1613.704; S. Rep. at 31; H.R. Rep. at 62, 1990 U.S.C.C.A.N. at 344. **[1A1; 1A2; 3A3; 3A2]** We also recognized that "to a great extent the employment provisions of the [ADA] merely generalize to the economy as a whole the duties, including that of reasonable accommodation, that the regulations under the Rehabilitation Act imposed on federal agencies and federal contractors." Vande Zande, 44 F.3d at 542. **[1A1; 2C2; 3B4]** It is therefore appropriate that we look to decisions interpreting the requirements of the Rehabilitation Act for guidance in understanding the meaning of analogous requirements under the ADA. Id. **[GF]** Unfortunately for Eckles, courts have been unanimous in rejecting the claim that "reasonable accommodation" under the Rehabilitation Act requires reassignment of a disabled employee in violation of a bona fide seniority system. **[W&B]** In fact, a virtual per se rule has emerged that such reassignment is not required under the Rehabilitation Act's duty to reasonably accommodate. **[3B3]** See, e.g., *Shea v. Tisch*, 870 F.2d 786, 789-90 (1st Cir.1989) (per curiam); *Carter v. Tisch*, 822 F.2d 465, 467-69 (4th Cir.1987); *Jasany v. United States Postal Service*, 755 F.2d 1244, 1251-52 (6th Cir.1985); *Mason v. Frank*, 32 F.3d 315, 319-20 (8th

Cir.1994); *Daubert v. United States Postal Service*, 733 F.2d 1367, 1370 (10th Cir.1984); cf. *Tyler v. Runyon*, 70 F.3d 458, 468 (7th Cir.1995) (noting importance of plaintiff's lack of seniority in rejecting claim that Rehabilitation Act required employer to train him for new position). **[3B4]** Eckles and the amici who support his position have not cited, and we are not aware of, a Rehabilitation Act decision holding that a particular reasonable accommodation was required even though it violated the provisions of a seniority system. **[GF]** Thus Congress drafted the ADA against the backdrop of well-established precedent that "reasonable accommodation" under the Rehabilitation Act had never been held to require trumping the seniority rights of other employees. **[1A1]** Title VII of the Civil Rights Act of 1964 also contains a duty of "reasonable accommodation," in this case to the religions of employees. Initially it emerged within 1966 EEOC guidelines interpreting Title VII, see 29 C.F.R. § 1605.2(b) (1968), and in 1972 it was incorporated into Title VII itself. 42 U.S.C. § 2000e(j). **[4A1]** Under Title VII an employer must "reasonably accommodate" the religious observances and practices of its employees, up to the point of "undue hardship on the conduct of the employer's business." Id. In *Trans World Airlines v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977), the Supreme Court considered a conflict between a demand for a particular "reasonable accommodation" under Title VII (being relieved from Saturday work duties, as required by the plaintiff's religion) and the seniority rights of other employees under a collective bargaining agreement (since more senior employees would be required to work in the plaintiff's stead). **[3B1; 3A4]** The Supreme Court decisively rejected the position of Hardison and the EEOC that the statutory requirement to accommodate necessarily superseded the collectively-bargained seniority rights of the other employees: "We agree that neither a collective bargaining contract nor a seniority system may be employed to violate a statute, but we do not believe that the duty

to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement." Id. at 79, 97 S.Ct. at 2274. [3A4] The Court emphasized the importance of collective bargaining and the protected status of employee seniority rights obtained through such bargaining: Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. **[MSQESC]** Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. Id. (emphasis added). The language of the ADA, like that of Title VII, falls far short of providing a "clear and express indication from Congress" that it intended "reasonable accommodation" to include infringing upon the seniority rights of other employees. **[3B1; 3A4; W&B]** We should not be understood as proposing that caselaw under either the Rehabilitation Act or Title VII can be simply imported wholesale when interpreting the meaning of "reasonable accommodation" and like terms under the ADA. **[4A1; 1A1]** We recognize that the ADA does expressly recognize "reassignment to a vacant position" as an expected form of reasonable accommodation, thereby rejecting a line of precedent under the Rehabilitation Act holding that reassignment of a disabled employee was never required. **[1A1; GF]** In addition, in Hardison, the Court found that "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. at 84, 97 S.Ct. at 2277. **[3A4]** The Senate and House Reports on the ADA clarified that Hardison's statement that only de minimis costs were required for reasonable accommodation does not apply under the ADA. S. Rep. at 36; H.R. Rep. at 68, 1990 U.S.C.C.A.N. at 350. **[3A1]** Thus we do not maintain that the ADA duty of "reasonable accommodation" is equivalent to that under the Rehabilitation Act

and Title VII; yet we recognize the usefulness of these acts for understanding the basic meaning of the term as it was being used at the time Congress decided to employ it within the ADA. **[GF]** Both sides and all of the amici in this case attempt to make much of certain aspects of the ADA's legislative history. Not surprisingly, the opposing positions rely on different parts of this history**. [W&B]** We conclude, however, that this legislative history strongly supports the position of Conrail and the Union and only weakly supports that of Eckles. **[GF]** We provide the relevant sections in full, emphasizing the portions relied upon by the parties: Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of a disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and [the] employer from losing a valuable worker. Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered. The Committee also wishes to make clear [that] reassignment need only be to a vacant position-"bumping" another employee out of a position to create a vacancy is not required. **[3A1]** (*Eckles v. Consolidated*, 94 F.3d 1041(1996). **[MSQESC]**

Example 3. This case includes Themes 2 and 3, and the relationships gap-filling process, weighing and balancing, and maintaining status quo versus effecting social change.

In Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir.1995), we held that the ADA does not require an employer to accommodate a disabled employee by violating a "bona fide" seniority system. **[3B4]** A "bona fide" seniority system has been defined as "one that was created for legitimate purposes, rather than for the purpose of discrimination." Eckles v. Consolidated Rail, 94 F.3d 1041, 1046 n. 7 (7th Cir.1996). **[3B4]** Boersig offers no evidence that Union Electric and Local

1439 incorporated the promotion system at issue in this case to discriminate against the disabled. **[3B2]** Thus, Boersig has failed to demonstrate that the promotion system is not "bona fide." **[GF]** Moreover, although the CBA's promotional system is based on departmental seniority rather than total length of employment, we find that this CBA creates a seniority system which Union Electric was not required to violate to accommodate Boersig's disability. See Benson, 62 F.3d at 1114. **[2B1; GF]** Unless an employer renegotiates this kind of seniority system with the union to allow certain accommodations for disabled employees, Boersig's "disparate impact" argument would require an employer to accommodate a disabled employee by violating the express terms of a CBA. **[2B1; W&B]** However, we have repeatedly held that the ADA does not require an employer to "take action inconsistent with the contractual rights of other workers under a collective bargaining agreement." **[MSQESC]** See, e.g., Benson, 62 F.3d at 1114. For similar reasons, the ADA does not require an employer to renegotiate a bona fide seniority system to avoid "screening out" a disabled employee who may not be able to reach the highest rung on a promotional series because of disability **[2C2].** Seniority systems contained in CBAs, such as the one involved in the instant case, create rights in union members which are protected by the National Labor Relations Act (NLRA), 29 U.S.C. § 151-187. **[2B1; 2C1]** Our Benson decision recognizes the importance of protecting these rights from unnecessary interference arising from the perceived need to accommodate a disabled employee under the ADA. **[3B4; MSQESC]** We believe that these rights are entitled to protection regardless of whether a plaintiff seeks a reasonable accommodation **[1A2]** or claims the seniority system has a disparate impact on disabled employees. **[1A1; MSQESC]** In either case, the plaintiff invites the court to disrupt a carefully negotiated agreement between union and employer at the expense of other union employees who hold legitimate expectations of

advancement based on the governing CBA. **[W&B]** This sort of judicial intrusion into labor relations is unwarranted unless an employee can show that a seniority system was designed to discriminate against the disabled. **[MSQESC]** Because we find the promotional system in the instant case is a bona fide seniority system, we reject Boersig's disparate impact claim. (*Boersig v. Union Electric Co.,* 219 F.3d 816 (2000). **[3B4]**

Example 4. This case includes Themes 1, 2, 3, and 4, and the Relationships gap-filling process, weighing and balancing, and maintaining status quo versus effecting social change.

A RIF is not an open sesame to discrimination against a disabled person. Christie v. Foremost Ins. Co., 785 F.2d 584, 587 (7th Cir. 1986). Even if the employer has a compelling reason wholly unrelated to the disabilities of any of its employees to reduce the size of its work force, this does not entitle it to use the occasion as a convenient opportunity to get rid of its disabled workers. **[MSQESC]** Hardin v. Hussmann Corp., 45 F.3d 262, 265-66 (8th Cir. 1995); Montana v. First Federal Savings & Loan Ass'n, 869 F.2d 100, 106 (2d Cir. 1989); Herold v. Hajoca Corp., 864 F.2d 317, 320 (4th Cir. 1988); cf. Huff v. UARCO, Inc., 122 F.3d 374, 386 (7th Cir. 1997). **[3B4]** This point is most easily seen by thinking of a RIF as a kind of hiring: the employer has decided to reduce its work force from, say, 100 to 80 employees; this means it has 80 slots to fill and in filling them must choose among 100 "applicants." **[3B1]** The law forbids the employer to disqualify the disabled applicants on the basis of their disability unless the disability prevents them from doing the work even with a reasonable accommodation. **[1A1]** Turning to the second point, we have tried to make clear in our previous cases, and here repeat, that a fired (demoted, etc.) worker who cannot do the job even with a reasonable accommodation has no claim under the Americans with Disabilities Act. **[W&B; 3B4]** E.g., Weigel v. Target Stores, 122 F.3d 461, 468 (7th Cir.

1997); Palmer v. Circuit Court, 117 F.3d 351, 352 (7th Cir. 1997); Weiler v. Household Financial Corp., 101 F.3d 519, 525 (7th Cir. 1996); Daugherty v. City of El Paso, 56 F.3d 695, 698 (5th Cir. 1995). The Act forbids discrimination against a "qualified" individual "because of the disability of such individual." 42 U.S.C. sec. 12112(a). **[3A3]** An individual who cannot perform the essential functions of the job even with a reasonable accommodation to his disability by the employer is not "qualified," 42 U.S.C. sec. 12111(8), **[3A3]** so the Act does not come into play. It is irrelevant that the lack of qualification is due entirely to a disability. **[W&B]** The disabled individual's only recourse under the Act in such a case is to prove that the employer has fixed a qualification that bears more heavily on disabled than on other workers and is not required by the necessities of the business or activity in question. This is the "disparate impact" approach to proving discrimination, Hazen Paper Co. v. Biggins, 507 U.S. 604, 609-10 (1993), and it is applicable to cases under the Americans with Disabilities Act. 42 U.S.C. sec.sec. 12112(b)(3)(A), 12112(b)(6); 29 C.F.R. Pt. 1630 App. sec. 1630.10; Crowder v. Kitagawa, 81 F.3d 1480, 1483-84 (9th Cir. 1996). **[3B4; 3A3]** A rule of an employer requiring a pilot to have good vision or a truck driver a valid driver's license bears more heavily on the disabled than on the able-bodied, but it is reasonable and so is permitted**. [GF]** As we shall see, the plaintiff has waived any disparate-impact claim. Even if the individual is qualified, if his employer fires him for any reason other than that he is disabled there is no discrimination "because of" the disability. This is true even if the reason is the consequence of the disability, as is implicit in the decisions cited earlier concerning the blind, alcoholic, or insulin-dependent worker. **[GF]** The employer who fires a worker because the worker is a diabetic violates the Act; but if he fires him because he is unable to do his job, there is no violation, even though the diabetes is the cause of the worker's inability to do his job. See Hazen Paper Co.

v. Biggins, supra, 507 U.S. at 611, (an age case, but the principle is the same); **[3A4; 3B3]** Siefken v. Village of Arlington Heights, 65 F.3d 664, 666 (7th Cir. 1995); Anderson v. University of Wisconsin, 841 F.2d 737, 740 (7th Cir. 1988). **[3B4]** Suppose that two workers are vying for a promotion to a job that requires a lot of reading. One of the workers is dyslexic, and as a result reads very slowly. He can do the job for which he is applying--and let us assume that his employer would give him the job if there were no other applicant for it--but he can't do it as well as the other applicant, who does not have a disability. It is not the dyslexic worker's "fault" that he can't read as well as his competitor; it is due entirely to his disability. The employer could not refuse to consider him for the promotion because of his dyslexia, but it is not disability discrimination for the employer to give the promotion to the other worker, the one who can do the job better. **[2C2; 3B1; W&B; MSQESC]** Sirvidas v. Commonwealth Edison Co., 60 F.3d 375, 378 (7th Cir. 1995); Overton v. Reilly, 977 F.2d 1190, 1195 (7th Cir. 1992); Aungst v. Westinghouse Electric Corp., 937 F.2d 1216, 1223 (7th Cir. 1991). **[3B4]** Comparative considerations are particularly important in the context of a bona fide RIF, Earley v. Champion Int'l Corp., 907 F.2d 1077, 1084 n. 5 (11th Cir. 1990); Healy v. New York Life Ins. Co., 860 F.2d 1209, 1220 (3d Cir. 1988), because the employer must decide which qualified workers to retain; he can't retain them all. **[3B1; 3B4]** To require him to retain the least able because of disability would handicap the able-bodied, and that is not required by the Act. Such handicapping, such discrimination in favor of the disabled, would invite the same criticisms as "reverse" discrimination on racial and sexual grounds--especially in a RIF case, where a better worker would lose a job to a worse one merely because the better worker had the good fortune not to be disabled. **[4A1; W&B; 2A1; MSQESC]** The Americans with Disabilities Act does not command affirmative action in hiring or firing. **[W&B]** Eckles v. Consolidated Rail Corp.,

94 F.3d 1041, 1051 (7th Cir. 1996); Daugherty v. City of El Paso, supra, 56 F.3d at 700; 29 C.F.R. Pt. 1630 App. (Background). **[3B4]** Of course in our hypothetical case of dyslexia it is open to the disabled worker to try to prove that he lost the promotion because his employer dislikes people with disabilities, not because his inability to read quickly made him the worse choice for the job. **[3B1; 2C2]** 242 U.S.C. sec. 12102(2)(C); **[3A4]** Vande Zande v. Wisconsin Department of Administration, 44 F.3d 538, 541 (7th Cir. 1994). **[3B4]** That is, it would be open to the dyslexic worker to try to prove that he was a victim of intentional discrimination, that comparative reading speed was merely a pretext. If he doesn't want to bear that burden of proof--if he wants to show instead that reading quickly is not a necessary qualification for the job in question-- then he has to switch to the disparate-impact approach and challenge the qualification on the basis of its effect and its reasonableness rather than on the basis of its motivation. **[3B3]** The RIF setting brings into view the third of our questions, what one might call the retrospective application of the principle that a personnel action that is based on a disability-related cause is not itself an action because of a disability**. [W&B]** In a RIF an employer has to make painful choices among qualified workers. Suppose it decides that the best way to do this is to confine eligibility for the diminished number of slots to workers who put in overtime work the previous year. **[2B2]** Suppose one of the workers rendered ineligible by this decision can prove that had he not been disabled that year he would have put in overtime; suppose further that he has recovered from his disability and is now entirely capable of performing to the employer's satisfaction. **[3B1]** We think that in a situation such as that (which has not been the subject of a published case), **[3B3]** the disabled employee still must prove either that the rule is a pretext for weeding out disabled employees or that it bears more heavily on the disabled and is not justified by the needs of the business. **[GF]** Otherwise it is a reasonable criterion of retention that

just happened to hit a disabled worker**. [2B2]** We cannot see what difference it makes in principle whether (as in our example of dyslexia) the employer prefers a worker who can do the job better simply because he is not disabled, or prefers a worker who, again simply because he is not disabled, performed better last year. This would be obvious if the issue were not retention but a bonus. **[3B1; 2C2]** (*Matthews v. Commonwealth Edison,* 128 F.3d 1194 (1997)).

