Envisioning a Future for Age and Disability Discrimination Claims

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This Article considers the reasons for reinterpretations of age and disability and examines the fundamental reasons for changes in the implementation of both the ADA and ADEA. Part I presents the basic structure and relevant requirements of the two statutes and comments on the reasons their legislative purposes are not often seen as overlapping. Part II discusses the recent Supreme Court decisions that have undermined the purposes and implementation of both the ADA and ADEA and chilled causes of action based on the ADA and ADEA. Part III projects the current problems with anti-discrimination causes into the future, when older people will comprise a significant part of the population of people with disabilities who choose employment. The commentary considers the nature of the baby boomers, the evolution of the job market, and contrasts the impediments to discrimination litigation in the late 20th century with the differences likely to develop. Finally, the narrative foresees the emergence of employment discrimination law of renewed vitality based on the ADA.

INTRODUCTION

It is no longer a good time to challenge unlawful age or disability discrimination.1 In 1990, the nation held high hopes for eradicating disability discrimination through the enactment of the Americans with Disabilities Act (ADA).2 Though the ADA arrived in the tenth year of Republican administration intent on limiting government and its costs, the ADA was a model of bipartisanship. Congress approved the ADA by a huge majority in both houses.3 Those hopes have turned to pessimism in the wake of the Supreme Court’s 1999 rulings that severely limited the definition of

3. See Miranda Oshige McGowan, Reconsidering the Americans with Disabilities Act, 35 GA. L. REV. 27, 30 n.2, 33-34 nn.18-27 and accompanying text (2002)(observing that the legislators typically had firsthand knowledge of the needs of people with disabilities, and that the Senate voted 93.8 percent and the House 93.1 percent in favor of the ADA).
"individuals with disabilities," and, consequently, limited the number of prospective claimants under the Act.4

Opponents of age discrimination have found themselves in similar straits. The Age Discrimination in Employment Act of 1967 (ADEA),5 a powerful catalyst for change in United States retirement policy, has been circumscribed by judicial decisions that limit the use of disparate impact theory.6 Thus, plaintiffs’ cases challenging employer rules or policies based on disparate impact, rather than an express intent to discriminate against older workers, have been marginalized.

Altogether, the ideals and optimism represented by these anti-discrimination laws have given way to political forces that favor deregulated business interests and diminished individual rights. Perhaps most troubling, the judicial reinterpretation of the ADA and ADEA assures that plaintiffs cannot get in the courthouse door to raise the question of an employer’s discrimination before a factfinder. Persons who frequently bear the burden of prejudice or stigma,7 such


The law distinguished the aged and disabled from persons subject to race discrimination because neither age nor disability is a suspect class. See Sarah Sutor, et al., The Constitutional Status of the ADA: An Examination of Alsbrook v. City of Maumelle in Light of Recent Supreme Court Decisions Concerning the 11th Amendment, 19 Rev. Litig. 485, 487 (2000); see also Stephen F. Befort & Holly Linquist Thomas, The ADA in Turmoil: Judicial Dissonance, the Supreme Court’s Response, and the Future of Disability Discrimination Law, 78 Or. L. Rev. 27, 27–29 (1999) (contrasting the relative success of Title VII and the ADA). Age and disability also differ from race in that individuals may move into the category, while race is immutable. Further, disability can be distinguished from either race or age because the race and age categories are largely self-defining. See Samuel Issacharoff & Justin Nelson, Discrimination
as the poor and those with compromised abilities, have little to cheer about on the legal front.\textsuperscript{8}

These changes arose from a variety of factors that reflect conservative shifts in the national political mood. The carefully crafted language of the ADA adopted the regulations\textsuperscript{9} and case law\textsuperscript{10} of the well-regarded Rehabilitation Act of 1973.\textsuperscript{11} The ADA has been criticized as too vague to provide employers with notice of their obligations.\textsuperscript{12} Many believe the law is misused and its original purposes betrayed because a substantial proportion of plaintiffs are employees suing their current employers for accommodation of hidden disabilities such as mental health conditions and back problems, both of which are difficult to confirm and accommodate effectively.

