

## Introduction to the Special Issue

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# An overview of workplace discrimination and disability

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It is now 22 years post ADA passage and there are no greater problems facing vocational rehabilitation than the marked increase in official unemployment and under-employment and the large decrease in labor force participation by Americans with disabilities (AWDs) due to the Great Recession. This fact has been convincingly documented [3, 4] in compelling terms:

- an official unemployment rate of 14.2% vs. 9% for non-disabled – larger than any other protected class of citizens [3];
- the average duration of unemployment was 25 weeks vs. 21 weeks for non-disabled [3];
- higher levels of under-employment including [4];
  - 7.8% involuntary part-time workers for AWDs vs. 5.5% for non-disabled; and
  - 11.5% experienced reduction in wages; i.e., full-time earnings <\$330 per week;
- a substantial reduction in the percentage of the American workforce identifying itself as “with disability” (down 9% in relative value from 3.44% to 3.14% [5, 6]; and
- protections against economic ruin afforded to most workers by higher levels of education and work/life experience were less effective for AWDs [4].

Collectively these numbers represent a reversal of nearly all the employment gains made since the enactment of ADA in 1990. This level of damage in the employment arena, in turn, impacts negatively on all other measures of independent living and community participation.

And so it is fitting that this Special Issue begins with the closing chapter of the Fogg et al. trilogy. Herein the authors present and analyze a variety of new datasets outlining trends in employment during the Great Recession. Noteworthy in these findings is the surprising impact of the Great Recession on the labor market status of workers over the age of 55. Specifically, older workers persisted in job seeking efforts and remained part of the active labor market more so than younger age groups. They were rewarded by record levels of hiring and the lowest levels of employment-to-population decline from 2007 to 2010. Their share of the labor market will dramatically increase in the decade ahead and with it the representation of workers with disabilities and all that this implies. Record levels of accommodation, workplace accessibility, assistive technology, ergonomics and innovation are likely to become routine due to this irrepressible demographic trend.

The balance of the Special Issue is devoted to the very latest findings from the National EEOC ADA Research Project (NEARP) at Virginia Commonwealth University (VCU). NEARP was conceived by the author in 2003 in consultation with Dr. Ronald Edwards, Director of the Office of Research, Policy and Planning for EEOC, the ADA Title I enforcement agency. An Intergovernmental Personnel Agreement (IPA) was

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established between the EEOC and VCU/NEARP researchers in order to access the EEOC core database known as the Integrated Mission System (IMS). Historically, the IMS was used as a management tool to monitor the workflow, performance, trends and outcomes for EEOC field offices relating to the investigation of claims under all civil rights laws, including ADA. The VCU/NEARP team was the first to obtain, access, and reconfigure this database for research purposes under the scrutiny of multiple university IRBs and the EEOC. Tables 1 through 6 following this Introduction provide examples of some of the more interesting data contained in the third iteration of the NEARP database, which goes through December 31, 2008.

In the main, NEARP was and continues to be a voluntary effort. Limited NEARP funding was provided by a single Mary Switzer Distinguished Research

Table 1

NEARP dataset: charging party basis categories by prevalence

Definition	<i>N</i>	%
Physical impairment	149,834	37.245
Other physical or behavioral impairment	70,785	17.596
Behavioral (Chemdep-Psych) impairment	63,785	15.855
Prongs 2, 3, 4 of definition of disability	55,566	13.812
Neurological impairment	42,111	10.468
Sensory impairment	20,210	5.024
	<b>402,291</b>	<b>100%</b>

Table 3

NEARP dataset: issue codes by prevalence (top 15 only)

Issue	Definition	<i>N</i>	%
Discharge	Involuntary termination of employment status on a permanent basis	130,816	32.518
Reasonable accommodation	Employer failed to provide reasonable accommodation to known limitations	72,538	18.031
Terms/conditions	Denial or inequitable application of rules relating to general working conditions or the job environment and employment privileges which cannot be reduced to monetary value	35,333	8.783
Harassment	Same as Intimidation except that this issue would be used to describe antagonism in non-employment situations or settings	30,956	7.695
Hiring	Failure or refusal by an employer to engage a person as an employee	21,653	5.382
Discipline	The assessment of disciplinary action by an employer against an employee	14,754	3.667
Constructive discharge	Employee is forced to quit or resign because of the employer's discriminatory restrictions, constraints, or intolerable working conditions	9,765	2.427
Layoff	Temporary involuntary separation from the Employer work force due to a lack of work	8,970	2.230
Promotion	Advancement to a higher level or work usually involving higher pay, potential for higher pay or more prestigious work environment	8,559	2.128
Wages	Inequities in monetary compensations paid for work performed. includes salary, tips, gratuities, commissions, incentives or bonuses	7,788	1.936
Demotion	Involuntary downgrading to a lower paid or less desirable job or with reduced benefits or lesser opportunities for advancement	6,788	1.687
Suspension	Suspension of employment status because of disability	5,984	1.487
Reinstatement	Failure or refusal of an employer to reinstate a person as an employee	5,852	1.455