Example 5. This case includes Themes 2 and 3, and the Relationships gap-filling process, and weighing and balancing.

Although the record contains a fair amount of evidence that relates to the way in which SIA treated disabled employees generally--probably because plaintiffs were trying to obtain class certification at one point-at this point that evidence is relevant only insofar as it may throw light on SIA's treatment of the specific individual cases still before us. **[3B2; GF]** For example, SIA's Manager of Safety and Environmental Affairs, Mark Siwiec, frequently expressed a negative attitude toward disabled employees, calling them "piece[s] of work," showing skepticism about their injuries, and volunteering the opinion that SIA should get rid of everyone with permanent restrictions. **[2A1]** There was also some debate over the background of SIA's program for disabled employees, as described in a November 1993 written policy statement. **[2B2]** Even before that time, SIA had a light-duty program that was open only to employees suffering from temporary disabilities. **[2B2]** The jobs in the program were temporary, normally lasting no longer than 90 days, and they carried with them a reduced wage. **[2B2]** This background information provides some context for the individual plaintiffs' cases. At this stage, however, it is the experience of the plaintiffs that is most important. **[3B2; W&B; GF] (***Dalton v. Subaru*, 141 F.3d 667 (1998))

Example 6. This case includes Theme 3.

Although we find that the failure to give the instruction requires us to vacate the district court's grant of injunctive relief, as well as the award of attorney's fees, SWB's success on this appeal may indeed be short lived. [3B3] The remand necessarily provides Belk with another opportunity to win outright on his discrimination claim. As manifested by the earlier jury verdict, Belk has produced sufficient evidence under the ADA to warrant a jury to return a favorable verdict for him. [3B2] For the foregoing reasons, we vacate the judgment and remand for a new trial (Belk v. Southwestern Bell, 194 F.3d 946 (1999)).

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Example 7. This case includes Themes 2, 3, and 4, and the Relationship weighing and balancing.

Finally, we must also briefly address Ms. Schneiker's assertion that Fortis' job posting system **[2B2]** has a disparate impact on its disabled employees. The district court held **[3B2]** that, because Ms. Schneiker is not disabled as that term is defined by the ADA, she is not a member of the protected class and therefore is not a proper disparate-impact plaintiff. **[4B2]** The ADA protects only those employees who are “qualified individual[s] with a disability,” 42 U.S.C. § 12112(a); **[3A3]** therefore, Ms. Schneiker would also have to be “disabled” in order to bring a disparate impact claim under the ADA. See Weigel, 122 F.3d at

465 (noting that a plaintiff must be disabled under the ADA in order to make out a prima facie case in the related context of a disparate treatment claim). **[3B4; 4B2]** We have already determined that she is not disabled within the meaning of the ADA **[4B2]** and so we hold that the district court was correct to grant summary judgment for Fortis on Ms. Schneiker's disparate impact claim **[W&B]** (*Schneiker v. Fortis Ins. Co.,* 200 F.3d 1055 (2000)).

Example 8. This case includes Themes 2, 3, and 4, and the Relationships gap-filling process, and weighing and balancing.

An employer may define the job in question, "in terms of both its essential scope and the qualifications required for it," **[2B2]** Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 676 (7th Cir. 1998), **[3B4]** as long as such qualifications are "job-related and consistent with business necessity," Bay, 212 F.3d at 974 (quoting 42 U.S.C. sec. 12113(a); 29 C.F.R. sec. 1630.15(b)(1)). **[2B2; 3A4]** In explaining why mitigating measures should be taken into account in defining an ADA disability, Sutton indicated that "[a] diabetic whose illness does not impair his or her daily activities," after utilizing medical remedies such as insulin, should not be considered disabled. Id. at 483, 119 S.Ct. 2139. **[3A4]** This statement does not mean, however, that no diabetic can ever be considered disabled under the ADA's meaning. **[W&B]** Such an approach would contradict the Court's view that whether a person is disabled under the ADA is an individualized inquiry based on the particular circumstances of each case. See id. **[W&B]** Moreover, as we have explained, the particular nature of Mr. Lawson's diabetes, even after treatment, could be said to significantly impair his daily activities, unlike the situation in Sutton. **[W&B; 3B2]** Additionally, there is evidence that these maladies inhibited Mr. Lawson's ability to maintain any significant employment for a number of years. **[3B2]** Mr. Lawson maintains that soon after his high school graduation, between 1985 and 1986, he had to quit his job with a small

construction company when he “had a serious insulin reaction and could no longer work.” R.41, Ex.2 at 2 ¶ 7. **[3B3]** Moreover, in August 1986, Mr. Lawson's application for SSDI benefits was granted, and he continued to receive total disability benefits until November 1998. **[3B3]** During that 12-year period, the Social Security Administration (“SSA”) reviewed Mr. Lawson's medical condition every two years and determined that he continued to meet its definition of disability, allowing Mr. Lawson continually to receive benefits. **[4B2]** We believe that a jury could conclude, from this evidence, that Mr. Lawson can show that a record exists indicating that his diabetes has limited substantially his ability to work. **[W&B]** Important in this determination is Mr. Lawson's receipt of disability payments under the Social Security Act and the facts surrounding that determination. **[3B2]** The Social Security Act provides income replacement to an individual who “is under a disability,” a term defined as an “inability to engage in any substantial gainful activity by reason of any physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). **[4B2; 3A3]** To obtain an award of SSDI benefits, Mr. Lawson had to demonstrate that he “is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy□” 42 U.S.C. § 423(d)(2)(A). **[4B2; 3A3]** The Supreme Court has held that evidence of the receipt of SSDI benefits regarding a claimed disability should not be a dispositive factor in ADA disability determinations. See Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 802-05, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999). **[3A4]** The Court also has indicated, however, that an SSA determination of disability can be relevant and significant evidence in showing that a disability exists for ADA purposes. See id. at 806, 119 S.Ct. 1597; see also Feldman v. American Mem'l

Life Ins. Co., 196 F.3d 783, 791 (7th Cir.1999); Weigel, 122 F.3d at 467-68. **[3A4]** More specifically, in Cleveland, the Supreme Court noted that because of differences in the mechanics of the SSA and ADA determinations of disability, a person could be considered disabled by the SSA but yet also be a "qualified individual with a disability" according to the ADA. See id. at 802-03, 119 S.Ct. 1597. **[4B2]** Yet it also explained that the two acts were similar enough in this regard to require a person, seeking to show that he is "qualified" to perform a job under the ADA's meaning, to provide a "sufficient explanation" as to how this does not conflict with the SSA's determination that he was "unable to work." Id. at 806, 119 S.Ct. 1597. **[4B2] [GF]** (*Lawson v. CSX Transp., Inc.,* 245 F.3d 916 (2001)).

Example 9. This case includes Theme 3, and the Relationship weighing and balancing.

In our initial opinion, because of the legal conclusion we reached, we proceeded on the assumption that there was a policy that was uniformly applied and did not examine the question whether an issue of fact existed regarding such policy and its application. **[W&B]** Thus, footnote 17 overstated the record with respect to such policy. Hernandez, 298 F.3d at 1036, n. 17. **[3B4]** As the Supreme Court pointed out, however, the footnote is inconsistent with our basic holding in that initial decision. See Raytheon Co., 540 U.S. at ___, n. 5, 124 S.Ct. at 519, n. 5. Accordingly, we withdraw the footnote. **[3A4]** (*Hernandez v. Hughes* Missile, 362 F.3d 564 (2004)).

Summary

The purpose of this research was to examine the patterns and themes of litigation in Americans with Disabilities Act of 1990 (ADA) disability discrimination cases charged under the theory of disparate impact (DI). Additional analyses were conducted on a subset of the ADA DI cases: Title I, or employment cases. The study included all

reported DI cases that originated under the ADA of 1990 and that were litigated between 1992 and 2012.

This study used a two-step approach to analyze the data: First, the researcher employed content analysis to identify and characterize patterns and trends of litigation in all reported U.S. Appellate Court ADA DI cases decided between 1992 and 2012. The ADA DI cases were analyzed chronologically, from the oldest to the most recent case, in order to track the evolution of the ADA through the federal appeals process from 1992 through July 2012. Variables analyzed included number of published and unpublished cases, distribution of U.S. Appellate Court jurisdictions, and distribution of ADA titles. Frequency analyses were conducted on the data.

Second, additional analyses were conducted on a subset of the ADA DI cases: Title I or employment discrimination cases. Variables analyzed included EEOC involvement, ADA definitional requirements or "prongs," elements of disparate impact cases, characteristics of charging and opposing parties, case dispositions, and case outcomes. Frequency analyses were conducted on this data. Constant comparative analysis was used to identify and characterize patterns and themes of the judicial opinions in the ADA Title I DI cases.

The researcher developed a framework for analysis based on a review of the literature of the sociopolitical perspective of disability to guide the analysis of the judicial opinions in the subset of disparate impact cases. Four themes were identified: Accommodations; Workplace Culture, Norms, and Policy; Judicial Process; and Policy Space. After the coding was complete, the researcher incorporated both the theoretical components of the framework (theory driven) and the coding data from the analysis of the judicial opinions (data driven) into the Concept Map (Appendix D). The codes, their definitions, and examples of coded judicial opinions are contained in the Codebook for Qualitative Analysis (Appendix E).

CHAPTER V

DISCUSSION

Introduction

> A law cannot change perceptions. Companies must be convinced that equal access to employment has value as a business strategy. (Noel, 1990, p. 26)

This chapter discusses the implications of the findings of the study. Specifically, the chapter presents the trends and themes identified in 20 ADA Title I disparate impact (DI) cases. The implications of this study for research, education, and practice in the field of rehabilitation counseling are also discussed.

The focus of this study was disparate impact cases, which comprise a small percentage of the cases decided by U.S. Appellate Courts under the ADA. In addition, this study limited its analysis to ADA disparate impact cases, which may be materially different from disparate impact cases brought under the Age Discrimination in Employment Act (ADEA) or disparate impact cases brought under Title VII of the Civil Rights Act of 1964 or under Section 504 of the Rehabilitation Act of 1973, as amended. The researcher chose to examine disparate impact cases because they focus on policies and practices that may discriminate against people with disabilities as a group rather than as individuals (U.S. EEOC, 2008). The policy-based approach is more closely aligned with the sociopolitical perspective of disability (Gill, Kewman, & Brannon, 2003; Hahn, 1984).

The purpose of this study was to examine the patterns and themes of litigation in Americans with Disabilities Act (ADA) disability discrimination cases charged under the theory of disparate impact. The study sample was comprised of 64 ADA disparate impact cases (Titles I, II, and III) that were litigated in the U.S. Appellate Courts between 1992 and 2012. There were no Title IV cases in the sample. The focus of the study was on Title I (employment) cases. To learn more about disparate impact cases charged under the

legal theory of disparate impact, additional analysis was conducted on the 20 ADA Title I disparate impact cases contained in the sample.

The following research questions and sub-questions guided the study:

1. What are the patterns of litigation in Americans with Disabilities Act (ADA) cases charged under the theory of disparate impact and litigated in U.S. Appellate Courts during the time period between 1992 and 2012?

a) What are the numbers of published and unpublished ADA disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012?

b) What is the distribution of the jurisdictions of the U.S. Appellate Courts in published ADA disparate impact cases?

c) What is the distribution of the titles of the published ADA disparate impact cases litigated in U.S. Appellate Courts: Title I, Title II, Title III, Title IV?

d) What is the number of published U.S. Appellate Court ADA Title I disparate impact cases brought by the Equal Employment Opportunity Commission (EEOC) from 1992 through 2012?

e) What prongs under the ADA's definition of disability are most frequently litigated in published U.S. Appellate Court ADA Title I disparate impact cases: (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment?

f) What is the fact pattern that gave rise to the dispute in published U.S. Appellate Court ADA Title I disparate impact cases: testing, hiring (qualified), promotion, discharge, or reasonable accommodations?

g) What essential fact elements of disparate impact theory are most frequently in dispute in published U.S. Appellate Court ADA Title I disparate impact cases: existence of practice/policy that wrongfully discriminates against people with disabilities, employer/employee relationship, practice/policy has an

adverse effect on people with disabilities, protected status, or policy/practice caused harm?

h) What types of defenses are most frequently claimed in published U.S. Appellate Court ADA Title I disparate impact cases: business necessity, job-relatedness?

i) What are the characteristics of the charging parties in ADA Title I disparate impact cases: type of disability, age, gender, race/ethnicity, and socioeconomic status?

j) What are the characteristics of the opposing parties in ADA Title I disparate impact cases: size of business; for-profit, non-profit, public institution; nature of business?

k) What was the basis of the disposition of the cases in ADA Title I disparate impact cases: procedural, substantive, or indeterminate?

l) What patterns and trends in litigation can be identified in published ADA Title I disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012?

2. Based on the subset of data identified in Research Question 1, what themes, in terms of the sociopolitical perspective of disability, can be identified in the judicial opinions of published ADA Title I disparate impact cases litigated in U.S. Appellate Courts from 1992 through 2012?

This study used a two-step, mixed methods approach to analyze the data relevant to the research questions and sub-questions. In the first step of the study, the researcher employed content analysis (Hall & Wright, 2008) to identify and characterize patterns and trends of litigation in all reported U.S. Appellate Court ADA cases charged under the theory of disparate impact from 1992 through 2012. Cases were analyzed chronologically, from oldest to most recent, because as cases make their way through the court system, the body of law on a particular topic evolves (Helms, 2010). Therefore,

decisions in older cases inform more recent cases, in a process known as precedent (Mellinkoff, 1992). Variables analyzed in the first step of the study included number of published and unpublished cases; distribution of jurisdiction; distribution of ADA titles; EEOC involvement; case fact patterns, and characteristics of charging and opposing parties. Frequency analyses were conducted on these data.

In the second step of the study, the researcher identified a subset of the ADA disparate impact cases analyzed in the first step: Title I, or employment discrimination cases. Constant comparative analysis (Strauss & Corbin, 1990) was used to identify and characterize patterns and themes of the judicial opinions in the Title I disparate impact cases. The relationships among the themes were also identified. The researcher developed a framework for analysis based on a review of the literature of the sociopolitical perspective of disability to guide the analysis of the judicial opinions in the subset of disparate impact cases.

The findings in this study will be illuminated for the reader in the following manner. First, the chapter describes four trends identified in the content analysis and frequency analysis conducted in step one of the study. Next, each trend is interpreted through the lens of the sociopolitical model of disability, as developed through the constant comparative analysis conducted in step two of the study. The four themes and the three relationships developed in step two of the study are depicted in the Concept Map (Appendix D). Finally, the implications of the study for rehabilitation research and practice will be discussed.

Trends and Themes in ADA Title I Disparate Impact Cases

The first step of the analysis employed content analysis (Hall & Wright, 2008) and frequency analysis to identify patterns and trends of litigation in this body of law. The results of the frequency analyses conducted on this data revealed four trends: (a)

Precedent, (b) Circuit and Judge Effects, (c) EEOC Successes, and (d) *Sutton* Decision Effect. Each trend will be described in the next section of the chapter.

The second step of the analysis employed constant comparative analysis (Strauss & Corbin, 1990) to identify themes in the judicial opinions of the 20 ADA Title I disparate impact cases. The results of the constant comparative analysis of the text of the judicial opinions conducted in step two of the study revealed four themes and three relationships among the themes. The four themes are Accommodation(s); Workplace Culture, Norms, and Policies; Judicial Process; and, Policy Space. The three relationships are gap-filling, weighing and balancing, and maintaining status quo versus effecting social change. The themes and relationships revealed in step two are depicted in the Concept Map in Appendix D (Daley, Conceicao, Mina, Altman, Baldor, & Brown, 2010).