The political forces behind the ADA's passage, in contrast, favored people with serious physical disabilities who were unemployed because of prejudice or the absence of reasonable accommodations. The burden of accommodation was justified politically by the purpose of making unemployed, isolated persons into competent, self-supporting workers. On the other hand, the


In \textit{University of Ala. v. Garrett}, 531 U.S. 356 (2001), the Court made essentially the same decision with regard to Title I of the ADA. See generally Sutor et al., \textit{supra} note 7 (reviewing an 8th Circuit decision preceding \textit{Garrett} with a similar holding); Ruth Colker, \textit{The Section Five Quagmire}, 47 \textit{UCLA L. Rev.} 653 (2000). See also Linda Greenhouse, \textit{In Alabama Ruling, High Court Trumpeted the Last Word: Power}, \textit{N.Y. Times}, Feb. 25, 2001, at 10A (asserting that in \textit{Garrett}, the Court ignored substantial congressional evidence of states' disregard for the rights of disabled persons and substituted its judgment of the ADA's purpose and meaning, acting as if Congress was just a bad lower court.). This Article must leave these important effects of reinterpretation to another day.

\textsuperscript{9} 34 C.F.R. pt. 104 (2002)

\textsuperscript{10} See \textit{Laura F. Rothstein}, \textit{Disability Law} 8–9 (1998).


\textsuperscript{12} See generally Jeffrey O. Cooper, \textit{Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason}, 74 \textit{Tul. L. Rev} 1207 (2000) (discussing the need for interpretation, especially textualism and practical reasoning as tools to approach the ADA).
ADA is seen by some as posing pitfalls for the unwary businessperson.13

The ADEA suffers from the changing character of the target population. At the time of the ADEA's enactment, a substantial proportion of older people were poor.14 Few retirees had pensions. Older women, who almost universally were without their own pensions, had to live to a very old age on a pittance.15 The impact of the Medicare program, enacted in 1964, was not clear. In any case, the cost of health care had barely begun its rise to the alarming levels of the 1990s, so Medicare coverage did not dramatically impact seniors' financial well-being.16 Workers who lost jobs as retirement age approached had difficulty finding new work.17 Perhaps, the perceived power of the 1960s "organization" raised the specter of employees unfairly victimized by dismissals intended to limit costs.18 The ADEA promised to be a weapon to provide security to older people who experienced discrimination in their last years.

In contrast, older people today present a different image. Good health care and healthy lifestyles create the expectation for many active years after the traditional retirement age of sixty-five.19 For example, advertisements feature older women contemplating entrepreneurial business start-ups.20 Happy snowbirds display bumper
stickers that announce they are spending their children's inheritance and, no doubt, the dividends from their smart investments, income from well-regulated pension funds, and their Social Security payments. The popular perception of retirement has shifted from humble elders to perennial travelers on the tennis courts for nearly three decades.21

This Article considers the legal, social, and judicial reasons for reinterpretations of age and disability. It also examines the fundamental reasons for changes in the implementation of both the ADA and ADEA. Part I presents the basic structure and relevant requirements of the two statutes and comments on the reasons their legislative purposes are not often seen as overlapping. Part II discusses the recent Supreme Court decisions that have undermined the purposes and implementation of both the ADA and ADEA and chilled causes of action based on the ADA and ADEA. Part III projects the current problems with anti-discrimination causes into the future, when older people will comprise a significant part of the population of people with disabilities who choose employment. The commentary considers the nature of the baby boomers, the evolution of the job market, and contrasts the impediments to discrimination litigation in the late 20th century with the differences likely to develop. Finally, the narrative foresees the emergence of employment discrimination law of renewed vitality based on the ADA. This new vitality will be carried forward by

21. See Elderlaw supra note 7, at 27-29. The characterization of the elderly as self-serving "greedy geezers" drew much public attention from the repeal of the Medicare provisions enacted by the Medicare Catastrophic Coverage Act of 1988 (MCCA), repealed by Medicare Catastrophic Coverage Repeal Act of 1989, 103 Stat. 1979. The MCCA promised to provide the first substantial increase in Medicare benefits since the program's start in 1965, lifted the sixty day limit on fully paid inpatient hospital care, and capped the twenty percent co-payment due on physician's fees. See Lawrence A. Frolik & Alison Patrucco Barnes, Elderlaw (1st ed. 1992) 483-84 (citing Joan O'Sullivan, Catastrophic Health Insurance: Medicare 7 (Cong. Research Office, Sept. 5, 1989)). The skilled nursing home coverage cap was increased from 100 to 150 days and the requirement of prior hospital stay was dropped. The reform package was a negotiated agreement between legislators and aging advocates, especially the American Association of Retired Persons (AARP), to provide an initial limited long-term care benefit through the federal social insurance program. Id. Critics focused primarily on the financing provisions, which required most retirees to pay higher premiums in exchange for increased benefits and required higher income retirees to pay more according to their income bracket, up to $1600. Id. A minority of relatively affluent elderly led the opposition, egged on by the mail campaigns of conservative lobbying groups. Advocates for the new benefits called the protestors "greedy geezers." Id. Congress repealed the measure on November 21, 1989.
retirees with disabilities who may create a new climate for accommodation of disabilities in the job market and the nation.

