



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

**Social Security Administration, Office of Disability Policy
Ideascale Campaign on Reasonable Accommodations**

We submit these comments as Co-Chairs of the Consortium for Citizens with Disabilities' Employment and Training, Rights, and Social Security Task Forces. The Consortium for Citizens with Disabilities (CCD) is a coalition of national organizations working together to advocate for national public policy that ensures the self-determination, independence, empowerment, integration, and inclusion of the 57 million children and adults with disabilities in all aspects of society.

Via IdeaScale, the Social Security Administration (SSA) has asked, *“Are there reasonable accommodations that employers provide universally, such that SSA could assume they would be available to any claimant when we determine whether he or she has the capacity to perform “any job in the national economy” (as required by our Statute)? If yes, what are those accommodations? What information or evidence can you offer to support any suggestion that such accommodations are universally available?”*

We do not believe that there are any reasonable accommodations that employers provide universally. SSA should not assume that claimants have access to reasonable accommodations when it determines whether individuals have the capacity to perform any jobs in the national economy.

As we explain below, a presumption that particular accommodations are universally provided by all employers is inappropriate because: (1) the ADA does not guarantee accommodations in all circumstances, (2) the different purposes and standards of the ADA and SSA benefits programs make a presumption based on the ADA inappropriate in the consideration of SSA benefits applications, (3) employers frequently fail to comply with the ADA, (4) particular accommodations are not universally effective even for people with the same type of disability, and (5) analyzing the availability of reasonable accommodations as part of the disability determination process would create a significant new administrative burden for SSA.

A presumption of universal accommodations is inappropriate because the ADA does not guarantee accommodations in all circumstances

The ADA, a civil rights law designed to protect individuals from discrimination in public programs, services, and activities, in public accommodations, and in employment, requires a highly individualized analysis to determine compliance. In the employment context, the ADA requires an employer to provide reasonable accommodations to qualified employees or job applicants with disabilities, unless to do so would cause undue hardship. Accommodations can include changes to the work environment (such as ergonomic furniture, alteration of an office to allow physical access, purchasing adaptive equipment or software) or changes in the way things

are normally done (such as alternate shifts, part-time work, job sharing, or teleworking) to allow an individual with a disability equal opportunity. To be reasonable, an accommodation must be both feasible and effective in enabling the employee to complete the essential functions of the job. An accommodation is not considered reasonable if providing it would constitute an undue hardship for the employer. According to the Equal Employment Opportunity Commission, an accommodation represents undue hardship when it would cause the employer to incur “significant difficulty or expense.” (EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, 2002, available at <http://www.eeoc.gov/policy/docs/accommodation.html>). The undue hardship analysis “focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.” *Id.*

For a number of reasons, a presumption that the ADA requires certain accommodations would be universally provided by employers to employees and job applicants with disabilities would be wrong. Such a presumption would wrongly deny SSA benefits to individuals based on accommodations that the ADA does not guarantee and/or that they would not receive from employers.

First, the ADA does not require employers to provide any accommodations as a “per se” matter. The determination about whether an accommodation is reasonable, and the corresponding determination that providing the accommodation would not constitute an undue hardship on the employer, are highly individualized and fact-specific determinations. An accommodation may be reasonable for one employer but not another given differences in the employer’s size, resources, or the nature of the business.

Furthermore, since different jobs have different requirements, an accommodation that is effective in one job would not be effective in all jobs. Some accommodations would not allow an employee to fulfill the essential obligations of a job. For example, it might be reasonable in many fields for a worker to spend the vast majority of the workweek alone and undisturbed, but there is no way for that need to be accommodated for child monitors (Dictionary of Occupational Titles code 301.677-010), where the presence of a child is necessary to the job. Similarly, sit-stand options at will are available to many employees, but a tractor-trailer truck driver (904.383-010) must drive trucks and this cannot be done from a standing position. Firefighters (373.364-010) are exposed to smoke and flames; alpine guides (353.164-010) must work at high altitudes. Accommodating a need to avoid these hazards would change the job to the extent that it became a different job altogether.

Even within the same job type, an accommodation may or may not be required. For example, many firms allow their telemarketing or customer service staff to telework, either as a matter of policy or as a reasonable accommodation. However, other employers may not offer telework—and may not be obligated to by the ADA, either because they employ fewer than 15 people or because the accommodation would be an undue hardship. For example, employers that stagger their employees’ shifts and require them to share equipment because of cost concerns may not always be required to purchase additional equipment and internet/ phone service to accommodate an employee’s disability. The size and resources of the employer are integral factors to the

analysis of whether the provision of an accommodation is reasonable. Accordingly, no accommodation ought to be considered universally provided.