Conceptually, each of the four themes developed through constant comparative analysis in step two of the study represents groups of stakeholders who have an interest in the outcome of the lawsuit. For example, the first theme, Accommodation(s) represents the disability rights movement's definition of the term *accommodations*, the legal meaning of the term, and the interaction between the disability rights movement's and the legal community's interpretations of the term *accommodations*.

The second theme, Workplace Culture, Norms, and Policies represents elements of the employer-employee relationship that may be the source of the dispute in ADA Title I disparate impact cases.

The third theme, Judicial Process, represents the elements of the law and legal processes that judges rely on in making their decisions in ADA Title I disparate impact cases; and, finally, the fourth theme, Policy Space, represents the role of the ADA as a civil rights statute within the larger realm of civil rights and disability policy in the United States.

Conceptually, each of the three relationships represents the interactions among the stakeholder groups. The "weighing and balancing relationship" represents the

consideration judges give to each of the factors as they balance both the factual issues specific to each case (internal factors) with the contextual factors of the case (external issues), such as economic or cultural values, that may influence stakeholder perceptions of the issues in the case. The "maintaining status quo versus effecting social change" represents the dual roles of U.S. courts: protecting existing rights and righting social wrongs (Bagenstos, 2009; Mezey, 2005). The "gap-filling" relationship reflects the courts' decision-making process in cases where there is incomplete information in the case.

Taken as a whole, the themes and the relationships among the themes represent the various factors considered by the judges in their decisions in the 20 ADA Title I disparate impact (DI) cases. The four themes and the three relationships are depicted in the Concept Map (Appendix D). The implications of each theme and relationship on rehabilitation research and practice will be described in the next section of the chapter.

The next section of the chapter walks the reader through each of the four trends identified through content analysis, provides examples of the trends from the text of the judicial opinions in the ADA Title I disparate impact cases, and interprets each of the four trends through the four themes and the three relationships developed through constant comparative analysis.

Trend 1: Precedent

The first trend identified by the content analysis and frequency analysis in step one was the precedential nature of several cases in the study. The law evolves through precedent, which means that the decisions in earlier cases influence the decisions in later cases with similar fact patterns (Mellinkoff, 1992). As the law evolves, cases whose decisions have not been overturned or remanded by a higher court (the appellate courts for the district courts; and the U.S. Supreme Court for the appellate courts) form a body of law on a specific legal issue. Precedent set by a higher court is binding on a lower court. For example, decisions by the U.S. Supreme Court are binding on U.S. Appellate

and District Courts, and decisions by U.S. Appellate Courts are binding on U.S. District Courts within the appellate court's jurisdiction or district (Mellinkoff).

Three cases in the sample served as precedent for later cases in this study: *Eckles v. Consolidated*, *Matthews v. Commonwealth*, and *Dalton v. Subaru*. The fact patterns in all three cases involved an employee (or employees in the *Dalton* case) who was requesting an accommodation to be transferred or reassigned in a workplace that operated under a collective bargaining agreement. In each case, the employer asserted that the requested accommodation was unreasonable because it would violate an existing bona fide occupational qualification (BFOQ) or seniority system under a collective bargaining agreement (CBA). In each case, the court agreed with the employer, and cited the earlier cases to support its opinion. For example, the judges in the *Dalton* case, which was decided in 1998, referred to both the *Matthews* (1997) and *Eckles* (1996) cases in their decision in *Dalton v. Subaru*: The court first cites the *Eckles* case, which was decided in 1996:

> We have already recognized some limitations on the employer's duty to reassign. For example, in *Gile* we held that an employer has no duty to "bump" an incumbent from a position just to accommodate the request of a disabled employee...Nothing in the ADA requires an employer to abandon its legitimate, nondiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers. See, e.g., *Cochrum*, 102 F.3d at 912-13 (employer not required to violate the provisions of a collective bargaining agreement to reassign a disabled employee pursuant to the ADA), citing *Eckles v. Consolidated Rail Corp*., 94 F.3d 1041, 1051 (7th Cir.1996), cert. denied, 520 U.S. 1146, 117 S.Ct. 1318, 137 L.Ed.2d 480 (1997); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir.1997), cert. denied, 522 U.S. 1115, 118 S.Ct. 1050, 140 L.Ed.2d 113 (1998) (even if there were no CBA in place, the

> ADA does not require an employer to reassign in violation of a bona fide seniority system).

The court then cites the *Matthews* case, which was decided in 1997, and notes that it has found no case law to support reassignment as an accommodation for an employee with a disability if such reassignment would require violating the terms of an existing CBA:

> In fact, we have been unable to find a single ADA or Rehabilitation Act case in which an employer has been required to reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer, see *Duckett*, 120 F.3d at 1225 (also failing to find such a case), and for good reason. The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees. An employer cannot, of course, convert its responsibility to look to a "broad range" of jobs into a "narrow band" simply by adopting a "no transfer" policy. Any such policy would remain subject to challenge both for any disparate impact it might impose on disabled employees, and for any unreasonable inflexibility in the face of a demand for reasonable adjustments to accommodate a disabled candidate for transfer. See 29 C.F.R. Pt. 1630, App. § 1630.10. See also *Matthews*, 128 F.3d at 1195-96. Rather, the "broad range" of jobs to which an employer must look when considering transfer as a reasonable accommodation for a disabled employee is bounded from above by the employer's freedom not to offer promotions and from below by its legitimate, nondiscriminatory limitations on lateral transfers and demotions.

All three cases (*Eckles v. Consolidated*, *Matthews v. Commonwealth*, and *Dalton v. Subaru*) were cited as precedent in one or more of seven of the 20 cases in the study.

Appendix H contains a matrix of the three precedential cases and the seven cases in the study sample in which they were cited.

Examining precedent is one way to determine what issues the court finds salient across a body of law. Precedent-setting decisions in appellate court cases also delimit the decisions of the lower district courts (Maltz, 1988). Once precedent has been set by a higher court, lower courts, which hear the majority of cases, are reluctant to go against precedent in future cases containing the same or similar fact patterns (Mellinkoff, 1992). Thus, future appellants in cases with similar fact patterns may find that precedent set in the earlier cases narrows the scope of relief available to them (Maltz). It is this narrowing, especially on the issue of the definition of disability under the ADA, that some disability rights activists, disability scholars, and legal scholars refer to as *backlash* against the ADA (Krieger, 2003). The concept of backlash as it relates to the results of this study is discussed later in this chapter.

Precedent in ADA Title I disparate impact cases may help or hinder employees with disabilities who believe they have been discriminated in the workplace. For example, an employee with a disability who works in a company where a CBA is in place may be denied an accommodation request for reassignment because such a request violates the terms of the CBA. That employee may still choose to bring suit against his or her employer under Title I of the ADA; however, the employee may find it difficult to prevail because of the precedent set in previous cases with the same or similar fact patterns, if the precedent was set by the appellate court which has jurisdiction over the district court that hears the employee's case, or if the precedent was set by the U.S. Supreme Court. In contrast, precedent may benefit an employee whose suit fits a particular exception to the fact pattern; for example, if the company policy prohibiting reassignment was put in place in bad faith. The judges in *Dalton v. Subaru* (1998) noted this exception in their decision:

> An employer cannot, of course, convert its responsibility to look to a "broad range" of jobs into a "narrow band" simply by adopting a "no transfer" policy. Any such policy would remain subject to challenge both for any disparate impact it might impose on disabled employees, and for any unreasonable inflexibility in the face of a demand for reasonable adjustments to accommodate a disabled candidate for transfer. See 29 C.F.R. Pt. 1630, App. § 1630.10. See also *Matthews*, 128 F.3d at 1195-96.

Themes and Relationships in Trend 1

The researcher interpreted Trend 1 through the lens of the sociopolitical model of disability, as developed through the constant comparative analysis conducted in step two of the study. The four themes and the three relationships developed in step two of the study are depicted in the Concept Map (Appendix D).

The analysis of the opinions in the three cases (*Eckles v. Consolidated*, *Matthews v. Commonwealth*, and *Dalton v. Subaru*) discussed in Trend 1 informed Theme 1, Accommodations because of the discussion in the opinions of the legal requirement to accommodate workers with disabilities under Title I of the ADA. The analysis informed Theme 2, Workplace Culture, Norms, and Policies, because of the role the CBA played in the judicial decisions in these cases. The analysis informed Theme 3, Judicial Process, because of the discussion in the opinions about the precedent set in similar cases. Finally, the analysis informed Theme 4, Policy Space, because of the discussion in the opinion of the *Matthews* case about previous cases in another disability discrimination statute, the Rehabilitation Act.

The *Dalton* case demonstrates the weighing-and-balancing relationship depicted in the Concept Map. The text of the opinion shows that, in the case of a company with a CBA in place, the judges weigh the rights of the employees with disabilities who are covered under the ADA with the rights of all company employees, disabled or not, who

are covered under the CBA. The court's reluctance to interfere in labor relations is seen in a later case, *Boersig v. Union Electric*:

> Our Benson decision recognizes the importance of protecting these rights from unnecessary interference arising from the perceived need to accommodate a disabled employee under the ADA. We believe that these rights are entitled to protection regardless of whether a plaintiff seeks a reasonable accommodation [or claims the seniority system has a disparate impact on disabled employees. In either case, the plaintiff invites the court to disrupt a carefully negotiated agreement between union and employer at the expense of other union employees who hold legitimate expectations of advancement based on the governing CBA. This sort of judicial intrusion into labor relations is unwarranted unless an employee can show that a seniority system was designed to discriminate against the disabled. Because we find the promotional system in the instant case is a bona fide seniority system, we reject Boersig's disparate impact claim. (*Boersig v. Union Electric Co.,* 219 F.3d 816 (2000).

An interesting and unexpected result of this study is the fact that the courts' decisions in cases where a CBA is in place appeared to show a distinct chronological trend that followed the relative decline of the power of labor unions throughout the 1990s and into the first decade of the 21st century (Geoghegan, 2004). Throughout the 1990s, when the ADA was less than a decade old, the judicial opinions in the cases in the study sample demonstrated reluctance on the part of the judges to disrupt existing CBAs. However, in 2012, as the analysis for this study was nearing completion, the U.S. Appellate Court in the 7th Circuit reversed its own precedent in two EEOC reasonable accommodation cases, *EEOC vs. United Airlines* and *EEOC vs. Humiston-Keeling* (2000), after a rehearing of the *EEOC vs. United Airways* case, citing the U.S. Supreme Court decision in *U.S. Airways, Inc., v. Barnett* (2002) as the reason for its reversal.

Although in *Barnett* the U.S. Supreme Court found that U.S. Airways was not required to violate its seniority system under its CBA in order to provide reassignment as an accommodation under the ADA, the court stated:

> [T]he simple fact that an accommodation would provide a 'preference'—in the sense that it would permit the worker with a disability to violate a rule that others must obey—cannot in and of itself, automatically show that the accommodation is not 'reasonable' (2002).

The *Barnett* decision therefore opens the door to allowing reassignment as a reasonable accommodation under the ADA in cases where a seniority agreement under a CBA is in place. Whether the decision in *Barnett* represents the high court's willingness to disrupt existing labor relations contracts due to the decline in the power of organized labor (Geoghegan, 2004) or if it simply represents the impact of the growing body of case law in ADA Title I cases on the courts' decisions, or is a result of other factors, is beyond the scope of this study. However, what is important to this study is that the decisions in the *U.S. Airways, Humiston-Keeling*, and *Barnett* cases indicates a willingness on the part of the courts to consider reassignment as a reasonable accommodation in situations where a CBA is in place. It is also important to note that the reversal of these decisions demonstrates that courts have interpreted the facts of a particular case in a way that results in a decision that goes against precedent (Maltz, 1988). The impact of these decisions will be discussed below, in the *Sutton* Effect trend.

Trend 2: Circuit and Judge Effects

The other similarity the *Eckles*, *Matthews*, and *Dalton* cases shared was the fact that they were litigated in the 7th Circuit. The analysis of the text of the judicial opinions revealed a consistent approach on the part of the 7th Circuit to cases that dealt with the issue of a reasonable accommodations request under a CBA. Specifically, the 7th Circuit expressed three reasons for not allowing the plaintiffs to prevail in these cases: (a) Requiring that an employee with a disability be given priority over more senior or more qualified non-disabled employees is affirmative action and the ADA is not an affirmative

action statute; (b) allowing accommodations that would violate the training and seniority requirements in CBAs puts the rights of the person with a disability above the rights of non-disabled workers whose rights are protected under longstanding, bona fide CBAs; and (c) requiring a company to pass over the best-qualified applicant for a position in order to accommodate a minimally qualified person with a disability is affirmative action, and contrary to the best economic interests of the employer who has the right to hire the best applicant for the job.

Themes and Relationships in Trend 2

The researcher interpreted Trend 2 through the lens of the sociopolitical model of disability, as developed through the constant comparative analysis conducted in step two of the study. The four themes and the three relationships developed in step two of the study are depicted in the Concept Map (Appendix D). Three reasons expressed by the justices in the 7th Circuit in their opinions, and cited by justices in cases in other appellate court circuits (see Appendix H), were grouped into codes that ultimately became part of Theme 1, Accommodations; Theme 2, Workplace Culture, Norms, and Policies; and, Theme 3, Policy Space. The judicial reasoning in the reasonable accommodations request under a CBA cases also informed two of the three relationships identified in the analysis of the 20 ADA Title I cases: weighing and balancing, and maintaining status quo versus effecting social change. More specifically, the researcher interpreted the courts' reasoning and decisions in these early (1996 – 2000) cases to mean that the courts were trying to determine how to interpret the requirements of a new law (ADA) (Theme 4, Policy Space) within the confines of existing collective bargaining agreements that are governed by another federal agency, the National Labor Relations Board (NLRB) (Theme 2, Workplace Culture, Norms and Policy, Category Policy Space). The ADA provided new remedies – accommodations – that the courts were trying to interpret as well (Theme 1, Accommodations). The decisions in the three cases (*Eckles*, *Matthews*, and *Dalton*), and the cases that cited the three cases, were incorporated into Theme 1,

Accommodations, Category A1, Legal Requirement. In these cases, the text of the judicial opinions contained discussions about the relative rights of employers, non-disabled employees, and people with disabilities. The researcher interpreted these discussions as evidence of the tension between the court's role as a protector of the rights of employees and businesses and its role as a mechanism for social change (maintaining status quo versus effecting social change).