I. Age Discrimination and Disability Discrimination: The Present Law

The United States' current discrimination laws flow from the concept and phrases of the landmark Civil Rights Act of 1964, which prohibited discrimination on the basis of race, religion, national origin and, by amendment, discrimination on the basis of sex. Under Title VII, the Act's employment provisions, employers may be sued by an individual asserting that an adverse action against that individual was caused at least in part by a prohibited motive. A prohibitive motive is one that results in an applicant not being hired or an employee is demoted, paid less or fired where race or sex might have been a motive in such a result. The burden of proof allocation between the plaintiff and defendant requires that the defendant respond to the plaintiff's prima facie case with evidence of a permissible motive for the adverse action. In the employment-at-will context, any non-discriminatory motive is acceptable. The defendant, however, "Bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." Absent an alternative reason for the adverse action, the finder of fact can infer that discrimination took place.

The Rehabilitation Act of 1973 is the earliest legislation prohibiting employment discrimination against people with disabilities. The Act builds on an older law providing vocational rehabilitation benefits to veterans of World War I. The Rehabilitation Act and its regulations provide many of the concepts and definitions later incorporated into the ADA. The Rehabilitation Act's scope, a compromise with advocates for broader protection

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24. The structure of a case was established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a race discrimination case.
27. 29 U.S.C. §§ 791-95 (1973). The legislation originally used the term "handicap," but was amended to use the preferred term "disability." Id.
28. See ROTHSTEIN, supra note 10, at 7.
of persons with disabilities, is limited to federal agencies, federal contractors receiving substantial funds, and entities receiving federal grants or participating in federal programs.

A. The Age Discrimination in Employment Act

Congress first prohibited age-based employment discrimination with the enactment of the Age Discrimination in Employment Act (ADEA) in 1967. The ADEA prohibits employers from failing or refusing to hire, or otherwise discriminating against any individual with respect to compensation or privileges of employment because of age. The protected class of workers includes anyone over the age of forty. The elements of a prima facie case are similar to other discrimination laws, except that under the ADEA the plaintiff need not show that he or she was replaced in the job or promotion desired by a person outside of the protected class. Thus, a fifty-five year old replaced by a forty-five year old may have an action under the ADEA.

An ADEA case, like a Title VII case, follows the structure established in McDonnell Douglas. In order for the plaintiff to avoid summary judgment against them, the plaintiff must show that 1) the individual belonged to the protected group; 2) the applicant applied for, or was employed in and was qualified for, a job for which the employer sought to hire; 3) despite the applicant’s qualifications, he or she was rejected; and 4) after the rejection the position remained open, and the employer continued to seek applicants from persons of the complainant’s qualifications or filled the position with another employee with comparable (or lesser) qualifications.

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29. 29 C.F.R. § 791 (1967).
30. Id. § 793.
31. Id. § 794.
34. Id.
35. Id.
36. 411 U.S. at 802.
37. Bohrer v. Hanes Corp. provides the following statement regarding the plaintiff and defendant’s burdens:

Prima facie proof of age discrimination does not necessarily entitle the plaintiff to a jury determination of his claim. Such proof simply shifts to the defendant employer the burden of producing evidence of nondiscriminatory reasons . . . . If the employer
The burden of proof then shifts to the employer-defendant to show nondiscriminatory reasons for the adverse action. Employers can avoid liability under the ADEA by proving that the motivation behind the adverse action (failing to hire, firing, demoting, failing to promote, denying a raise, etc.) was not age discrimination. The employer can assert the affirmative defense that the plaintiff failed to fulfill a "bona fide occupational qualification" (BFOQ), i.e., the employer is justified in its disparate treatment of certain older employees. The defense requires that substantially all persons over a certain age within the protected class have certain characteristics that render them unable to perform the job safely or efficiently, and that individual capabilities cannot be determined.