Technology has advanced in such a way as to make new accommodations possible. For example, text-to-speech computer software has allowed people with visual impairments additional ways to read and edit text. However, such technology is not available in all workplaces and employers are not universally required to provide it. Furthermore, technology has made some jobs more complex for some people, creating a need for additional or different accommodations, which may or may not be met.

There is no accommodation that enjoys a presumption of reasonableness under the ADA. Therefore, very similarly situated employees with near-identical impairments may be entitled to very different accommodations—or no accommodations at all. Given this very fact-dependent determination, no accommodation could be truly universal, even within a particular job category. As the U.S. Supreme Court has stated, “. . . the matter of “reasonable accommodation” may turn on highly disputed workplace-specific matters; and an SSA misjudgment about that detailed, and often fact-specific matter would deprive a seriously disabled person of the critical financial support the statute seeks to provide.” *Cleveland v. Policy Management Systems Corp.*, 526 US 795 (1999).

Second, employers are allowed to choose among accommodations. If more than one accommodation would be effective, the employer may decide which accommodation to provide and can base that decision on a number of factors, including cost or ease to the employer in providing the accommodation (see <http://www.eeoc.gov/policy/docs/accommodation.html>, question 9). The fact that the employer chooses makes it impossible to find any one universally-available accommodation that could be guaranteed to be available to any employee in any job. Even assuming there was a particular accommodation that could work universally at any job, employers have the power to unilaterally reject it in favor of other reasonable accommodations which are not universal.

Third, millions of workers are not provided the protection of the ADA at all. The provisions of the ADA only apply to employers with more than 15 employees (http://www.eeoc.gov/employers/coverage_private.cfm). The U.S. Census Bureau estimates that in 2012, there were over 4.9 million firms in the United States with fewer than 15 employees, and these firms employed more than 17 million people (http://www2.census.gov/econ/susb/data/2012/us_state_naicssector_small_emplsize_2012.xls). Bureau of Labor Statistics (BLS) March 2015 data, collected using different methodology, show that over 7 million firms, with 16.5 million workers, have fewer than 10 employees (http://www.bls.gov/cew/apps/table_maker/v4/table_maker.htm#type=13&year=2015&ind=10&supp=0). The BLS data is not broken down by firms with 15 employees or less (data categories include fewer than 5 employees, 5-9, and 10-19) but there are an additional million firms that employ 10-19 employees and 13 million workers are employed by those firms. A presumption that any specific accommodation would be available to an individual in any job class is misguided because some of those jobs would almost certainly be in firms that are not required by law to provide any accommodation to its workers.

The different purposes and standards of the ADA and Social Security disability benefits make it inappropriate to use a presumption based on ADA requirements in considering SSA benefit applications

The Americans with Disabilities Act (ADA) has a completely different purpose than the SSI and SSDI programs. The distinction between the purposes of the ADA and the Social Security disability programs has long been recognized by SSA. In 1993, SSA's then-Associate Commissioner for the Office of Hearings and Appeals addressed the issue when it first arose in some Administrative Law Judge (ALJ) hearings. He noted: "Whether or how an employer might be willing (or required) to alter job duties to suit the limitations of a specific individual would not be relevant because our assessment must be based on broad vocational patterns ... rather than on any individual employer's practices." He concluded that "the ADA and the disability provisions of the Social Security Act have different purposes and have no direct application to one another."

The United States Supreme Court also has recognized that the ADA and the civil rights protections of the ADA were designed for different purposes. In *Cleveland v. Policy Management Systems Corp*, 526 US 795 (1999), the U.S. Supreme Court noted that the Social Security Act provides cash benefits to individuals under a "disability" as defined in the Act, while the ADA "seeks to eliminate unwarranted discrimination against disabled individuals." The Supreme Court found that "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side" and thus held it would not apply a negative presumption that an individual who represents that he or she is unable to work for purposes of an SSDI benefits application cannot pursue an ADA claim. By the same token, a presumption that a particular accommodation would be provided by all employers, enabling a person to work, is inappropriate in the consideration of an SSA benefits application.

Injecting the ADA requirement of "reasonable accommodations" into the SSA disability process misreads the intent of the ADA. The ADA is a civil rights law protecting, among others, employees and job applicants with disabilities. The SSA does not enforce employer violations of the ADA. Nor does SSA have the expertise to conduct the type of analysis required to determine whether the ADA would require accommodations for a particular person to do a particular job. Moreover, establishing criteria in SSA's disability determination process that assume reasonable accommodations by the employer would improperly shift the employer's burden of showing that an accommodation would be an undue hardship onto potential employees, i.e., claimants.

The inclusion of ADA criteria in the SSA disability determination process will confuse and hinder accurate disability determinations. For example, individuals with severe disabilities could be denied disability benefits if the adjudicator finds that reasonable accommodations have been made for workers with "similar" limitations. SSA could not reasonably conclude, without conducting an individualized assessment, that a claimant is not disabled because an incumbent worker with the "same" impairments and limitations is able to perform substantial gainful activity with a reasonable accommodation.