The text of the *EEOC v. Humiston-Keeling* (2000) case, also a 7th Circuit case, is provided below, both as an example of the court's reliance on the *Dalton* and *Matthews* decisions in later decisions, and as an introduction to Trend 3, EEOC Successes:

> The Tenth Circuit cases are not distinguishable from the present case, but they are inconsistent with decisions of this court that hold that the Americans with Disabilities Act is not a mandatory preference act. In *Dalton v. Subaru-Isuzu Automotive, Inc.*, supra, 141 F.3d at 679, we held that an employer is not required "to reassign a disabled employee to a position when such a transfer would violate a legitimate, nondiscriminatory policy of the employer The contrary rule would convert a nondiscrimination statute into a mandatory preference statute, a result which would be both inconsistent with the nondiscriminatory aims of the ADA and an unreasonable imposition on the employers and coworkers of disabled employees." A policy of giving the job to the best applicant is legitimate and nondiscriminatory. Decisions on the merits are not discriminatory. See also *Malabarba v. Chicago Tribune Co.,* 149 F.3d 690, 699-700 (7th Cir.1998), where we said that "the ADA does not mandate a policy of 'affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled person be given priority in hiring or reassignment over those who are not disabled,' " and *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir.1997), where we said that "the Americans with Disabilities Act does not command affirmative action in hiring or firing." It is true that antidiscrimination statutes

impose costs on employers. That is obvious in disparate-impact cases, when the employer is told to change a policy that may not have been adopted for discriminatory reasons (though that is its effect) and so presumably is efficient. The duty of accommodation operates in a similar way. It requires the employer to incur (if it need be) an expense rather than just to desist from invidious discrimination. The requirement is implicit in the ADA's creating an "undue hardship" safe harbor for employers; the safe harbor would be otiose if the employer's only duty were to stop doing something. But there is a difference, one of principle and not merely of cost, between requiring employers to clear away obstacles to hiring the best applicant for a job, who might be a disabled person or a member of some other statutorily protected group, and requiring employers to hire inferior (albeit minimally qualified) applicants merely because they are members of such a group. That is affirmative action with a vengeance. That is giving a job to someone solely on the basis of his status as a member of a statutorily protected group. It goes well beyond enabling the disabled applicant to compete in the workplace, or requiring the employer to rectify a situation (such as lack of wheelchair access) that is of his own doing. Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989)." . . .The EEOC does not deny that in every case the applicant chosen for the job was better than Houser in the sense of likely to be more productive. Nor does it deny that the company had a bona fide policy, consistently implemented, of giving a vacant job to the best applicant rather than to the first qualified one. Nor does it suggest that Houser's disability played any role in the decisions favoring her competitors. None of the jobs involved a degree of lifting that her disability would have interfered with her performing, and it is not suggested that the defendant harbors any animus toward disabled workers. Rather the Commission interprets the "reassignment" form of reasonable accommodation to require that the disabled

> person be advanced over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job, unless the employer can show "undue hardship," a safe harbor under the statute. §12112(b)(5)(A); *Vande Zande v. Wisconsin Dept. of Administration*, 44 F.3d 538, 542 (7th Cir.1995). The fact that the disability isn't what makes the disabled person unable to perform the job as well as the person who got it is, in the Commission's view, irrelevant. (*EEOC v. Humiston-Keeling*).

As mentioned in the discussion under Trend 2, the 7th Circuit reversed itself in the *EEOC vs. Humiston-Keeling* and *EEOC vs. U.S. Airways* cases, demonstrating a shift in the court's treatment of cases that involve reassignment as an accommodation under Title I of the ADA in situations where a CBA is in place that would otherwise prohibit such reassignment. The 7th Circuit's comparison of accommodations to mandatory preference or affirmative action in the *Eckles*, *Matthews*, and *Dalton* cases informed Theme 1, Accommodations, in the Concept Map. Specifically, the text of the opinions in the *Eckles*, *Matthews*, and *Dalton* cases, highlights the difference between the legal definition of accommodations and the sociopolitical model of disability definition of accommodation. In the court's view, accommodations are a legal requirement with a ceiling and a floor; in other words, accommodations are allowed within a narrow band of situations. In the *Eckles*, *Matthews*, and *Dalton cases, and in Humiston-Keeling*, the court expressed the view that the reassignment accommodation requested would go beyond what was required by the ADA. In contrast, the sociopolitical model views accommodations a method to increase the participation of people with disabilities in society, including the workplace; therefore, accommodation under the sociopolitical model of disability is viewed as a human right as well as a legal right (Hahn, 1984; Oliver, 1990; Shakespeare & Watson, 2006). Under the sociopolitical model of disability, accommodation has no ceiling or floor. The differing views of accommodation may

cause confusion and misunderstanding among the various stakeholder groups; this tension is depicted in Theme 1, Accommodation, in the Concept Map.

The 7th Circuit's reversal in the *EEOC vs. Humiston-Keeling* and *EEOC vs. U.S. Airways* cases demonstrates the evolution of the law in ADA Title I cases. Although the majority of outcome research on Title I of the ADA has shown that plaintiffs (employees) lose in court in nearly 90 percent of the cases (Colker, 2009), an examination of individual cases demonstrates that courts can and do reverse decisions over time in a given body of law Maltz, 1988).

Trend 3: EEOC Successes

Disability scholars and activists have criticized the EEOC (Krieger, 2003; Mezey, 2005) for not bringing more cases on the behalf of plaintiffs under Title I of the ADA, and for its dearth of successes in the cases it does litigate. Some scholars have noted the ongoing lack of funding for the agency, which results in understaffing and backlogs, as the source of the problem (Krieger, 2003). Other scholars have suggested that the EEOC has not yet been presented with the type of watershed case that *Griggs vs. Duke Power* was in Title VII cases (Bagenstos, 2009). This study contained two cases in which the EEOC was the charging party: *EEOC v. Kronos*, and *EEOC v. Randstad*. The two EEOC cases in this study were administrative subpoena cases and involved large-scale investigations of assessments used in hiring, in the Kronos case, and literacy requirements for hiring, in the *Randstad* case. The appellate courts in both cases reversed the district courts' decisions to deny EEOC enforcement of its subpoenas. In addition, as mentioned, the 7th Circuit reversed its decision in the *EEOC vs. Humiston-Keeling* case as a result of the U.S. Supreme Court case, *U.S. Airways v. Barnett*.

The *EEOC vs. Humiston-Keeling* case was reviewed but eliminated from the study because it was brought and litigated as a reasonable accommodations case. Stein and Waterstone (2006) have noted that many ADA reasonable accommodations cases are similar to disparate impact cases. The legal reasoning underlying Stein and Waterstone's

assertions is beyond the scope of this study; however, their discussion about the similarities in ADA reasonable accommodation and disparate impact cases provides the rationale for including the *EEOC vs. Humiston-Keeling* case in this discussion.

All three of the EEOC cases are ongoing; therefore, it is too soon to know how the EEOC will fare in district court on these issues. However, the favorable rulings for plaintiffs have broad implications for the rehabilitation counseling profession, especially as cases charged under the Americans with Disabilities Act Amendment Act of 2008 (ADA AA, 2008) begin to make their way through the courts. The ADA AA 2008 is expected to make it easier for plaintiffs to make their prima facie case (qualified individual with a disability); therefore, the expectation is that more reasonable accommodations and disparate impact cases will survive motions for summary judgment (Wax, 2012). The EEOC wins in the *Kronos* and *Randstad* cases have broad implications for plaintiffs in reasonable accommodations and hiring and promotions cases, obviously. But the decisions also have implications for the practice of rehabilitation counseling as well. Hiring practices, policies, assessment tools, and reasonable accommodations are all areas in which rehabilitation counselors have knowledge and skills. Rehabilitation counselors can provide valuable education and training for businesses, human resource professionals, and rehabilitation clients about the reasonable accommodations process under the ADA, along with information about the types of accommodations available.

Themes and Relationships in Trend 3

In addition, rehabilitation counselors serve as an important link between the theoretical perspective posited by the sociopolitical perspective of disability that accommodations maximize human potential and facilitate access and inclusions, and the legal requirement of "reasonable accommodations" under the ADA, the goal of which is a level playing field rather than the maximizing of individual potential. Under the legal requirement of "reasonable accommodations, the boundaries of accommodations are limited by case law in ADA Title I cases. The Concept Map (Appendix D) depicts the

tension between the two stakeholder perspectives in Theme 1, Accommodations. Category A depicts the legal requirement of "reasonable accommodations"; Category B depicts the sociopolitical perspective, or disability rights view, of accommodations; and Category C depicts the differences in meaning ascribed to the term "accommodations" by various stakeholder groups. The courts weigh and balance accommodations as a policy solution or legal requirement (Theme 4, Category C) with accommodations as a social good (Theme 4, Category C) in making decisions in disparate impact cases that involve reasonable accommodations, such as *Eckles, Matthews,* and *Dalton*, and the *EEOC v. Humiston-Keeling* cases discussed in the previous section.

Trend 4. The Sutton Effect

In 1999, the U.S. Supreme Court decided an important Title I ADA case: *Sutton v. U.S. Airlines*. The *Sutton* case was viewed as a defeat by disability rights advocates in that it demonstrated a further narrowing of the Court's views on who is a qualified individual with a disability under the ADA. The case was viewed as a way for courts to proceed directly to summary judgment on behalf of the employer, without considering the merits or facts of the case (Stein & Waterstone, 2006). The U.S. Supreme Court in *Sutton* focused on mitigating measures and individualized inquiry:

> In *Sutton v. United Airlines*, ___ U.S. ___, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999), twin sisters brought an ADA claim based on their denial of employment as commercial airline pilots. The Supreme Court upheld a dismissal of plaintiffs' claim under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief could be granted. Both sisters suffered severe myopia and, uncorrected, their visual acuity was 20/200 or worse in the right eye, and 20/400 or worse in the left eye. However, with the use of corrective lenses, both women had 20/20 vision. The Court determined that neither woman was disabled under the ADA as "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment. . . ."

> *Sutton*, 119 S.Ct. at 2143. With glasses serving as a mitigating measure, both women had perfect eyesight; thus, the Supreme Court held they could not claim protection under the ADA. In so holding, the Court rejected the opinions of the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ), as espoused in their ADA Guidelines, that a disability should be determined without regard to mitigating measures. 29 CFR pt. 1630, App., § 1630.2(j) (1998); 28 CFR pt. 35, App. A, § 35.104 (1998); 28 CFR pt. 36, App. B, § 36.104 (1998). The Court, noting that the existence of a disability is an individualized inquiry, felt that the guidelines approach "would often require courts and employers to speculate about a person's condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual's actual condition." *Sutton*, 119 S.Ct. at 2147. (Belk v. Southwestern Bell (1999)).

This study contained four cases in which the court cited the *Sutton* case in its opinion: *Belk v. Southwestern Bell*, *Lawson v. CSX Transp., Inc*., *Schneiker v. Fortis*, and *Gonzales v. City of New Braunfels*. In two of the cases, *Schneiker* and *Gonzales*, the court affirmed for the defendant on the basis that the plaintiff was not a qualified individual with a disability. However, in the other two cases, *Belk* and *Lawson*, the courts provided a detailed description of the individualized inquiry they employed to make the determinations that the plaintiff was a qualified individual with a disability. Both cases were decided in favor of the plaintiff. The court in *Lawson* made note that under *Sutton's* individualized inquiry, the court could take the severity of the disability into effect in its decision:

> In explaining why mitigating measures should be taken into account in defining an ADA disability, *Sutton* indicated that "[a] diabetic whose illness does not impair his or her daily activities," after utilizing medical remedies such as insulin,

should not be considered disabled. Id. at 483, 119 S.Ct. 2139. This statement does not mean, however, that no diabetic can ever be considered disabled under the ADA's meaning. Such an approach would contradict the Court's view that whether a person is disabled under the ADA is an individualized inquiry based on the particular circumstances of each case. See id. Moreover, as we have explained, the particular nature of Mr. Lawson's diabetes, even after treatment, could be said to significantly impair his daily activities, unlike the situation in Sutton (2001).

Themes and Relationships in Trend 4

This trend demonstrates the "gap-filling" process that courts engage in as they compare what the statute says on its face with the facts of the case and fill in missing information. The courts in Lawson relied on testimony from outside experts, including medical experts, a vocational rehabilitation counselor, and information from the Social Security Administration. There are implications for rehabilitation research and education in these four cases. Specifically, more research needs to be done on cases in which the plaintiff prevailed. Looking only at outcome data, ADA Title I cases (brought under the theories of disparate impact, disparate treatment or reasonable accommodations) in which the plaintiff prevails are few in number (Colker, 2009). However the text of the judicial opinions in the individual cases may contain useful information about the workplace policies at issue, reasonable accommodations, and the nature and severity of the disability. For example, in cases where there are no damages awarded, such as in disparate impact cases, more research needs to be done to determine if courts are more willing to use the "individualized inquiry" approach to plaintiffs' advantage than they are in cases where damages are awarded.

Future Research

Areas for future research related to the results of this study include: comparing ADA Title II and Title III disparate impact cases to ADA Title I disparate impact cases;

following up on the cases in this sample remanded to district court, for example, *Belk v. Southwestern Bell* (1999); and examining ADA Title I disparate impact cases at the district court level.

Scholars in the fields of law, disability, and public policy find themselves at an important crossroads. The passage of the ADA AA 2008 represented a recommitment to the civil rights approach in remedying societal discrimination against people with disabilities. However, at the time this study was conducted, the ADA AA was too new to have produced a volume of case law large enough to determine if the reforms have had the desired effect of broadening judicial interpretation of the law. Therefore, as cases charged under the ADA AA make their way through the court system, it will be important examine disparte impact cases filed under the ADA AA, to compare similarites and differences in the patterns and trends of litigation between the two statues.

In addition, disability scholars are examining the limits of the ability of courts to implement the goals of civil rights legislation (Bagenstos, 2009; Colker, 2009). Disability scholars have also begun to question the usefulness of the sociopolitical model of disability as a way to conceptualize and describe disability. Indeed, there is a call for a new language of disability that replaces "the minority group model with language that speaks of disability as a form of human variation and that calls for a universal design and universalizing of disability" (Asch, 2001, p. 399). Scholars have noted the limitations of anti-discrimination laws in removing societal barriers that prevent people with disabilities from being included in society, including the workplace. Future research on the judicial opinions in ADA Title I disparate impact cases may provide insight into workplace policies and procedures that often operate as unseen and unnoticed barriers to inclusion, the "built-in headwinds" as the court in *Griggs* (1971) noted. More research about policies and procedures may help employers avoid using hiring tests and assessments that inadvertently and unnecessarily screen out applicants with particular types of disabilities.

Role of Rehabilitation Counseling in the ADA and

ADA AA 2008

The rehabilitation counseling profession has a long history of calling for more research and practice skills in disability legislation and policy (Bruyère, 2000; Burton, 1979; McCrone, 1991; Tarvydas & Cottone, 1991; Schriner, 1995, 2001). Indeed, shortly after the ADA was passed, McCrone noted that "federal disability-related policy, legislation, and advocacy skills are the weak links in many otherwise excellent training programs in rehabilitation counseling" (1991, p. 16). McCrone further stated that "federal disability policy and legislation define rehabilitation practice" (p. 16) and asserted that:

> To a large degree, the success of the Americans with Disabilities Act will depend on the quality of vocational rehabilitation services in preparing 'qualified' people with disabilities for work and ADA protections. There is too much energy, too many good ideas and too much at stake in the professional rehabilitation community to leave federal legislative advocacy to the lobbyists. (p. 19)

More recently, Bruyère (2000) asserted that rehabilitation professionals are an integral component in the successful implementation of Title I of the ADA:

> A minimum contribution is in being able to inform persons with disabilities about their ADA rights, and employers about their responsibilities under Title I. Additionally, the contribution of rehabilitation service delivery providers has become increasingly important. Service providers have a part to play in the implementation of disability employment policy at the local level. Being able to understand the interplay of federal policies at the state and local levels is gaining ever-increasing importance, particularly with new work-force development and state welfare reform legislation that affects services to persons with disabilities. (p. 26)

The value of rehabilitation professionals in ADA Title I litigation was noted by Lee (2003), who found that plaintiffs in ADA Title I cases "who have presented evidence, particularly through the use of vocational experts" about accommodations that will allow them to perform the essential functions of the job have been more successful than plaintiffs who argue for elimination of the portions of the job they can no longer perform (p. 26). In addition, studies conducted about the profession of rehabilitation counseling (Chan et al., 2003; Leahy et al., 2009) identify "legislation or laws affecting

individuals with disabilities" (Leahy et al., 2009, p. 102) as an area of practice that practitioners rate as important and an area of practice that they use frequently.

The results of this study may be used in rehabilitation education settings to develop practical legal research skills that may improve counselors' awareness of issues in practice that may require "legal literacy" and ensure that rehabilitation counselors have the knowledge, skills, and awareness to practice competently and ethically when working with clients who may require information about their rights under the ADA. Specifically, information about judicial decision making under Title I of the ADA may lead to a more comprehensive and realistic understanding on the part of rehabilitation counselors about the process of litigation and increase counselors' abilities to inform clients of their rights under the ADA.