As another affirmative defense an employer may assert that the alleged adverse action was not related to the plaintiff's age, but was related to a "reasonable factor other than age" (RFOA). While employers advancing this defense have recourse to the widest range of other possible motives for failing to hire or firing, the employer must at least meet the burden of production in response to the plaintiff's prima facie case. Absent an employment or union contract with contrary provisions, many reasons are acceptable. Such reasons include personality conflicts, low productivity, poor

offers proof, which raises a genuine issue of fact as to whether it terminated the plaintiff for good cause, or of some basis other than age, the presumption of discrimination engendered by the plaintiff's initial evidence is dispelled. 715 F.2d 213, 218 (5th Cir. 1983).

40. Under a BFOQ, an employer may, for instance, show that a chronological age limit was "reasonably necessary to the normal operation of the . . . business." Id. The employer admits the discriminatory decision is based on age, but justifies its actions with reference to the requirements of its business purposes. See, e.g., Diaz v. Pan American Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971) (involving the failure to hire applicant as a flight attendant because of his sex, the court held that having exclusively female flight attendants was not "reasonably necessary" to the safe transport of passengers, which it deemed to be the essence of Pan Am's business).
43. Courts are split on whether the RFOA provision is an affirmative defense or merely a burden of going forward. ELDERLAW, supra note 7, at 132.
44. Id.
or decreasing work quality, or absenteeism.\textsuperscript{45} An older employee may even suffer an adverse action related to work status or pay because of health problems and have no claim under the ADEA.\textsuperscript{46}

Another aspect of the ADEA that distinguishes it from the other discrimination statutes is that it prohibits mandatory retirement for most workers. This counters the then-existing norm that subjected about forty percent of workers to mandatory retirement at age sixty-five.\textsuperscript{47} Many workers may still be subject to mandatory retirement. The workers include those involved in physically demanding work that requires reliable, safe competency, including public safety officials such as firefighters and law enforcement officers.\textsuperscript{48} "Bona fide executives or high policymakers" entitled to substantial, immediate retirement benefits may also be required to retire from their sensitive positions.\textsuperscript{49} No widespread merit-based evaluation system has been developed to exclude older workers on the basis of failing ability. Instead, an employer who wants to encourage retirement is likely to make it financially desirable for the employee.

The ADEA, in sum, has significant limits although it improves the choice available to older workers. On one hand, it only provides protection from an adverse employment action if the claimant can show that he or she could fulfill all the employer's requirements. On the other hand, the ADEA unequivocally prohibits mandatory retirement for most employees. This ends the presumption that older workers should be removed from the workforce.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{45} Hood, supra note 41, at 10.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Elderlaw, supra note 7, at 97.
\item \textsuperscript{48} 29 U.S.C. § 623(j) (1994).
\item \textsuperscript{49} 29 U.S.C. § 631(c) (1994); 29 C.F.R. § 1625.12 (2001) (highlighting that the provision protects the interests of businesses seeking innovative leadership, while assuring that the forced "retiree" has a comfortable income without employment).
\end{enumerate}
\end{footnotesize}
B. The Americans with Disabilities Act

Title I of the Americans with Disabilities Act (ADA) addresses anti-discrimination requirements in employment settings. In the manner of federal statutes, it sets out definitions of terms, the nature of discriminatory activities, and enforcement measures. The regulations are quite important to the law's interpretation, though courts have not always agreed with all their provisions. Additional interpretive guidance is provided by the Equal Employment Opportunity Commission (EEOC) Interpretive Guidance, which provides a section-by-section analysis of the regulations, and a technical assistance manual, which adds further discussion and examples supporting the interpretation. A still longer treatment of the material is found in the EEOC Enforcement Guidance.

Title I prohibits discrimination in job application procedures, hiring, advancement or discharge, compensation, job training, and other terms, conditions, and privileges of employment. The ADA protects an "individual with a disability," who is defined in three ways: one who has a physical or mental impairment that substantially limits one or more of the major life activities of that individual; having a record of such impairment; or, being regarded as having such an impairment. A physical or mental impairment


51. The statute begins with three definitions that apply throughout the Act: "Auxiliary aids and services," "disability," and "state." 42 U.S.C. § 12102. The most frequently used 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." Id. § 12102(2).

The segregation of these definitions from any substantive title provides the basis for the Supreme Court's opinion in the 1999 cases that no agency has interpretative authority over the Act's provisions. Sutton v. United Air Lines, Inc., 527 U.S. 471, 479 (1999). Thus, the EEOC regulations defining a person with a disability as one evaluated in an unmitigated state, 29 C.F.R. § 1630.2(j)(3)(i) (2001), carries no weight with the Court. Sutton, 527 U.S. at 479-80.