Employers frequently fail to comply with the ADA

Employers frequently fail to comply with even the basic requirements of the ADA. The U.S. Equal Employment Opportunity Commission (EEOC) receives thousands of charges each year

from employees alleging discrimination under the ADA. In the decade from Fiscal Year 2005-2014, over 46,000 ADA-related charges to the EEOC ended in “merits resolutions,” meaning that the charging employee obtained a favorable outcome and/or was found to have made a meritorious allegation (<http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm>). Many of these involve denial of reasonable accommodations. Individuals and government enforcement agencies must often use the legal system to obtain accommodations for workers, which also demonstrates that reasonable accommodations are far from universal. (http://www.eeoc.gov/eeoc/history/45th/ada20/ada_cases.cfm). Many other employees and applicants are unlawfully denied reasonable accommodations but lack access to legal assistance to obtain them.

Due to the individualized nature of disabilities, accommodations are not universally effective even for individuals with the same type of disability

There are no universal disabilities. Each person—even those living with the same condition—is different and has different limitations. The Centers for Disease Control and Prevention (CDC) recognizes this: “Disabilities can affect people in different ways, even when one person has the same type of disability as another person. Some disabilities may be hidden or not easy to see” (<http://www.cdc.gov/ncbddd/disabilityandhealth/types.html>).

Since each person with a disability has unique circumstances and needs, the physical, environmental, and sensory challenges each faces in the workplace vary greatly—particularly when you consider the tremendous range of work settings and duties available in the national economy. The EEOC’s Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act explains that “People with disabilities are restricted in employment opportunities by many different kinds of barriers. Some face physical barriers that make it difficult to get into and around a work site or to use necessary work equipment. Some are excluded or limited by the way people communicate with each other. Others are excluded because of rigid work schedules that allow no flexibility for people with special needs caused by disability” (<http://askjan.org/links/ADAtam1.html#III>).

Moreover, individuals—especially those with variable and progressive conditions—can have needs that are sporadic and/or change over time. As needs and limitations change, so does the effectiveness of accommodations. Individuals with multiple sclerosis (MS), for example, may have episodic exacerbations that promptly require accommodation, but after the exacerbation subsides and the individual’s health returns, that accommodation may no longer be necessary. Also, many with MS begin to experience steadily increasing disability at some point in their disease course—resulting in changes over time to what accommodations are needed. As an example showcasing how accommodations can change over time even for the same person: In 2005, Person X is diagnosed with MS and experiences fatigue that periodically requires adjustments to his work schedule; in 2008, Person X experiences a severe exacerbation of optic neuritis requiring accommodations aiding vision; by 2015, Person X has more significant cognitive deficits from his MS and has lost use of his legs, requiring use of a wheelchair, memory aids, and sitting in an area of the office with few distractions.

For accommodations to adequately support each unique person with a disability in their particular workplace, they cannot be universal. Rather, as the Technical Assistance Manual

states, “every reasonable accommodation must be determined on an *individual basis* (emphasis added). A reasonable accommodation always must take into consideration two unique factors:

- the specific abilities and functional limitations of a particular applicant or employee with a disability; and
- the specific functional requirements of a particular job.”

The enforcement regulations of the ADA also encourage each person and job to be looked at on an individual basis in regard to accommodations.

Due to the unique nature of each individual with a disability, even widely available accommodations do not guarantee each unique individual’s ability to work in a particular work environment and perform the duties of a particular job. In other words, what may prove effective in one situation may not even be possible and/or effective in another. For example, alterations to work stations are available in many workplaces. This type of accommodation may prove effective for some individuals who work with a computer at a desk, but would not be effective for people with certain types of impairments, such as those who need to miss work for dialysis or chemotherapy. Similarly, when working in a sedentary office environment, limitations to lifting may be possible; but if installing HVAC equipment, a person may need to lift 50 to 100 pounds. Another example is that alternate work schedules may be widely available, but they are not available for every occupation and can actually hinder some people more than they help. Some people would require such a reduction in hours worked that their job would not meet SSA’s definition of substantial gainful activity. Employment at will and limitations on FMLA (especially in small businesses) mean people cannot always take leave and return to work.

Furthermore, some individuals may choose not to disclose their condition to their employer. If a person does not require reasonable accommodation at a given point in their employment, there is no legal requirement to do so. This is a decision that is very personal and oftentimes difficult to make. Especially for those with hidden disabilities, people may be wary of disclosing for fear or discrimination, being pigeonholed at work, or treated differently by colleagues and supervisors. Disclosure is done on a need-to-know basis and oftentimes only when requesting individualized accommodations for specific symptoms.

Factoring "reasonable accommodations" into the disability determination process would create a significant new administrative burden for SSA.