One way that rehabilitation educators can increase rehabilitation counselor knowledge and skills in ADA legal terminology and case law, and computer assisted legal research (CALR) is to develop collaborations among rehabilitation counseling education programs and law schools and law libraries, and local attorneys practicing in discrimination law. These collaborations may serve to expand on the information already provided to students about the laws and policies that govern rehabilitation practice, and may also serve as information and referral resources for clients and employers.

The Sociopolitical Model in Rehabilitation Counselor Education and Practice

For more than two decades, rehabilitation scholars, educators, and practitioners have embraced the sociopolitical model of disability with its emphasis on consumer empowerment and disability identity, and its focus on advancing the civil rights of people with disabilities (Bruyère, 2000; Kosciulek, 1999; Maki, 2012; Maki, McCracken, Pape, & Scofield, 1978; Schriner, 1995; Tarvydas & Cottone, 1991).

Since the 1970s, rehabilitation counselors have been increasingly required to develop skills in advocacy, not only to act on behalf of consumers who are unable to

advocate for themselves but also to provide education and training to consumers so that consumers may act as self-advocates (Burton, 1979; Liu & Torporek, 2004; Tarvydas & Cottone, 1991). In addition, the 2010 Commission on Rehabilitation Counselor Certification (CRCC) Code of Professional Ethics outlined new standards for practice for rehabilitation educators, students, and practitioners in the area of advocacy, including advocacy in the area of civil rights, legislation, and public policy that affect clients' choices about their education, employment, and ability to live independently in the community. Indeed, rehabilitation counselors have an ethical obligation to become informed and involved in the policy design and implementation process, in particular when policies being debated at the local, state, and national levels determine how scarce resources will be allocated to consumer programs and services:

> Therefore, steps should be taken to clarify, to inform, and to influence this debate in the arena of public policy and societal attitude. Consumer advocacy is an ethical responsibility of rehabilitation counselors. (Tarvydas & Cottone, 1991, p. 16)

Thus, to ensure that rehabilitation counselors have the knowledge, skills and awareness to practice competently and ethically in the area of the ADA, more research in the area of law and ethics is needed (Tarvydas & Cottone, 1991). More detailed information about what happens in the courtroom may lead to a more comprehensive and realistic understanding of how the law works, and increase rehabilitation counselors' abilities to inform clients of their situations and rights under the ADA so that they can make truly informed decisions regarding their options and choices.

Another way to improve rehabilitation counselor knowledge, skills, and awareness about the impact of policy design and implementation on service delivery systems is to develop curricula that emphasizes the origin, funding, and administration of the agencies and programs that rehabilitation counselors and their clients interface with on a daily basis. Improving rehabilitation counselors' understanding about which governmental and legal institutions govern the operations of rehabilitation agencies and

programs may increase counselors' self-efficacy in the area of advocacy. Most rehabilitation counselors act as advocates at the client level in their day-to-day practice; however, advocacy at the systems level may require more knowledge about underlying models that guide agency and program practice. Rehabilitation counselors need to understand the program structures and eligibility requirements of dozens of programs on the local, state, and federal levels, and, in addition, know when to refer clients to other agencies or set up collaborating relationships with partner agencies (Schriner, 1995).

Workers with disabilities now compete in a global economy, and in a work environment where labor and labor unions have decreasing power (Geogehagen, 2004). Therefore, ethical practice requires that rehabilitation counselors have an understanding of how changes in the global economy, for example, changes in labor laws, trade agreements, and treaties, may affect the local economy and a client's ability to find employment. An understanding of labor law and labor unions may also benefit rehabilitation counselors who work with employers who operate under CBAs. Developing knowledge and skills in the area of labor relations may assist the rehabilitation counselor in developing productive rather than adversarial relationships with organized labor that will benefit all employees, not just employees with disabilities (Bruyère, Johnson, & Reiter, 2010)

Finally, service delivery systems are currently operating in a time of budgetary austerity. Rehabilitation counselors, already working with decreased agency and government budgets, need to be prepared for a shift in the way services are delivered. The rehabilitation counselors who will be best prepared to meet the changes brought about by a diverse workforce, including older employees and returning Iraq and Afghan war veterans, as well as continued cuts in funding for service delivery systems will be those who have a knowledge base in disability policy (Schriner, 1995) and are competent in advocacy and multicultural counseling techniques (Liu & Toporek, 2004).

Limitations

This research examined judicial opinions decided under Title I of the ADA and charged under disparate impact theory. The study and the results of the study have several limitations. For example, this study employed qualitative design and methodology to examine judicial opinions. Qualitative studies do not incorporate the quantitative concepts of random sampling, reliability, and validity in their analysis; therefore, unlike quantitative research, the results of a qualitative study cannot be generalized to the larger population (Patton, 2002). Thus, the results of this research cannot be generalized to judicial opinions not included in this study (Denzin & Lincoln, 2005; Patton, 2002).

This research examined a subset of judicial opinions in ADA Title I cases, specifically disparate impact cases, from the Act's July 26, 1992, effective date through December 31, 2008, after which date the ADA Amendments Act of 2008 became effective. "The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009" (U. S. EEOC, *Questions and answers on the final rule implementing the ADA Amendments Act of 2008,* n.d.). Therefore, Title I disparate impact cases filed under the ADA AA may be substantially different from cases filed under the ADA of 1990. For example, the ADA AA:

> made a number of significant changes to the definition of 'disability.' It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The final regulations were published in the Federal Register on March 25, 2011. (EEOC, *Questions and answers on the final rule implementing the ADA Amendments Act of 2008,* n.d.)

The focus of this study was disparate impact cases, which are a very small percentage of the cases decided by U.S. Appellate Courts under the ADA. In addition, this study limited its analysis to ADA disparate impact cases, which may be materially different from ADEA or Title VII or Rehabilitation Act disparate impact cases. The researcher chose to examine disparate impact cases because they focus on policies and practices that may discriminate against people with disabilities as a group rather than as

individuals (U. S. EEOC, 2008). The policy-based or minority group approach is more closely aligned with the sociopolitical perspective of disability (Gill et al., 2003; Hahn, 1984). However, because disparate impact cases are few in number, they may be materially different from other types of ADA cases, such as disparate treatment cases. Part of this difference may be due to the type of relief available to parties filing disparate impact cases: "Disparate impact cases are not litigated often in ADA settings because there are no damages available for employment claims and because most cases involve individualized assessments" (L. Sandler, personal communication, October 6, 2008). Damages are "the money that a person may recover at law when he has been harmed" (Mellinkoff, 1992, p. 147).

This study used computer-assisted legal research (CALR) to locate the cases to be analyzed in this study. The researcher chose Westlaw, a subscription-based or commercial electronic database, to identify the cases that comprised the sample in this study. Westlaw, along with LexisNexis, is one of the most widely used commercial electronic databases for legal research in both U.S. law schools and legal practice. One advantage of using electronic legal databases such as Westlaw is their ability to compile large amounts of court records in a searchable format to save legal researchers time and improve accuracy (Hall & Wright, 2008). However, there is a lack of standardization across databases; for example, Westlaw uses Keycite and LexisNexis uses Shepards, respectively, as citation systems. In addition, the cases contained in both Westlaw and LexisNexis databases are drawn from published print volumes, known as reporters. The reporters are organized by either jurisdiction or topic. ThomsonWest, the publishing arm of Westlaw, exercises editorial control over the content of its reporters; therefore, a limitation of using commercial reporters is that not every case is included in the reporters. In addition, some cases are not released for publication by the court. These "unpublished" cases are not precedential and cannot be cited as such. ThomsonWest includes unpublished cases in its online database and compiles them in its *Federal Appendix*

reporter. Approximately 80% of federal court of appeals cases are unpublished (Gerken, 2004). This study examined both published and unpublished ADA disparate impact cases; however, it is important to note that there may be material differences between published and unpublished cases.

Another consideration is the type of judicial opinion. For example, some opinions are *per curiam* (Latin, "through the court"). In these cases, the authors of the majority opinion are not revealed; however, the name of the author (or authors) of the minority or dissenting opinion is revealed in *pur curiam* cases.

Finally, although the researcher has 13 years' experience as a court reporter, and is therefore familiar with legal terminology and the process of litigation, it is important to note that the researcher has no formal training in the law and is not an attorney. Thus, the researcher views the law and cases discussed within this study from the perspective of a disability and rehabilitation scholar and educator rather than as a legal scholar.

Summary

This chapter discussed the study's findings and described how the findings may contribute to research and practice in the field of rehabilitation counseling. Specifically, this study may provide information about the process of litigation in general, and about ADA Title I disparate impact cases specifically, which may improve rehabilitation counselors' knowledge and skills about the ADA. Rehabilitation counselors are charged by their code of professional ethics to act as advocates. Advocacy in the context of the law and litigation in the employment setting entails understanding employers' duties and responsibilities under the ADA, particularly n the area of reasonable accommodations. The chapter also discussed the need for more research in the area of ADA Title I reasonable accommodations cases to increase the field's understanding of what aspects of the accommodations process are most problematic for employers, with the goal of making suggestions and improvements in the process proactively to prevent the time and expense of litigation. In addition, the theory of disparate impact is different from

disparate treatment, in that, unlike disparate impact, there is no assertion that the discrimination is intentional. The findings in this study may, however, inform disability and rehabilitation scholars about ADA disparate impact cases, a body of law about which little is known.

A substantial record of quantitative research has established that judicial interpretation of Title I of the ADA has not met the expectations of the disability community or the Congress. However, knowledge about judicial interpretation of Title I of the ADA is largely based on analysis of the outcomes of litigation rather than on the process of the litigation. The present study brought the tradition of legal content analysis into traditional quantitative rehabilitation research and provided a new method for understanding the role of the law in rehabilitation practice. It also may provide practitioners with an understanding of the manner in which language used by policymakers is interpreted by the courts, which may, in turn, inform and improve the development of public policies and practices that serve people with disabilities.

In addition, the patterns in trends identified in ADA Title I DI cases law may provide information about the types of policies and practices that are most frequently litigated. Rehabilitation practitioners may be able to use the information in this study to develop education and outreach strategies for employers on best practices for hiring, accommodating, and promoting employees with disabilities. Because the workplace policies and procedures identified in the study are neutral on their face, rather than intentionally discriminatory, employers may benefit from information that assists them in evaluating their policies and procedures proactively, which may avoid costly and time-consuming litigation. Finally, workplace policies and procedures that fairly represent the essential function of the job and are applied uniformly to workers with and without disabilities will contribute to a more diverse workforce.

APPENDIX A

AMERICANS WITH DISABILITIES ACT

TITLE I DISPARATE IMPACT CASES, 1992-2012

Table A1. Americans with Disabilities Act Title I Disparate Impact Cases, 1992-2012

Case Name	Case Number	Year of Decision	Other Claims	Circuit
EEOC v. Kronos[b]	694 F.3d 351	2012		3
EEOC v. Randstad	685 F.3d 433	2012	Title VII, race	10
Lopez v. Pacific Maritime[a]	636 F. 3d. 1197	2011, Mar.	CA FEHA; DT##	9
Lopez v. Pacific Maritime[a]	657 F. 3d. 762	2011, Sept.	CA FEHA; DT	9
EEOC v. Kronos[b]	620 F. 3d. 287	2010		3
Rivera-Garcia v. Sistema Univ.	442 F.3d 3	2006		1
Hernandez v. Hughes[c]	292 F.3d 1038	2002		9
Hernandez v. Hughes#	362 F. 3d 564	2004		9
Douglas v. California Youth Auth.	271 F.3d 812	2001	Eleventh Amendment; Rehab Act	9
Lawson v. CSX Transp., Inc.	245 F.3d 916	2001		7
Burns v. Coca-Cola	222 F.3d 247	2000	RA###	6
Boersig v. Union Electric Co.	219 F.3d 816	2000	RA	8
Erickson v. Board of Governors	207 F.3d 945	2000	Eleventh Amendment	7
Schneiker v. Fortis Ins. Co.	200 F.3d 1055	2000	RA	7
Belk v. Southwestern Bell	194 F.3d 946	1999	RA; DT	8
Pond v. Michelin	183 F.3d 592	1999	RA; DT	7
Gonzales v. City of New Braunfels	176 F.3d 834	1999	RA	5
Gantt v. Wilson	143 F.3d 1042	1998	RA; ADEA	6
Dalton v. Subaru	141 F.3d 667	1998	RA	7
Matthews v. Commonwealth Edison	128 F.3d 1194	1997		7
Sieberns v. Wal-Mart	125 F.3d 1019	1997	RA	7
Eckles v. Consolidated	94 F.3d 1041	1996	RA	7
Kennedy v. Chemical Waste	79 F.3d 49	1996		7

[a] Two appeals in the same case. The most recent case was analyzed.

[b] Two appeals in the same case. The 2012 case dealt with procedural issues (cost-sharing and confidentiality orders) so only the 2010 case was analyzed.

[c] Became U.S. Supreme Court Raytheon v. Hernandez, 540 U.S. 44 (2003).

#Two appeals in the same case; the 2004 case (on remand from Supreme Court) was analyzed

##ADA Reasonable accommodation claim

###ADA Disparate treatment claim

APPENDIX B

U.S. APPELLATE COURT RULINGS ON ELEMENTS OF DISPARATE IMPACT CASE

Table B1. U.S. Appellate Court Rulings on Elements of Disparate Impact Case

Four Elements of ADA Disparate Impact Case	Plaintiff Claim and Appellate Court Ruling	
	Plaintiff Claim	Court Ruling
1) Identify policy	Lopez (2011) Hernandez (2004) Lawson (2001) Schneiker (2000) Boersig (2000) Burns (2000) Gonzales (1999) Belk (1999) Pond (1999) Dalton (1998) Gantt (1998) Sieberns (1997) Eckles (1996)	Schneiker (Appellate court agreed with district court that plaintiff not disabled, so DI claim fails) Sieberns (Requested DI claim on appeal; court rejected the request because plaintiff did not allege DI claim and presented no statistical evidence) Lawson (Reversed and remanded in favor of plaintiff. Appellate court stated that it made no judgment on whether plaintiff waived DI claim, as employer asserts)
2) Identify employer's use of policy	Lopez (2011) Hernandez (2004) Boersig (2000) Burns (2000) Gonzales (1999) Belk (1999) Pond (1999) Dalton (1998) Gantt (1998) Eckles (1996)	
3) Demonstrate DI on self	Lopez (2011) Hernandez (2004) Boersig (2000) Burns (2000) Gonzales (1999) Belk (1999) Pond (1999) Dalton (1998) Gantt (1998) Eckles (1996)	Gonzales (Policy is facially neutral, but plaintiff did not show that policy had an effect on him) Gantt (Appellate court determined policy is uniform) Dalton; Burns; Eckles; Pond; Boersig (Bona fide promotional, leave or seniority policy under collective bargaining agreement)
4) Demonstrate causal relationship	Lopez (2011) Hernandez (2004) Belk (1999)	Lopez (No statistical evidence presented) Belk (Remanded for jury instructions on business necessity) Hernandez (Failed when tried on remand from U.S. Supreme Court; dispute over whether DI was proper theory)