56. 42 U.S.C. § 12112(a) (1994). The regulations provide further specifications.

includes physiological disorders, cosmetic disfigurement, or anatomical loss affecting one of the major body systems. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Generally, an employer must make adjustments or modifications that are "reasonable" in nature and cost in order to allow full participation by a person with a disability. A person who can perform the essential functions of the job, with or without such accommodations or adjustments, is termed a "qualified individual with a disability." Thus, the scope of the ADA's coverage depends upon one being a "qualified individual with a disability," such as substantially impaired in a major life activity, but not so impaired as to be precluded from performing fundamental job duties, with reasonable accommodations if necessary.

In sum, the ADA provides significant protections lacking in the ADEA by requiring examination of the essential, rather than marginal, functions of the job. While deference is given to the employer's job description and assertions about duties, courts often inquire further and make their own determination. In addition, the ADA requires the employer and employee to engage in "an informal, interactive process...[to]...identify the precise limitations resulting from the disability and the potential reasonable accommodations that could overcome those limitations." Accommodation need only be "reasonable" and, if so,
must be provided by the employer, though the cost may not be "de minimis."

C. The Legal and Political Separation of Age and Disability Discrimination

Most attorneys specializing in services to the elder population have never used the provisions of the Americans with Disabilities Act (ADA) to pursue a client's claim. This is curious, since the ADA offers protection against discrimination in employment, which anecdotal evidence suggests occurs for older people with some frequency.

This oddity is best explained by the ADA's political origin, which stands firmly on the claims of disabled individuals of working age who could not get jobs because of fear, or mistake, or prejudice that undervalues their real capabilities. When Congress enacted the ADA, the legislation targeted young adults using wheelchairs or who had other physical infirmities like blindness or deafness.

In contrast, older people with health problems and chronic conditions are assumed to be interested in retirement, not the opportunity to work. Further, the older population has its own identity and stereotypes. The clients of the elder law attorney would almost certainly not identify themselves as having disabili-

65. Title I and its regulations clearly imply that the employer bears the cost of the accommodation because the definition of undue burden allows consideration of factors relevant to the employer's financial resources. Title I, however, makes no reference to the prospective or current employee's resources. 42 U.S.C. § 12111(10) (1994). Further, the employee can refuse any accommodation offered by the employer but risks being unable to perform the job's essential functions and, therefore, being one who is not a qualified person with a disability. 29 C.F.R. § 1630.9 (2001). Title III, on public accommodations, explicitly prohibits imposing a surcharge on persons with disabilities to cover the costs of reasonable modifications or auxiliary aids and services. 29 C.F.R. § 36.301(c) (2001).

66. See e.g., 29 C.F.R. § 1630(p) (2001); Lyons v. Legal Aid Society, 68 F.3d 1512 (2d Cir. 1995) (holding that the cost of Manhattan parking spaces for Legal Aid attorney with severe ambulatory disabilities may be a reasonable accommodation, though cost might be up to $520 per month).


ties. Conversely, people allied with the disability rights movement would almost universally distinguish themselves from the elder population, believing that age is not the source of difficulty.

D. An Aged Person is Sometimes a Person with a Disability

Age is not, in itself, a disability. The Senate Committee Report on the ADA excludes the possibility of using age as a proxy for disability.\(^7\) Discrimination because of an age-related disability, however, is analogous to the very types of discrimination the ADA prohibits. The ADA's findings and purposes state that society has tended to isolate and segregate individuals with disabilities. This legislation is necessary to remedy intentional and unintentional discrimination including the effects of architectural barriers, transportation and communication barriers, and overprotective rules and policies.\(^7\) These purposes seem to apply to older people with disabilities as readily as to younger disabled persons.

The universal effects of aging include both natural changes in abilities and senses, and a rising incidence of chronic conditions with symptoms that impact the awareness and activities of older people.\(^7\) Occurring to different individuals at very different ages, but increasingly likely with advancing age, are the loss of physical vigor, speed, strength, and flexibility.\(^7\) Diseases, such as arthritis or congestive heart disease, impair these functions, sometimes severely, for a minority of individuals.