SSA would face added administrative complexity if it were to consider "reasonable accommodations" as defined by the ADA in making a disability determination. This would constitute an enormous new burden on already-strained resources and staff. The ADA reasonable accommodations process is highly individualized: it is designed to address a specific employee's request of a specific employer for an accommodation to allow that employee to perform a specific job for which he or she is otherwise qualified. The employer and employee work together to assess whether the employee’s disability can be reasonably accommodated. This is intended to be an interactive process by which the covered individual and the employer determine the precise limitations created by the disability and how best to respond to the need for accommodation. SSA, on the other hand, has a very different responsibility: to assess whether jobs that a claimant could perform exist in significant numbers in the national economy.

It is difficult to imagine how SSA would reconcile its duty to assess what jobs exist in the national economy with the ADA's highly individualized process to determine whether a specific employer is required to provide a specific accommodation to meet the needs of a specific employee. We are unaware of the existence of objective data upon which ALJs, state agency personnel, or vocational experts could base such a determination.

As a result, any determination by SSA that a claimant could work if provided with a reasonable accommodation would be both highly subjective and highly likely to be challenged in court, where questions of what constitutes "undue hardship" as well as what is a "reasonable accommodation" under the ADA already are the subject of significant litigation.

The Supreme Court recognized the burden such a determination would create for SSA—and for claimants—in its decision in *Cleveland v. Policy Management Systems Corp.*, 526 US 795 (1999). Justice Stephen Breyer noted in his opinion for a unanimous court:

[W]hen the SSA determines whether an individual is disabled for SSDI purposes, it does not take the possibility of "reasonable accommodation" into account, nor need an applicant refer to the possibility of reasonable accommodation when she applies for SSDI. See Memorandum from Daniel L. Skoler, Associate Comm'r for Hearings and Appeals, SSA, to Administrative Appeals Judges, reprinted in 2 Social Security Practice Guide, App. § 15C[9], pp. 15-401 to 15-402 (1998). The omission reflects the facts that the SSA receives more than 2.5 million claims for disability benefits each year; its administrative resources are limited; the matter of "reasonable accommodation" may turn on highly disputed workplace-specific matters; and an SSA misjudgment about that detailed, and often fact-specific matter would deprive a seriously disabled person of the critical financial support the statute seeks to provide.

Further, the Skoler memorandum referenced above is based on facts and circumstances that remain true today:

[T]he fifth-step assessment is based on the functional demands and duties of jobs as ordinarily required by employers throughout the national economy, and not on what may be isolated variations in job demands (regardless of whether such variations are due to compliance with anti-discrimination statutes or other factors). Whether or how an employer might be willing (or required) to alter job duties to suit the limitations of a specific individual would not be relevant because our assessment must be based on broad vocational patterns...rather than on any individual employer's practices. To support a fifth-step finding that an individual can perform 'other work,' the evidence (e.g., vocational expert testimony) would have to show that a job, which is within the individual's capacity because of employer modifications, is representative of a significant number of other such jobs in the national economy.

SSA already is faced with the pressing need to develop a reliable alternative to the Dictionary of Occupational Titles that will hold up to court challenges. The additional burden of tracking specific accommodations provided by employers for specific jobs would add significant cost, complexity, and time to the development of a new Occupational Information System. Absent such a system, it is impossible to understand whether the number of jobs that provide necessary accommodations for an individual claimant are significant or insignificant in the national economy.

Conclusion

Workplace accommodations are intensely individualized. Whether an employer must grant a reasonable accommodation, whether an accommodation is reasonable or unreasonable, which accommodation or combination of accommodations an employer provides, and whether that accommodation allows an individual to perform substantial gainful activity all depend on

particular aspects of the workplace and of the employee's physical and mental conditions. Accommodations that work in one setting or for one person or at one time may not be available or helpful in another. It would be factually incorrect for SSA to assume that any accommodation is universally available. Such a practice would lead to significant additional administrative obligations for SSA, causing additional delays and hardships for claimants.

Sincerely,

Employment and Training Task Force Co-chairs

Kelly Buckland, National Council on Independent Living

Alicia Epstein, SourceAmerica

Susan Goodman, National Down Syndrome Congress

Susan Prokop, Paralyzed Veterans of America

Rights Task Force Co-chairs

Dara Baldwin, National Disability Rights Network

Samantha Crane, Autistic Self Advocacy Network

Sandy Finucane, Epilepsy Foundation

Jennifer Mathis, Bazelon Center for Mental Health Law

Mark Richert, American Foundation for the Blind

Social Security Task Force Co-chairs

Kate Lang, Justice in Aging

Jeanne Morin, National Association of Disability Representatives

T.J. Sutcliffe, The Arc of the United States

Ethel Zelenske, National Organization of Social Security Claimants' Representatives