APPENDIX C

SOCIOPOLITICAL MODEL OF DISABILITY FRAMEWORK

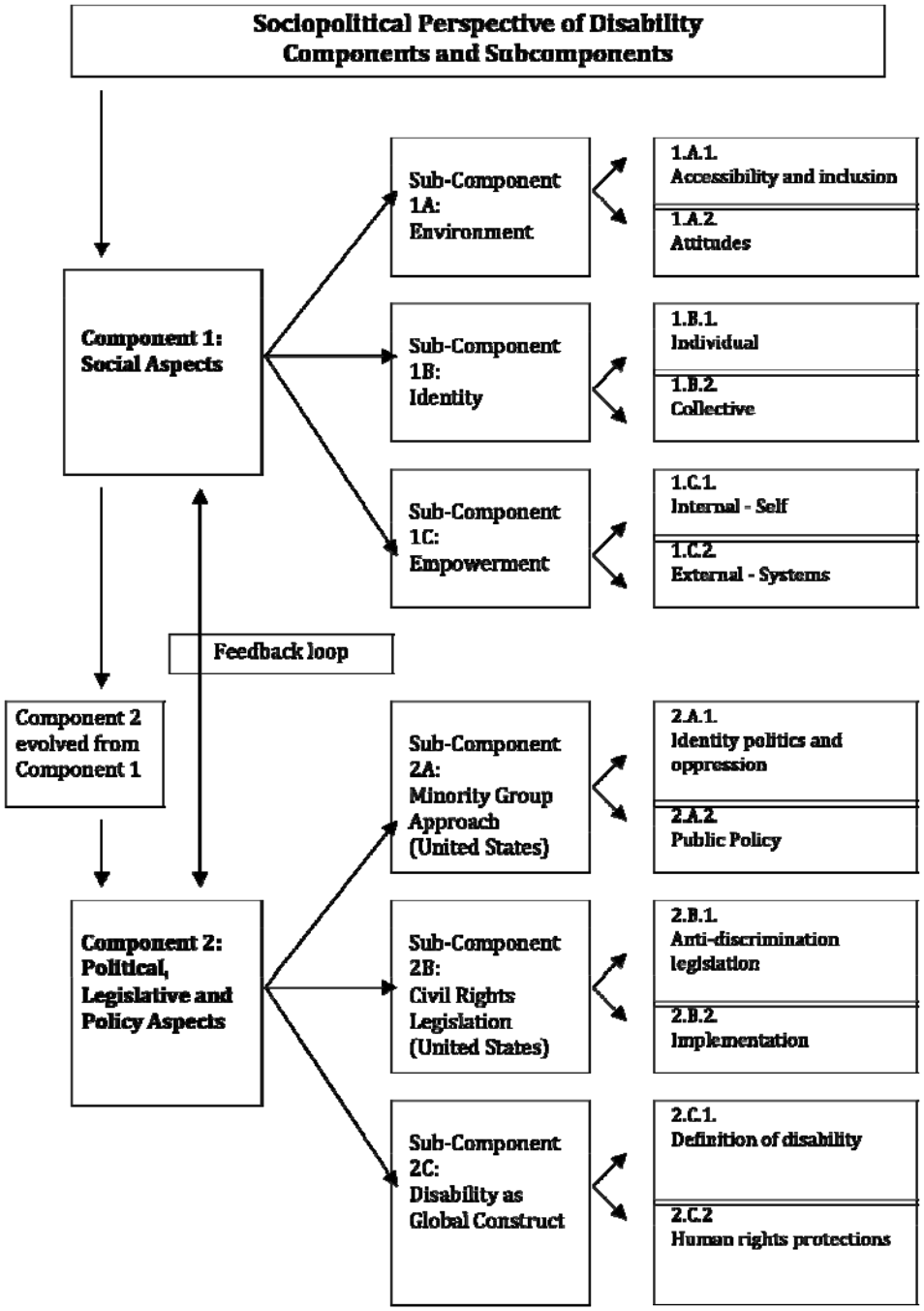

Figure C1. Sociopolitical Model of Disability Framework

APPENDIX D

CONCEPT MAP

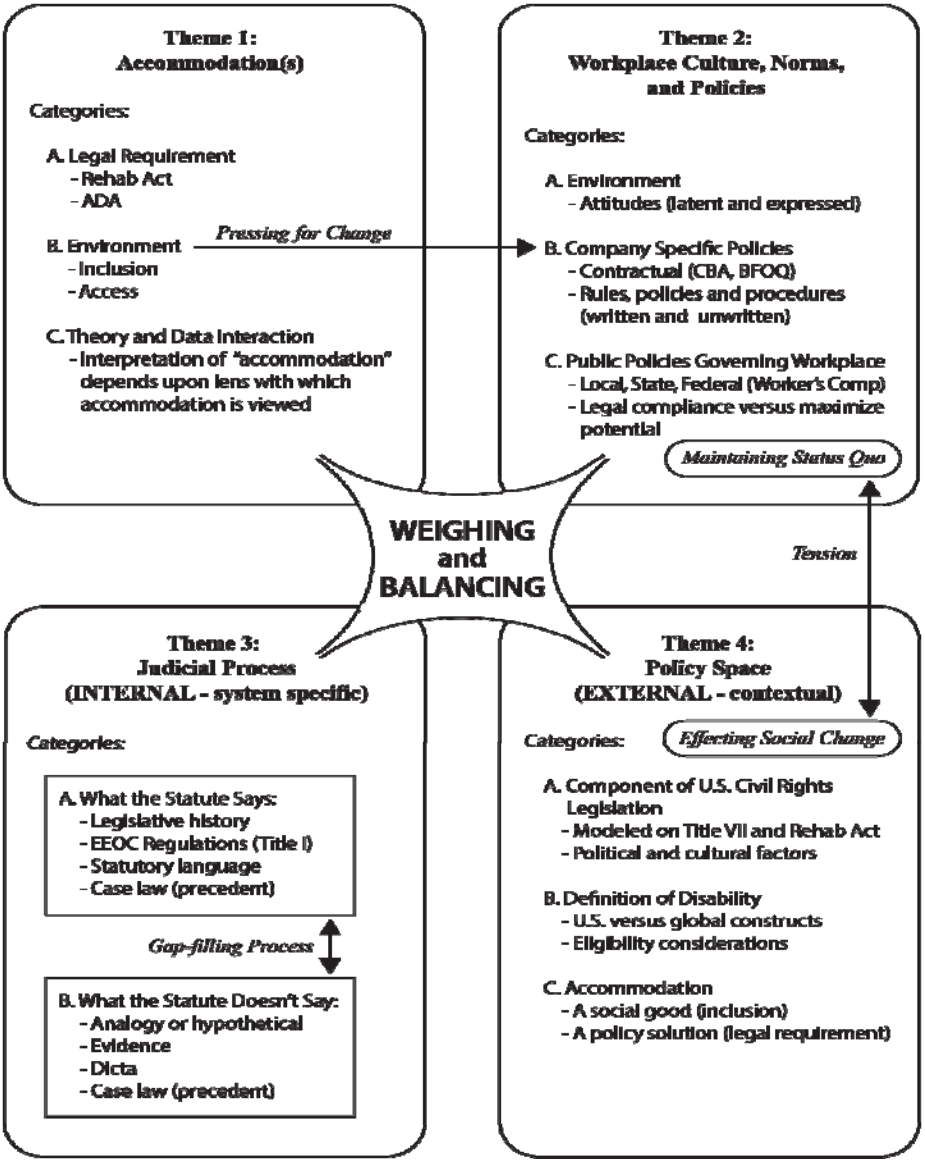

Figure D1. Concept Map

APPENDIX E

QUALITATIVE ANALYSIS CODEBOOK

Table E1. Initial Coding

COMPONENT	SUBCOMPONENT	DEFINITION (FROM THEORY/LIT REVIEW)	INCORPORATED INTO THEMES & CATEGORIES (DATA ANALYSIS)
1. Social Aspects		Disability is socially created. Examines the interaction between the PWD* and his/her environment	(Heading)
	1A: Environment	Locus of disability: Barriers present in the physical environment impede full participation of PWD. The goal is to increase access to the physical environment, and facilitate inclusion in the social environment (1.A.1) It is attitudes and environment (accessibility) that create stigma and prejudice (1.A.2)	Accommodations: We recognize that the ADA does expressly recognize "reassignment to a vacant position" as an expected form of reasonable accommodation, thereby rejecting a line of precedent under the Rehabilitation Act holding that reassignment of a disabled employee was never required. **[1A1; GF]** We also recognized that "to a great extent the employment provisions of the [ADA] merely generalize to the economy as a whole the duties, including that of reasonable accommodation, that the regulations under the Rehabilitation Act imposed on federal agencies and federal contractors." Vande Zande, 44 F.3d at 542. [**1A1; 2C2; 3B4]** Attitudes: For example, SIA's Manager of Safety and Environmental Affairs, Mark Siwiec, frequently expressed a negative attitude toward disabled employees, calling them "piece[s] of work," showing skepticism about their injuries, and volunteering the opinion that SIA should get rid of everyone with permanent restrictions. **[2A1]**

Table E1 (continued)

			Workplace Policies: Moreover, although the CBA's promotional system is based on departmental seniority rather than total length of employment, we find that this CBA creates a seniority system which Union Electric was not required to violate to accommodate Boersig's disability. See Benson, 62 F.3d at 1114. **[2B1; GF]** Finally, we must also briefly address Ms. Schneiker's assertion that Fortis' job posting system **[2B2]** has a disparate impact on its disabled employees. Workplace laws/regulations: Seniority systems contained in CBAs, such as the one involved in the instant case, create rights in union members which are protected by the National Labor Relations Act (NLRA), 29 U.S.C. § 151-187. **[2B1; 2C1]**
	1B: Identity	PWD engage in meaning making to create both an individual and collective identity. Adjustment to Disability; Transformation (1.B.1) Disability rights and disability culture (1.B.2)	

Table E1 (continued)

	1C: Empowerment	Answers the question: who is the expert? The individual with the disability (1.C.1) or the professional (1.C.2) Includes self-determination (choice) (1.C.1); locus of control (1.C.1 and 1.C.2); self (1.C.1) and systems (1.C.2) advocacy	Maximizing Potential: For similar reasons, the ADA does not require an employer to renegotiate a bona fide seniority system to avoid "screening out" a disabled employee who may not be able to reach the highest rung on a promotional series because of disability **[2C2].** In either case, the plaintiff invites the court to disrupt a carefully negotiated agreement between union and employer at the expense of other union employees who hold legitimate expectations of advancement based on the governing CBA. **[W&B]**
2. Political, Legislative, and Policy Aspects		Examines the interaction between PWD and government, policy, laws. Collective identity can be channeled into advocacy for civil rights protections and the development of policies that promote independence; full citizenship	(Heading)
	2A: Minority Group Approach (U.S.)	The minority group approach views PWD as minority group that has experienced oppression at the hands of the majority Developed out of earlier civil rights movements and identity politics in the U.S. (2.A.1) The design of public policy reflects society's views about disability (2.A.2)	Attitudes toward disability expressed in law/policy: A RIF is not an open sesame to discrimination against a disabled person. Christie v. Foremost Ins. Co., 785 F.2d 584, 587 (7th Cir. 1986). **[3B3]** Even if the employer has a compelling reason wholly unrelated to the disabilities of any of its employees to reduce the size of its work force, this does not entitle it to use the occasion as a convenient opportunity to get rid of its disabled workers. **[MSQESC]**

Table E1 (continued)

	2B: Civil Rights Legislation	Development (2.B.1) and implementation (2.B.2) of civil rights and anti-discrimination law, e.g., Rehab Act and ADA. The EEOC, the DOJ, and the Courts are responsible for implementation of the ADA (2.B.2)	Civil Rights Legislation; Implementation: As we noted in Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir.1995), the term "reasonable accommodation" in the ADA was apparently borrowed from the regulations issued by the Equal Employment Opportunity Commission ("EEOC") in implementation of the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. See 29 C.F.R. § 1613.704; S. Rep. at 31; H.R. Rep. at 62, 1990 U.S.C.C.A.N. at 344. **[1A1; 1A2; 3A3; 3A2]** This provision, Kennedy contends, was incorporated into the ADA along with the rest of Title VII's provisions regarding limitations periods **[4A1].**
	2C: Disability as a Global Construct	Asks the question: How should disability be defined in a global society and a global economy? (2.C.1) Human rights protections at the individual nation level and global efforts (treaties) (2.C.2)	Definition of Disability: During that 12-year period, the Social Security Administration ("SSA") reviewed Mr. Lawson's medical condition every two years and determined that he continued to meet its definition of disability, allowing Mr. Lawson continually to receive benefits. **[4B2]**

Table E2. Development of Themes, Categories, and Subcategories

COMPONENT	SUBCOMPONENT	DEFINITION (FROM THEORY/LIT REVIEW)	INCORPORATED INTO THEMES & CATEGORIES (DATA ANALYSIS)
1. Social Aspects		Disability is socially created. Examines the interaction between the PWD* and his/her environment	Incorporated into: Theme 1) Accommodations. Theme 2) Workplace Culture, Norms, and Policies. Theme 4) Policy Space.
	1A: Environment	Locus of disability: Barriers present in the physical environment impede full participation of PWD. The goal is to increase access to the physical environment, and facilitate inclusion in the social environment (1.A.1) It is attitudes and environment (accessibility) that create stigma and prejudice (1.A.2)	Incorporated into: Theme 1) Accommodations. Category 1B) Environment. Subcategory 1B1) Inclusion. Subcategory 1B2) Access. Category 1C) Theory and Data Interaction. Theme 2) Workplace Culture, Norms, and Policies. Category 2A. Environment. Subcategory 2A1) Attitudes (latent and expressed). Theme 4) Policy Space. Category 4C) Accommodations. Subcategory 4C1) A social good (inclusion)

Table E2 (continued)

	1B: Identity	PWD engage in meaning making to create both an individual and collective identity. Adjustment to Disability; Transformation (1.B.1) Disability rights and disability culture (1.B.2)	
	1C: Empowerment	Answers the question: who is the expert? The individual with the disability (1.C.1) or the professional (1.C.2) Includes self-determination (choice) (1.C.1); locus of control (1.C.1 and 1.C.2); self (1.C.1) and systems (1.C.2) advocacy	Incorporated into: Theme 2) Workplace Culture, Norms, and Policies. Category 2C2) Legal Compliance versus Maximizing Potential
2. Political, Legislative, and Policy Aspects		Examines the interaction between PWD and government, policy, laws. Collective identity can be channeled into advocacy for civil rights protections and the development of policies that promote independence; full citizenship	Incorporated into: Theme 1) Accommodations. Theme 2) Workplace Culture, Norms, and Policies. Theme 3) Judicial Process. Theme 4) Policy Space.
	2A: Minority Group Approach (U.S.)	The minority group approach views PWD as minority group that has experienced oppression at the hands of the majority Developed out of earlier civil rights movements and identity politics in the U.S. (2.A.1) The design of public policy reflects society's views about disability (2.A.2)	Incorporated into: Theme 2) Workplace Culture, Norms, and Policies. Category 2C1) Public Policies Governing Workplace. Theme 4) Policy Space. Category 4A) Component of U.S. Civil Rights Legislation Subcategory 4A2) Political and cultural factors.