Perceptive functions decrease from a very early age. Vision (as so many discover) universally declines beginning in one's forties while hearing becomes perceptibly less acute in one's fifties.\(^7\) Unnatural deterioration, in contrast, might result from glaucoma or retinal deterioration related to diabetes or the effects of long term

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71. 42 U.S.C. § 12101 (2), (5).
73. See Elderlaw, supra note 7, at 13.
74. Id. at 14. See Thomas S. Rees, Auditory and Vestibular Dysfunction, in PRINCIPLES OF GERIATRIC MEDICINE AND GERONTOLOGY, supra note 72, at 617 (finding that the loss of hearing ability is widespread among older people, and the etiology of age-related hearing dysfunction is frequently difficult to determine); see also Robert E. Kalina, Aging and Visual Function, in PRINCIPLES OF GERIATRIC MEDICINE AND GERONTOLOGY, supra note 72, at 603 (acknowledging that many changes in vision in later life are universal, inevitable, and currently untreatable).
exposure to loud noise. If a person is lucky and active, significant physical symptoms of aging may not be felt until age eighty or even ninety; but, should one live so long, symptoms will inevitably come that intrude into the routine activities of an active day. The symptoms of chronic conditions may begin at any age, often exist for a time without reaching a threshold of awareness or impairment, and may develop into significant impairment of function.

Cognitive function also declines with age. Some natural functions of the human brain, such as memory, are naturally less capable with increasing age. Fortunately, for decades, the brain compensates by using other portions of its pathways and no significant effects are detectable.

Thus, aging includes both natural senescence and disease processes, which might be exacerbated or accelerated by genetics, lifestyle, and habits. It may be difficult, but surely possible, to determine whether an impairment is a deviation from the natural course of aging, if necessary. Few cases have considered whether the entirely natural effects of aging on eyesight, hearing, or reflexes, for example, qualifies an individual as a “individual with a disability” under the ADA.

The definition of a person with a disability in the context of employment suggests that a decline from the “normal” range of capabilities at whatever age is enough to qualify a plaintiff. Those who have chronic conditions in addition to advanced age, though

75. See, e.g., Jackson, supra note 72, at 213 fig.15-2 (showing the rising rates of severe disability after age sixty-five projected to the year 2040 based on various assumptions about longevity and disability rates).

76. The severe effects of Alzheimer’s disease, for example, are symptoms of that disease, and do not affect most people no matter how long they might live. Elderlaw, supra note 7, at 17; see Claudia H. Kawas, Alzheimer’s Disease, in Principles of Geriatric Medicine and Gerontology, supra note 72, at 1257.

77. Elderlaw, supra note 7, at 14.

78. A possible explanation for the paucity of cases dealing with the natural effects of aging as a disability in the ADA context may center on the line of cases that culminated in the Supreme Court’s decision in Sutton. Sutton v. United Air Lines, Inc., 527 U.S. 471, 488 (1999). In that case, the Court held that under the ADA, the determination of whether an impairment substantially limits one or more major life activities is made with reference to the mitigating measures an individual employs. Id. at 488. Therefore, an elderly person who uses glasses, hearing aids, or medication may no longer qualify as a person with a disability once the corrective measures are considered. See also Murphy v. United Parcel Serv., 527 U.S. 516, 521 (1999) (holding that a disadvantaged UPS mechanic capable of controlling his hypertension through medication was not substantially limited in any major activities).

79. 29 C.F.R. § 1630.2(i) (2001) (defining “major life activities” as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working”) (emphasis added); id. at § 1630.2(j)(1)(i) (2001) (providing as one definition of the phrase “substantially limits” as being “[u]nable to perform a major life activity that the average person in the general population can perform” (emphasis added)).
the conditions might be quite common, do not represent the average person. Therefore, are they persons with disabilities if they are substantially impaired?  

In the alternative, a plaintiff's body with its chronic impairments is the body as it naturally occurs at eighty or ninety years of age, rather than being an "individual with a disability" under the ADA. If the standard encompassed by the term "average" is set by age group, a number of aged potential plaintiffs who have significant age-related impairments that are typical physical and mental conditions for the "average" person of that age may fall outside the ADA's scope.

Because indications in the ADA are scarce, it may be possible that many impairments commonly associated with aging are sufficient to qualify an individual as disabled, as compared with the "average person." At the least, elderly disabled people suffering from chronic diseases and their symptoms might qualify as "persons with disabilities" under the ADA.

II. AGE AND DISABILITY DISCRIMINATION LITIGATION LIMITED

In such a socially sensitive public arena as discrimination policy, the impact of important laws may be expected to change over time. The more significant the scope and effect of the law, the greater the potential backlash if its mandates outpace society's norms or resources. Both the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA) reflected and then changed society's values at the time they were passed. Both laws have undergone recent reinterpretations that blunt their effectiveness in identifying discrimination and render it unrewarding for perpetrators. Significant changes in social policy have curtailed the generous helping hand offered to elders by the

80. *Sutton*, 527 U.S. at 479 (holding that a person who suffers from a physical or mental impairment that substantially limits one or more major life activities can establish a disability under the ADA).