Table 2

NEARP dataset: charging party ethnicity by prevalence

Race	EEOC alphacode	<i>N</i>	%
White	WHITE	222,730	55.365
African American	AFRCAMER	71,828	17.855
Null	NULL	49,917	12.408
Other	OTHER	29,223	7.264
Hispanic/Mexican	HISPMEX	21,865	5.435
Asian	ASIAN	4,198	1.044
Native American/ Alaskan native	NATVAMER	2,311	0.574
Mixed ethnicity	MIXDETHN	219	0.054
Total		<b>402,291</b>	<b>100%</b>

Fellowship from NIDRR to create a disability-specific profile of workplace discrimination involving with diabetes, a condition affecting the author. The successful publication of these findings [8] was followed by a larger NIDRR commitment under the auspices of the ADA National Network: Coordination, Outreach and Research Center from 2006–2011. Additional funds have been forthcoming from participating universities and foundations such as VCU and the National Multiple Sclerosis Society. These funds and efforts of dozens of volunteer researchers have enabled the NEARP to realize and advance the following NIDRR objectives:

1. Improved community participation for AWDs (in employment) by mitigating workplace

Table 4  
NEARP dataset: closure codes (merit, not-merit)

Type	Definition	Merit?	N	%
Withdrawn w/benefits by CP	Withdrawn w/benefits (e.g., after independent settlement, resolved through grievance procedure, or after Employer unilaterally granted desired benefit to CP w/o formal "agreement")	Yes	24,149	6.003
Settled w/benefits to CP	Settled w/benefits, where EEOC was party to settlement	Yes	36,567	9.090
Successful conciliation	Successful conciliation. EEOC has determined discrimination occurred, and Employer has accepted resolution	Yes	11,638	2.893
Conciliation failure	Conciliation failure. EEOC has determined discrimination occurred, but employer has not accepted resolution	Yes	19,743	4.908
No cause finding	Full EEOC investigation failed to support alleged violation(s)	No	264,271	65.692
Admin closure-process	Administrative closure due to processing problems; e.g., Employer out of business or cannot be located, file lost or cannot be reconstructed	No	4,810	1.196
Admin closure: Bankruptcy	Administrative closure due to Employer bankruptcy	No	195	0.048
Admin closure	Administrative closure because CP cannot be located	No	1,034	0.257
Admin closure	Administrative closure because CP non-responsive	No	3,368	0.837
Admin closure	Administrative closure because CP uncooperative	No	5,568	1.384
Admin closure	Administrative closure due to outcome of related litigation	No	361	0.090
Admin closure	Administrative Closure because CP failed to accept full relief	No	147	0.037
Admin closure	Administrative Closure because EEOC lacks jurisdiction; includes inability of CP to meet definitions, Employer <15 workers, etc	No	24,332	6.048
Admin closure	Administrative Closure because CP withdraws w/o settlement or benefits. Reason unknown	No	6,108	1.518
Total			<b>402,291</b>	<b>100.001%</b>

Table 5  
NEARP dataset: employer size (number of employees)

Number of workers	N	%
15–100	125,054	31.086
101–200	45,292	11.259
201–500	42,655	10.603
501+	167,109	41.539
Null	22,181	5.514
Total	<b>402,291</b>	<b>100.001%</b>

discrimination and thus furthering the spirit and intent of ADA Title I.

2. A truly national research agenda devoted to workplace discrimination with a major focus on research capacity building. To date, 65 unique researchers from 17 institutions of higher education have published using NEARP data. NEARP has honored data extraction requests from all researchers, and has often supported them with data analyses and interpretation of findings.
3. Substantial heuristic value. To date, 67 refereed journal articles have been published by NEARP. Ten more are in preparation. This is the vast

majority of all published empirical studies of the nature and scope of ADA workplace discrimination. Most NEARP publications have been bundled in special issues of such journals as the *Journal of Occupational Rehabilitation*; *Journal of Vocational Rehabilitation*; *Rehabilitation Counseling Bulletin*; *WORK: A Journal of Disability, Prevention and Rehabilitation*; and *Advances in Developing Human Resources*. Similar Projects of note at Cornell University and the University of North Carolina-Chapel Hill have generated complementary work of very high quality, often examining court decisions, state allegations, and other pertinent trends.