Table E2 (continued)

			Category 4C) Accommodations. Subcategory 4C2) A policy solution.
	2B: Civil Rights Legislation	Development (2.B.1) and implementation (2.B.2) of civil rights and anti-discrimination law, e.g., Rehab Act and ADA. The EEOC, the DOJ, and the Courts are responsible for implementation of the ADA (2.B.2)	Incorporated into: Theme 1) Accommodations. Theme 2) Workplace Culture, Norms, and Policies. Theme 3) Judicial Process. Theme 4) Policy Space Category 4A Component of U.S. Civil Rights Legislation
	2C: Disability as a Global Construct	Asks the question: How should disability be defined in a global society and a global economy? (2.C.1) Human rights protections at the individual nation level and global efforts (treaties) (2.C.2)	Incorporated into: Theme 4) Policy Space Category 4B) Definition of Disability. Subcategory 4B1) U.S. versus Global Constructs

*Person with disability

Table E3. Second Analysis

Revised Codebook: Themes, Categories and Subcategories -- Data Analysis of 20 ADA Title I Disparate Impact Cases					
THEME	CATEGORY	SUBCATEGORY	DEFINITION	CODE	EXAMPLES
1. Accommodations			Accommodations increase access to both the built and social environments for people with disabilities, including the workplace. Accommodations are an important strategy in addressing societal discrimination against PWDs (Theory).	1	(Theory)
	1A. Legal Requirement		Refers to statements in the cases that refer to "reasonable accommodations" being a requirement under the law.	1A	(Heading)
		1A1. Rehab Act	Refers to statements in the cases that cite or reference to "reasonable accommodations" under the Rehab Act	1A1	We recognize that the ADA does expressly recognize "reassignment to a vacant position" as an expected form of reasonable accommodation, thereby rejecting a line of precedent under the Rehabilitation Act holding that reassignment of a disabled employee was never required. **[1A1; GF]**
		1A2. ADA	Refers to statements in the cases that cite or reference "reasonable accommodations" under the ADA.	1A2	

Table E3 (continued)

2. Workplace Culture, Norms, and Policies			Includes intangible workplace factors, such as culture and norms. Includes tangible factors, such as written policies, procedures, and legislation that govern the employee/employer relationship.	2	(Heading)
	2A. Environment		It is attitudes and environment (accessibility) that create stigma and prejudice (Theory)	2A	(Theory)
		2A1. Attitudes (latent and expressed)	Refers to statements in the cases that cite or reference employer or co-worker attitudes about disability in spoken or written formats, or any other type of communication (photos).	2A1	For example, SIA's Manager of Safety and Environmental Affairs, Mark Siwiec, frequently expressed a negative attitude toward disabled employees, calling them "piece[s] of work," showing skepticism about their injuries, and volunteering the opinion that SIA should get rid of everyone with permanent restrictions. **[2A1]**
	2B. Company Specific Policies		Refers to statements in the cases that cite or reference policies and procedures specific to an employer or a job/position.	2B	(Heading)
		2B1. Contractual (CBA/BFOQ)	Refers to statements in the cases that cite or reference legal contracts and agreements between the employer and labor unions (CBA)	2B1	Moreover, although the CBA's promotional system is based on departmental seniority rather than total length of employment, we find that this CBA creates a seniority system which Union Electric was not required to violate to accommodate Boersig's disability. See Benson, 62 F.3d at 1114. **[2B1; GF]**

Table E3 (continued)

		2B2. Rules, policies, and procedures (written and unwritten)	Refers to statements in the cases that cite or refer to the materials companies use to hire, train, promote, discipline, and discharge employees; for example, written and unwritten policies on conduct, absenteeism, tardiness, sick leave; job and position descriptions; and retirement and health care policies.	2B2	Finally, we must also briefly address Ms. Schneiker's assertion that Fortis' job posting system **[2B2]** has a disparate impact on its disabled employees.
	2C. Public Policies Governing Workplace		The design and implementation of public policy reflects attitudes about disability (Theory)	2C	(Theory)
		2C1. Local, State, and Federal.	Refers to statements in the cases that cite or refer to specific polices Refers to statements in the cases that cite or refer to specific state and federal policies that govern the employer/employee relationship and the operations of the workplace.	2C1	Seniority systems contained in CBAs, such as the one involved in the instant case, create rights in union members which are protected by the National Labor Relations Act (NLRA), 29 U.S.C. § 151-187. **[2B1; 2C1]**
		2C2. Legal compliance vs. maximizing potential	Refers to statements in the cases that cite or refer to the court's duty to consider the rights of each party affected by the litigation; for example, the employer, the non-disabled employees, and the qualified person with a disability.	2C2	For similar reasons, the ADA does not require an employer to renegotiate a bona fide seniority system to avoid "screening out" a disabled employee who may not be able to reach the highest rung on a promotional series because of disability **[2C2].**
3. Judicial Process			Refers to the process of litigation, including judicial decision-making (Data). Anti-discrimination laws are an important strategy in addressing workplace discrimination; however,	3	(Theory)

Table E3 (continued)

			the laws' implementation may be inconsistent with the intent of the legislation (Theory).		
	3A. What the Statute Says		Refers to the text of legal documents.	3A	(Heading)
		3A1. Legislative History	Refers to statements in the cases that cite or refer to the ADA's legislative history.	3A1	While the text of the ADA does not provide much support for Eckles' position, neither does it decisively answer the question of whether "reasonable accommodation" can require that the otherwise valid seniority rights of other employees be trumped. [GF] Thus we look also to the background of the ADA's "reasonable accommodation" concept and the legislative history of the ADA. **[3A1]**
		3A2. EEOC Regulations	Refers to statements in the cases that cite or refer to EEOC regulations.	3A2	As we noted in Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 542 (7th Cir.1995), the term "reasonable accommodation" in the ADA was apparently borrowed from the regulations issued by the Equal Employment Opportunity Commission ("EEOC") in implementation of the Rehabilitation Act of 1973, 29
					U.S.C. § 701, et seq. See 29 C.F.R. § 1613.704; S. Rep. at 31; H.R. Rep. at 62, 1990 U.S.C.C.A.N. at 344. **[1A1; 1A2; 3A3; 3A2]**

Table E3 (continued)

		3A3. Statutory Language	Refers to statements in the cases that cite or refer to the ADA's statutory language	3A3	The Act forbids discrimination against a "qualified" individual "because of the disability of such individual." 42 U.S.C. sec. 12112(a). **[3A3]** An individual who cannot perform the essential functions of the job even with a reasonable accommodation to his disability by the employer is not "qualified," 42 U.S.C. sec. 12111(8), **[3A3]** so the Act does not come into play. It is irrelevant that the lack of qualification is due entirely to a disability. **[W&B]**
		3A4. Case law (U.S. Supreme Court)	Refers to statements in the cases that cite or refer to cases decided by the U.S. Supreme Court	3A4	The Supreme Court decisively rejected the position of Hardison and the EEOC that the statutory requirement to accommodate necessarily superseded the collectively-bargained seniority rights of the other employees: "We agree that neither a collective bargaining contract nor a seniority system may be employed to violate a statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement." Id. At 79, 97 S.Ct. at 2274**. [3A4]**

Table E3 (continued)

	3B. What the Statute Doesn't Say		Refers to the written, spoken, or other types of communication (photos) that are extra-legal in nature.	3B	(Heading)
		3B1. Analogy or hypothetical	Refers to analogies or hypothetical examples used by the court to illustrate or explain a legal matter or decision.	3B1	This point is most easily seen by thinking of a RIF as a kind of hiring: the employer has decided to reduce its work force from, say, 100 to 80 employees; this means it has 80 slots to fill and in filling them must choose among 100 "applicants." **[3B1]**
		3B2. Evidence	Refers to testimony, written documents submitted by the parties to the case. Also includes references to the circuit court record in the case.	3B2	Kennedy does not claim that the defendants' seniority system discriminates against disabled persons or anybody else. **[3B2]**
		3B3. Dicta	Refers to judicial commentary that carries no legal weight.	3B3	The qualification limiting the new statute of limitations to intentionally discriminatory seniority systems is merely a recognition that those are the only systems that can be challenged under Title VII. **[4A1]** There is, the argument continues, no exemption in the ADA for bona fide seniority systems. Therefore disparate impact must be a basis for challenging seniority systems under the ADA **(an issue, however, on which there is as yet no appellate ruling) [3B3]**

Table E3 (continued)

					A RIF is not an open sesame to discrimination against a disabled person. Christie v. Foremost Ins. Co., 785 F.2d 584, 587 (7th Cir. 1986). **[3B3]**
		3B4. Case law (Appellate Court)	Refers to statements in the cases that cite or refer to cases decided by U.S. Appellate Courts.	3B4	As the Supreme Court pointed out, however, the footnote is inconsistent with our basic holding in that initial decision. See Raytheon Co., 540 U.S. at ___, n. 5, 124 S.Ct. at 519, n. 5. Accordingly, we withdraw the footnote. **[3A4]** (Hernandez v. Hughes Missile, 362 F.3d 564 (2004)).
4. Policy Space			All anti-discrimination legislation shares a similar focus or purpose; that is, to advance and protect the civil rights of minority groups who have experienced societal discrimination (Theory)	4	(Theory)
	4A. Component of U.S. Civil Rights Legislation		Refers to statements in the text that cite or refer to the ADA as a civil rights statute.	4A	(Heading)
		4A1. Title VII and Rehab Act	Refers to statements in the text that cite or refer to the ADA's relationship to other civil rights legislation, such as the Rehab Act and Titles VI and VII.	4A1	This provision, Kennedy contends, was incorporated into the ADA along with the rest of Title VII's provisions regarding limitations periods **[4A1].**
	4B. Definition of Disability		The definition of disability changes, depending on the context (Theory).	4B	(Theory)

Table E3 (continued)

		4B2. Eligibility Considerations	Refers to statements in the text that cite or refer to the definition of disability within the statutes, policies, programs, and services that comprise disability policy, including disability employment policy.	4B2	During that 12-year period, the Social Security Administration ("SSA") reviewed Mr. Lawson's medical condition every two years and determined that he continued to meet its definition of disability, allowing Mr. Lawson continually to receive benefits. **[4B2]**
Relationships					
Weighing and balancing			Weighing and balancing includes references in the text of the judicial opinions to statements courts make about the factors that influence their decision-making process.	W&B	In either case, the plaintiff invites the court to disrupt a carefully negotiated agreement between union and employer at the expense of other union employees who hold legitimate expectations of advancement based on the governing CBA. **[W&B]** Both sides and all of the amici in this case attempt to make much of certain aspects of the ADA's legislative history. Not surprisingly, the opposing positions rely on different parts of this history. **[W&B]**
Gap-filling			Gap-filling includes references in the text of the judicial opinions to the process courts engage in when making decisions in cases where information is missing or incomplete.	GF	In Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir.1995), we held that the ADA does not require an employer to accommodate a disabled employee by violating a "bona fide" seniority system**. [3B4**]

Table E3 (continued)

					A "bona fide" seniority system has been defined as "one that was created for legitimate purposes, rather than for the purpose of discrimination." Eckles v. Consolidated Rail, 94 F.3d 1041, 1046 n. 7 (7th Cir.1996). **[3B4]** Boersig offers no evidence that Union Electric and Local 1439 incorporated the promotion system at issue in this case to discriminate against the disabled. **[3B2]** Thus, Boersig has failed to demonstrate that the promotion system is not "bona fide." **[GF]** Moreover, although the CBA's promotional system is based on departmental seniority rather than total length of employment, we find that this CBA creates a seniority system which Union Electric was not required to violate to accommodate Boersig's disability. See Benson, 62 F.3d at 1114. **[2B1; GF]**
Maintaining status quo vs. effecting social change			Maintaining status quo versus effecting social change includes references in the text of the judicial opinions to statements the courts make about the rights of one group against the rights of another group.	MSQ ESC	A RIF is not an open sesame to discrimination against a disabled person. Christie v. Foremost Ins. Co., 785 F.2d 584, 587 (7th Cir. 1986). **[3B3]** Even if the employer has a compelling reason wholly unrelated to the

Table E3 (continued)

					disabilities of any of its employees to reduce the size of its work force, this does not entitle it to use the occasion as a convenient opportunity to get rid of its disabled workers. **[MSQESC]**

APPENDIX F

GLOSSARY

Table F1. Glossary

Disability	The term "disability" means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such impairment (42 U.S.C. § 12101-12213).
Disability-related characteristics	In this study, this term referred to language contained within U.S. appellate court opinions in ADA Title I disparate impact cases that referred to disability in general, or a specific person or persons with a disability (42 U.S.C. § 12101-12213, Section 12102).
Eleventh Amendment Immunity (sovereign immunity)	State government, and any of its associated agencies, cannot be sued without its consent. The receipt of benefits from a federal government agency or program abrogates immunity on the issue in question.
Inter alia	Indicates that other holdings were made by a court in a case but only one ruling is cited by the court.
Judicial opinion	A legal document that states the reasoning behind a decision in a court case. Depending on the type of court and the type of case, an opinion may be written by a single judge or a panel of judges.
Minority Group Model of Disability	Disability is a characteristic that merits the protection of civil rights legislation if people with disabilities are viewed as a minority group that has experienced societal discrimination similar to other minority groups, such as racial minorities and women (Hahn, 1984; 1985). See also sociopolitical perspective of disability.
Motion	A motion is a charging or opposing party's request to the court, asking for a specific action on the part of the court.
Motion for Summary Judgment	A motion is a charging or opposing party's request to the court, asking for a specific action on the part of the court. A motion for summary judgment is a request to the court to enter judgment without a trial because there is no legal foundation to support a ruling for the other party. A judgment granted when there is no genuine issue of material fact upon which the law can provide relief. See also Summary Judgment.
Precedent	The prior decisions of a court furnish the basis for deciding later cases involving similar issues or fact patterns.
Pretext	A reason given for an action that is not the actual reason.
Prima facie case of discrimination by disparate impact	A prima facie case of discrimination by disparate impact requires that plaintiff (1) identify the challenged employment practice or policy, and pinpoint the employer's use of it; (2) demonstrate a disparate impact on a protected group; and (3) demonstrate a causal relationship between the identified practice and the disparate impact.
Protected Class	A term used in United States anti-discrimination law that describes specific characteristics that cannot be targeted for discrimination or harassment. Examples of protected classes and the laws governing the protected class: Race: Civil Rights Act of 1964; Age (40 and over); Age: Discrimination in Employment Act of 1967; Disability: Vocational Rehabilitation and Other Rehabilitation Services of 1973; Americans with Disabilities Act of 1990 and Amendments Act of 2008 .

Table F1 (continued)

Reasonable accommodation	The term "reasonable accommodation" may include: making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities (Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12213, Section 12112).
Remand	A decision made by an appellate court to send a case back to the trial court (district court) for retrial
Reverse	A decision made by an appellate court to overturn a lower court's decision in a case.
Sociopolitical perspective of disability	A theoretical framework that views disability as socially constructed, meaning that disability is caused by external factors, such as societal attitudes and inaccessible environments. Physical or cognitive conditions may cause impairments or functional limitations, but these do not have to lead to disability unless society fails to include or accommodate individuals with these conditions. This theory of disability originated in the United Kingdom during the 1980s, where it was termed the social model of disability. The political component of the framework was added by scholars in the United States, who sought political and legal remedies to address societal discrimination (Hahn, 1984; 1985). See also minority group model of disability.
Summary Judgment	A judgment granted when there is no genuine issue of material fact upon which the law can provide relief.