81. 29 C.F.R. § 1630.2(j)(1)(i) (2001) (using the "average person in the general population" as the point of comparison in determining whether a person's impairment "substantially limits" a major life activity); see *White v. Orange Auto Ctr.*, 101 F. Supp. 2d 485, 487, 494 (E.D. Tex. 2000) (holding that a sixty-three year old male who suffered from poor vision, cataracts, and macular degeneration disease established a genuine issue of material fact as to whether he was substantially limited in any major life activity when his best corrected vision was 20/200).
Older Americans Act of 1965. Similarly, the social characterization of people with disabilities and their advocates may also be undergoing a cynical transformation as resistance grows to the ADA's requirements.

A. Judicial Interpretation Limitations on the ADEA

Under the ADEA, employer decisions that treat employees differently depending on their age, such as enforcing rules that expressly distinguish persons in the protected class from those outside the class and treat those in the protected class less favorably, may be examples of disparate treatment. Disparate treatment is prohibited by the ADEA unless it falls under the BFOQ (bona fide occupation qualification) defense or RFOA (reasonable factor other than age) exception. Other facially neutral rules or policies may in fact treat workers in the protected class differently from others, causing a disparate impact on workers of the protected class. The Supreme Court acknowledged the prohibition on disparate impact discrimination in Griggs v. Duke Power, a race discrimination case. The Court stated that the "[Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation." An example is a rule that considers only recent years in evaluating work experience, the so-called "recency factor." Such a rule is likely to discriminate against older workers who have a broader range and

83. Dace v. ACF Industries, Inc, 722 F.2d 374, 378 (8th Cir. 1983) (suggesting that employer's desire to save money could be linked to age discrimination), reh'g denied, 728 F.2d 976 (8th Cir. 1984). But see Hazen Paper, 507 U.S. at 610 (holding that in the ADEA context, disparate treatment requires that the plaintiff's age must have "actually played a role in [the employer's decision-making] process and had a determinative influence").
84. See Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980) (stating that "a prima facie case of discriminatory impact may be established by showing that an employer's facially neutral practice has a disparate impact upon members of plaintiff's [ADEA] class, in this case teachers over 40 years of age"), cert. denied, 451 U.S. 945 (1981).
86. Id. at 431.
duration of experience, since significant qualification information will fall outside recent years.

Notable ADEA disparate impact cases have involved the higher compensation typically provided older workers. For example, *Geller v. Markham*, the first case to apply disparate impact theory under the ADEA involved a fifty-five year old teacher with extensive experience. She sued a Connecticut school district for failure to hire her for a permanent position because of a cost-cutting policy that limited hiring to only those with few years of experience. The Second Circuit Court of Appeals found that Geller established a *prima facie* case under the *McDonnell Douglas* framework that required the defendant to refute her claims or abide by a jury verdict. Geller's evidence included expert testimony that showed that 92.6 percent of teachers over age forty in the state had sufficient experience to be excluded from consideration for hiring under the rule.

In 1993, *Hazen Paper v. Biggins*, a case where the employer fired the plaintiff at the age of sixty-two amid charges that the plaintiff was doing business with a competitor, ushered in a new era in age discrimination litigation and undermined the ADEA's potentially broad sweep. The plaintiff showed that in a short time, after ten years with his employer, his retirement benefits would have vested had he not been fired. The vesting rule, however, depended upon his years at the company, not his age. That is, if he had joined the company at eighteen, he might be as young as twenty-eight when his benefits vested, well below the threshold that defines the protected class under the ADEA. The Supreme Court held that the plaintiff had no cause of action because years of service was not a proxy for age. Thus, no inference that the plaintiff was fired because of age was permissible.

After *Hazen Paper*, the higher costs associated with long term employees cannot support an inference of age discrimination.