4. Knowledge translation. Target publications have appeared in journals read by human resources professionals, rehabilitation counselors, occupational therapists, rehabilitation psychologists, speech therapists, mobility specialists, special educators, biomedical engineers, physiatrists, assistive technologists, consumer organizations and advocates. There have been scores of professional presentations (approaching 200 to date) by NEARP

Table 6  
NEARP dataset: employer industry (NAICS Code)

Industry	<i>N</i>	%
Agriculture, forestry, fishing, and hunting	2,066	0.514
Mining	2,850	0.708
Utilities	5,534	1.376
Construction	7,336	1.824
Manufacturing	65,970	16.399
Wholesale trades	7,152	1.778
Retail trades	30,897	7.680
Transportation and warehousing	19,219	4.777
Information	15,636	3.887
Finance and insurance	16,554	4.115
Real estate, rental, and leasing	2,946	0.732
Professional, scientific, and technical	14,231	3.537
Management of companies and enterprises	67	0.017
Administrative, support, waste management, and remediation services	15,785	3.924
Educational services	20,716	5.150
Health care and social assistance	43,856	10.902
Arts, entertainment, and recreation	2,658	0.661
Accommodation and food services	8,578	2.132
Other services (Except public administration)	14,258	3.544
Public administration	35,849	8.911
Null	70,133	17.433
<b>Total</b>	<b>402,291</b>	<b>100.001%</b>

researchers. There have been over a dozen regular features of NEARP findings in the “Research Corner” of the ADA Compliance Guide by Thomson Publishing, Inc., an authoritative monthly periodical for human resources professionals. Four monographs and seven PhD dissertations have also included NEARP findings.

Currently there are 402,291 allegations in the NEARP database. This figure includes all ADA Title I allegations which were closed by EEOC from the effective date of the ADA Title I (July 26, 1992) through December 31, 2008 and which meet the extraction criteria of NEARP. Project team members are mindful that many incidents of workplace discrimination go unreported. As with most civil or criminal offenses, it is not possible at this time to determine the prevalence of unreported workplace discrimination.

Following are some findings of interest which illustrate “lessons learned” about ADA related discrimination based on NEARP research:

1. **Dominant Issues.** The overwhelming majority of discrimination is related to job retention or the quality of work, not job acquisition. Specifically, there are 40 areas of human resources in which some measurable discrimination is found. However, 76% of all allegations derive from just five issues. From a risk analysis perspective, this

is where Employers should be most vigilant: Discharge and constructive discharge (35%); Reasonable accommodation (18%); Terms and conditions of employment (9%); Disability harassment & intimidation (9%) and Hiring (5%) [7].

2. **Outcomes of Investigations.** Merit resolutions which favor the Charging Party occur in 22% of all closures. Non-merit resolutions which favor the Employer occur 66% of the time. The balance (12%) includes closures for a variety of technicalities, such as Employer bankruptcy or lack of ADA jurisdiction [7].
3. **Impairment Matters.** Most impairment groups show significantly higher levels of actual discrimination on two or three issues. Allegations derived from people with HIV have higher levels on 19 issues. They are closed with merit at much higher levels as well – 30% vs. 21% in the comparison group [2].
4. **Attitudes vs. Behaviors.** Social psychologists tell us that negative attitudes are more prevalent toward persons with behavioral disabilities. In workplace discrimination, however, levels of actual discrimination are higher for persons with physical and sensory impairments [1].
5. **Size Matters.** Although large businesses (over 500 workers) employ less than 1/5 of American workers and have dedicated human resources

departments, they receive more allegations of discrimination than small or medium size employers [7].

6. Model Employment Practices. Although considerable energy is expended on issues such as prohibited medical inquiry, job training, employment testing, and benefits, each of these issues comprises less than 1% of all allegation activity [9].
7. Project data clearly supported the position of disability advocates that the Sutton Trilogy of Supreme Court decisions (1999–2002) severely reduced the ADA protections intended by Congress. Such data and sworn testimony by aggrieved parties provided impetus to the passage of the ADA Amendments Act of 2008 [10].
8. Hiring discrimination is more prevalent among those with physical and sensory impairments and white males. It is a mistaken belief in HR circles that hiring is an “invisible process” because Charging Parties prevail more in hiring allegations than in other prevalent types of complaints [9].
9. Firing, on the other hand, has a markedly lower merit rate showing that employers are well defended when such charges are filed. Surprisingly, however, the firing merit rate soars when Charging Parties file an allegation involving an alternative prong of the ADA definition of disability, such as “record of” or “regarded as” disabled [11].

In this special issue, the NEARP quest for discrimination knowledge continues. Three articles seek to advance our understanding of impairment-specific conditions. Roessler and colleagues document the uniqueness of discrimination as it effects transition-age youth with epilepsy; Van Wieren’s team does the same for people with autism; and Hurley and associates use a multivariate approach to differentiating actual vs. perceived discrimination for people with mental illness. To close the special issue, Shaw and colleagues profile disability harassment and Draper’s team presents the first ever report those who file allegations under the alternative prong “record of disability”. Surprisingly, the EEOC resolves a higher proportion of investigations for this group as meritorious (actual discrimination) than for the group of charging parties who are disabled in real time (proximate to the discriminatory event).

This shows the wisdom of Congress in including this particular alternative prong of the term “disability”.

Although the analyses of discrimination by impairment, type of discrimination, or merit prediction are far from complete, NEARP researchers intend to provide an explicit focus over the next four years on industry-specific profiles of ADA Title I discrimination. The hope is that these tools will help to assist employers to identify and mitigate the industry-specific manifestations of this insidious virus in their environments.

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