APPENDIX G

ALL CASES IN INITIAL SAMPLE

Table G1. All Cases in Initial Sample

Case Name	Case Number	Decision Date	ADA Title I DI/DT/FA	ADA Title II	ADA Title III	Other
Young v. UPS	F. 3d.	2013				Outside date range
Serrano v. Cintas	699 F.3d. 884	2012				Title VII, sex
EEOC v. Kronos	694 F. 3d 351	2012	DI			
Apsley v. Boeing	691 F.3d 1184	2012				ADEA
EEOC v. Ranstad	685F.3d 433	2012	DI			Title VII
Cinnamon Hills Youth	685 F.3d. 917	2012			DI	FHA; Rehab Act
Hopkins v. Springfield	485 Fed. Appx 137	2012		DT		
James v. City of Costa Mesa	684 F. 3d. 825	2012		DI		
James v. City of Costa Mesa	700 F.3d. 394	2012		DI		
West v. Prudential Ins.	463 Fed. Appx. 170	2011				Title VII
Frame v. City of Arlington	657 F. 3d. 215	2011		DT		Rehab Act
Brief v. Albert Einstein College	423 Fed. Appx. 88	2011			DT	
Lopez v. Pacific Maritime	636 F. 3d. 1197	2011	DI			CA FEHA
Lopez v. Pacific Maritime	657 F. 3d. 762	2011	DI			CA FEHA
Smith v. NYCHA	410 Fed. Appx. 404	2011		DT		
Everson v. Leis	412 Fed. Appx. 771	2011		DT		
Barton v. Clancy	632 F.3d. 9	2011	DT			Title VII
Wilson v. Director of Adult	407 Fed. Appx. 111	2010		DI		Rehab Act
Astralis Condo v. Secretary HUD		2010			DI	FHAA
EEOC v. Kronos	620 F. 3d. 287	2010	DI			
Spees v. James Marine	617 F. 3d. 380	2010	DT			PDA
AAPD v. Harris	605 F. 3d. 1124	2010		DI		
Gillard v. Northwestern	366 Fed. Appx. 686	2010				Title II Civil Rights Act
Quad v. Town of Southhold	369 Fed. Appx. 202	2010		DI		FHA
Harris v. Beth Israel Medical Center	367 Fed. Appx. 184	2010	DT			

Table G1 (continued)

Massbaum v. WNC Management	361 Fed. Appx. 904	2010			DT	FHA
Fulton v. Goord	591 F. 3d. 37	2009			FA	Rehab Act
Alvarado v. Cajun	588 F.3d. 1261	2009	DT			
Lopez v. Massachusetts	588 F.3d 69	2009				Title VII
Lonberg v. City of Riverside	571 F.3d 846	2009		DI		
Mitchell v. Brooklyn Hosp.	326 Fed. Appx. 44	2009	DT			Title VII; ADEA
Detterline v. Salazar	320 Fed. Appx. 853	2009				Rehab Act
Schwartz v. City of Treasure Island	544 F.3d 1201	2008		DI		FHA, Rehab Act
McDonald v. Coldwell Banke		2008				Title VII; FHA
Tucker v. Tennessee	539 F.3d. 526	2008		DI		
Boldridge v. Tyson	280 Fed. Appx. 723	2008	DI			
Miller v. American Airlines	525 F.3d 520	2008	DT			ERISA
Scott v. Eastman Chemical	275 Fed. Appx. 466	2008	DI			
Floyd v. Home Depot	274 Fed. Appx. 763	2008	DI			
Munson v. Del taco	522 F.3d 997	2008			DI	
Femino v. NFA Corp	274 Fed. Appx. 8	2008	DT			ERISA
Budnick v. Town of Carefree	518 F.3d 1109	2008			DI	FHAA
A Helping Hand v. Baltimore Co.	515 F.3d. 356	2008			DI	
Mark v. Lemahieu	513 F.3d 922	2008				IDEA; Rehab Act; FAPE
Hollenbeck v. US Olympic	513 F.3d 1191	2008			DI	Rehab Act
Bates v. UPS	511 F.3d. 974	2007	DI			
Alaska v. EEOC	508 F.3d 476	2007				Title VII, race, sex
Sheely v. MRI radiology	505 F.3d 1173	2007			DT	Rehab Act

Table G1 (continued)

Crawford v. U.S. Dept. of Homeland Security	245 Fed. Appx. 369	2007				Title VII, race
New Directions v. City of Reading	490 F.3d 293	2007		DI		
Wallace v. Georgia Dept. of Trans.	212 Fed. Appx. 799	2006	DI			Title VII
Bates v. UPS	465 F.3d 1069	2006	DI			
Wisconsin Comm. Services v. City of Milwaukee	465 F.3d 737	2006		DI		Rehab Act
Gulino v. NY State Edu. Dept.	460 F.3d. 361	2006				Title VII, race
Comm. For Equity v. Michigan H.S. Athletic	459 F.3d 676	2006				Title VII, sex
Minor v. Centocor	457 F.3d 632	2006				ADEA; Title VII, sex
Chaudhry v. Neighborhood Health	178 Fed. Appx. 900	2006		DT		ERISA
Rivera-Garcia v. Sistema Univ.	442 F.3d 3	2006	DT			
Affordable Housing re City	433 F.3d 1182	2006				Title VII
Ryburn v. Potter	155 Fed. Appx. 102	2005				Title VII, race
Comm. Services v. Wind Gap Mun.	421 F.3d 170	2005		DI		FHAA
Sirridge v. Bar-S Food	138 Fed. Appx. 948	2005				ADEA
Wisconsin Comm. Services v. City of Milwaukee	413 F.3d 642	2005		DI		Rehab Act
Woodman v. WWOR-TV	411 F.3d 69	2005				ADEA
Disability Advocates v. McMahon	124 Fed. Appx. 674	2005		DT		
Dillery v. City of Sandusky	398 F.3d 562	2005		DT		Rehab Act

Table G1 (continued)

Cooper v. Southern Co.	390 F.3d 695	2004				Title VII, race
Sandoval v. City of Boulder	388 F.3d 1312	2004				Title VII, race, sex
McGary v. City of Portland	386 F.3d 1259	2004		RA		FHAA
Ability Center v. Sandusky	385 F.3d 901	2004		DI		
Three Rivers v. Housing Authority	382 F.3d 412	2004				Rehab Act
Sanchez-Lopez v. Fuentes-Pujols	375 F.3d 121	2004				First Amendment
Tsombanidis v. West Haven	352 F.3d 656	2003		DI		FHAA
Chaffin v. Kansas St. Fair	348 F.3d 850	2003		DI		
Giebeler v. M&B Ass'n	343 F.3d 1143	2003				FHAA
Dehoyos v. Allstate	345 F.3d 290	2003				FHA
Goldman v. Standard	341 F.3d 1023	2003				CA Unruh Act
Davidson v. AOL	337 F.3d 1179	2003	DT			
Save our Valley v. Sound Trans	335 F.3d 932	2003				Title VII
Endres v. Indiana St. Police	334 F.3d 618	2003				Title VII, religion
Holmes v. Marion County	349 F.3d 914	2003				Title VII, religion
Henrietta D. v. Bloomberg	331 F.3d 261	2003		DI		
Crano v. Graphic Packaging	65 Fed. Appx. 705	2003	FA			
Nanda v. Board of Trustees	303 F.3d 817	2002				Title VII, race, sex, national origin
Lovell v. Chandler	303 F.3d 1039	2002		DI		Rehab Act
Cudjoe v. Independent	292 F.3d 1058	2002				Rehab Act; IDEA; FERPA; Title VI, race
Hernandez v. Hughes	292 F.3d 1038	2002	DI			
Hernandez v. Hughes	298 F.3d 1030	2002	DI			
Pryor v. National	288 F.3d 548	2002				Title VI, race
Turney v. Catholic Health	35 Fed. Appx. 166	2002	DT			Title VII, ADEA, Rehab Act, FMLA

Table G1 (continued)

Omya Inc. v Vermont	33 Fed. Appx. 581	2002				Limitation of commerce
Lapid-Laurel v. Zoning Board	284 F.3d 442	2002				FHAA
Drayton v. Western Autor	Not reported	2002				Title VII, race
RECAP v. City of Middletown	294 F.3d 35	2002		DI		FHA, Rehab Act
RECAP v. City of Middletown	281 F.3d 333	2002		DI		FHA, Rehab Act
Hibbs v. Department of H.R.	273 F.3d 844	2001				FMLA
Reikenbacker v. Foster	274 F.3d 974	2001		DI		Rehab Act
Morton v. UPS	272 F.3d 1249	2001	DI			
Johnson v. K Mart	273 F.3d 1035DT	2001				
Casteel v. Executive Board	272 F.3d 463	2001				ADEA
Douglas v. CYA	271 F.3d 812	2001	DI			Rehab Act
Garcia v. SUNY	280 F.3d 98	2001		DI		
Thompson v. Colorado	258 F.3d 1241	2001		DI		11th Amendment
Thompson v. Colorado	278 F.3d 1020	2001		DI		11th Amendment
Jeffries v. Wal-Mart	15 Fed. Appx. 252	2001				Title VII
Adams v. Florida Power	255 F.3d	2001				ADEA
Rummery v. Illinois Bell	250 R.3d 553	2001				ADEA
Lowery v. Hazelwood	244 F.3d 654	2001	DT			Rehab Act, MHRA
Lawson v. CSX	245 F.3d 916	2001	DI			
O'Rourke v. City	235 F.3d 713	2001				Title VII, sex
Hein V. All America	232 F.3d 482	2000	DT			ADEA
Reese v. State of MI	unpublished disposition	2000	DT			
Mullins v. Crowell	228 F.3d 1305	2000				Rehab Act
Popovich v. Cuyahoga	227 F.3d 627	2000		DT		11th Amendment
EEOC v. Humiston-Keeling	227 F.3d 1024	2000	DI			
Varner v. Illinois State	226 F.3d 927	2000				Equal Pay Act

Table G1 (continued)

Chittister v. Department	226 F.3d 223	2000				FMLA
Wakefield v. State Farm	unpublished disposition	2000				Title VII, race
Lavia v. Pennsylvania	224 F.3d 190	2000	DI			
Katz v. Regents	229 F.3d 831	2000				ADEA, FEHA
Burns v. Coca-Cola	222 F.3d 247	2000	DI			
Boersig v. Union Elec.	219 F.3d 816	2000	DI			
Phillips v. Union Pacific	216 F.3d 703	2000	DT			Title VII, race
Garrett v. AutoZone	224 F.3d 765	2000	DT			
Frank v. United Airlines	216 F.3d 845	2000	DT			Title VII, ADEA
Allen v. Interior	214 F.3d 978	2000	DT			
Arguello v. Conoco	207 F.3d 803	2000				Title VII, race
Erickson v. Board of Gov.	207 F.3d 945	2000	DI			11th Amendment
Crocker v. Runyon	207 F.3d 314	2000				Rehab Act
Horner v. Kentucky H.S.	206 F.3d 685	2000				Title IX
Schniker v. Fortis	200 F.3d 1055	2000	DI			
Brown v. Brody	199 F.3d 446	1999				Title VII race, sex,
Mendoza v. Borden	195 F.3d 1238	1999	DT			ADEA, Title VII sex
Belk v. Southwestern Bell	194 F.3d 946	1999	DI			
Smith v. Xerox	196 F.3d 358	1999				ADEA, Title VII sex
Davoll v. Webb	194 F. 3d 1116	1999	DT			Equal Protection
Seth v. City of Seattle	unpublished disposition	1999				ADEA
Mitchell v. USBI	186 F.3d 1352	1999				ADEA
Pond v. Michelin	183 F.3d 592	1999	DI			
Washington v. Indiana H.S.	181 F.3d	1999		DI		Rehab Act
Bay Area Addiction v. City of Antioch	179 F.3d 725	1999		DT		
Zenor v. El Paso Health	176 F.3d 847	1999	DT			TCHRA
Gonzales v. City	176 F.3d 834	1999	DI			

Table G1 (continued)

Hunsaker v. Contra	149 F.3d 1041	1998		DI		
Chavez v. Coors	176 F.3d 488	1999	DT			Title VII, race
Zukle V. Regents	166 F.3d 1041	1999		FA		Rehab Act
Berg v. Florida	163 F.3d 1251	1998				Rehab Act
Theriault v. Flynn	162 F.3d 46	1998		DT		
Lesage v. State of Texas	158 F.3d 213	1998		DT		Title VI, race, public inst.; 11th Amend.
Ferguson v. City	157 F.3d 668	1998		DI		Title VI
Coger v. Board of Regents	154 F.3d 296	1998				ADEA
Varner v. Illinois State	150 F.3d 706	1998				Equal Pay Act
Cathcart v. Flagstar	155 F.3d 558	1998	DT			
Cercpac v. Health	147 F.3d 165	1998		DI		Rehab Act
Doe v. Pfrommer	148 F.3d 73	1998		DT		Rehab Act
Gantt v. Wilson	143 F.3d 1042	1998	DI			ADEA
Kolstad v. ADA	139 F.3d 958	1998				Title VII
Kimel v. Board of Regents	139 F.3d 1426	1998				ADEA; 11th Amend
Dalton v. Subaru	141 F.3d 667	1998	DI			
Norman-Bloodshaw v. Lawrence	135 F.3d 1260	1998				Title VII, race
Harper v. BP	unpublished disposition	1998				Title VII, race
Matthews v. Commonwealth	128 F.3d 1194	1997	DI			
Smith v. Metropolitan	128 F.3d 1014	1997				Title IX
DeBoard v. Board of Ed.	126 F.3d 1102	1997		DT		Rehab Act
Sieberns v. Wal-Mart	123 F.3d 1019FA	1997	FA/DI			
Huff v. UARCO	122 F.3d 374	1997	DT			ADEA
McPherson v. Michigan H.S.	119 F.3d 453	1997		DT		Rehab Act
Tyler v. City	118 F.3d 1400	1997		DI		
Fisher v. Vassar	114 F.3d 1332	1997				ADEA, Title VII, sex
Miners v. Cargill	113 F.3d 820	1997	DT			

Table G1 (continued)

Woodson v. Scott	109 F.3d 913	1997				Title VII
Kolstad v. ADA	108 F.3d 1431	1997				
Smith v. City	99 F.3d 1466	1996	DT			ADEA
Frederick v. Great Lakes	102 F.3d 550	1996	DT			
Tanca v. Nordberg	98 F.3d 680	1996				Title VII
Kraul v. Iowa Methodist	95 F.3d 674	1996	DI			PDA; Title VII, sex
Inmates v. Wecht	93 F.3d 1124	1996		DT		
Eckles v. Consolidated	94 F.3d 1041	1996	FA			
Crowder v. Kitagawa	81 F.3d 1480	1996		DT		
Modderno v. King	82 F.3d 1059	1996	DI			Rehab Act
Kennedy v. Chemical Waste	79 F.3d 49	1996	DI			
Kelly v. BPS	61 F.3d 350	1995	DT			Lousiana Civil Rights Act
Lee v. City	unpublished disposition	1996	DT			
Brennen v. Comptroller	unpublished disposition	1996	DT			
Ellis v. United	73 F.3d 999	1996				ADEA
Sandison v. Michigan H.S.	64 F.3d 1026	1995		DI	DI	Rehab Act
U.S. v. Contreras	937 F.2d 1191	1991				Criminal case
National Black Police v. Velde	712 F.2d 569	1983				Outside of date range

APPENDIX H

PRECEDENT IN ADA TITLE I DISPARATE IMPACT CASES, 1992-2012

Table H1. Precedent in ADA Title I Disparate Impact Cases, 1992-2012

Case Name	Year of Decision	Eckles	Matthews	Dalton	Sutton	BFOQ/CBA/ Seniority[b]	Circuit	Decision for: Plaintiff (P) Defendant (D)
Lawson v. CSX Transp., Inc.	2001		X		X	BF	7	Reversed (P)
EEOC. v. Humiston-Keeling[a]	2000		X	X		BF	7	(D) Reversed in 2012 (P)
Burns v. Coca-Cola	2000			X		BC/CBA/Sen.	6	Affirmed (D)
Boersig v. Union Electric	2000	X				BF/CBA/Sen.	8	Affirmed (D)
Schneiker v. Fortis	2000				X		7	Affirmed (D)
Belk v. Southwestern Bell	1999				X		8	Vacated and Remanded (P)
Pond v. Michelin	1999	X				BF/CBA/Sen.	7	Affirmed (D)
Gonzales v. City of New Braunfels	1999			X	X		5	Affirmed (D)
Dalton v. Subaru	1998	X	X			BF/CBA/Sen.	7	Split[c]
Matthews v. Commonwealth Edison	1997	X				BF/Sen.	7	Affirmed (D)
Eckles v. Consolidated	1996					BF/CBA	7	Affirmed (D)
Kennedy v. Chemical Waste	1996					BF/CBA/Sen.	7	Affirmed (D)

[a]ADA Reasonable accommodation claim (included for illustrative purpose; case not analyzed)

[b]Bona fide occupational qualification/Collective bargaining agreement/seniority system

[c]Nine plaintiffs; Court reversed for 2 plaintiffs; affirmed for 7 plaintiffs

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