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88. 635 F.2d 1027, 1030 (2d Cir. 1980).
89. *Id.*
90. *Id.* at 1032–33.
91. *Id.* at 1033. The court might have given more weight to the fact that over sixty percent of teachers under forty also had enough experience to be excluded by the rule.
93. *Id.* at 607.
94. See *id.* at 609 (requiring direct evidence of age-related animus to meet the requirement for discriminatory intent and holding that “there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age”).
Rather, the plaintiff must show disparate treatment, an intent to treat the older worker worse because of age.95

A further difficulty with the ADEA is that it provides no protection to older workers who are demoted or fired because of the effects of disability.96 The ADEA sought to provide older workers opportunities to overcome unwarranted stereotypes and prejudices against them, and to enable them to get good jobs that they were able to perform. It did not take up the cause of older workers who are less capable physically or mentally than younger workers or than their own younger selves. The ADEA includes no requirements for accommodating workers with disabilities, nor does it require that the employer consider anyone who does not meet the employer's expectation of efficient and effective services.97

As a result, the ADEA leaves significant room for discrimination against older workers. First, the older, chronically impaired worker who must achieve a specific result without assistance from others or without resources for special equipment may be unable to compensate for changes in productivity due to aging. The older worker presenting such problems might be hired because of the ADEA, but may soon be fired without an opportunity to show his or her worth as a worker. The likelihood of an adverse action against such a worker is, of course, exacerbated by any employer stereotypes that raise skepticism and impatience with early performance or mistakes. Thus, the older worker who compensates for her lesser speed and strength due to a chronic condition by conscientious organization and motivating co-workers to willingly engage in teamwork that limits the impact of her physical impairments may not be able to continue as a valued employee. Second, the same might be true of a skilled craftsperson who could compensate for


96. See Frier, supra note 41, at 175–76; Hood, supra note 41, at 11.

97. See generally Frier, supra note 41 (concluding that the ADA provides protection for older workers who suffer adverse action because of impaired performance due to ill health). Older applicants might also be excluded on the basis of generalizations about the correlation between age and a lack of strength or stamina. See Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 237 (5th Cir. 1976) (holding that bus company need not hire extra-board drivers over the age of forty because the job was “strenuous”). But see Western Airlines v. Criswell, 472 U.S. 400, 422 (holding that no BFOQ defense established by the airline that required flight engineers to retire at age sixty contrary to Federal Aviation Administration requirements and industry practice).
diminished visual acuity by appropriate lighting and equipment but is allowed and provided only the standard work tools.

Without a doubt, age discrimination continues. A February 2000 Bureau of Labor Statistics study of layoffs over the prior three years indicates that workers age fifty-five to sixty-four gained reemployment at a rate of only fifty-six percent, as compared with eighty-eight percent reemployment for workers age twenty to twenty-four, and eighty percent for workers twenty-five to fifty-four.98 Further, the congressional debates on the ADEA characterized employers' views on older workers as paradoxical. These views included prizing the stability, better skills, and greater knowledge of older workers, but "despising" older people as applicants and new hires because of the possibility (i.e., both stereotype and statistically increased likelihood) of poor health.99 The ADEA does not at this time, however, hold the potential for expansion for more comprehensive coverage of workers on the basis of age.

B. The Fading of Age-based Social Services

The Older Americans Act (OAA) has provided a package of social services to elderly people since its enactment in 1965.100 Its legislative purpose was "to assist... older people [to] secure equal opportunity to the full and free enjoyment" of adequate income, good physical and mental health care and rehabilitative services, suitable housing, and employment opportunities.101 At the time of enactment, close to half of current retirees' incomes fell below the federal poverty level.102 The OAA required establishment of an Area Agency on Aging in every state, which administered statewide plans for aging services.103 A substantial package of nutrition and community-based services was to be provided to anyone age 65 or

98. Press Release, Bureau of Labor Statistics, Worker Displacement During the Late 1990s (August 9, 2000), available at http://stats.bls.gov/news.release/ disp.nr0.htm (last visited May 11, 2002). Workers age sixty-five and older gained reemployment at a rate of only twenty-six percent, a statistic difficult to adjust for genuine voluntary retirement. See id.
101. Id. § 3021.
older, without regard to income. At congregate meal sites, for example, any senior could receive a hot meal at least once a day with no obligation to donate toward its cost.

The idea soon suffered from a shortage of funds that called for choices with regard to what services were available. Meal sites targeted their social services programs to poverty assistance, rather than information and referral, and recreation for more affluent seniors. The composition of the poor older population also changed to include substantial numbers of foreign-born elders. By the time of the 1987 reauthorization hearings, participation in nutrition programs had dropped because many participants wanted familiar ethnic foods and needed non-English programs to meet their needs. Advocates and legislators failed repeatedly to agree on new criteria to guide state and federal government on funding and delivery of senior services. Funds for existing programs continued to shrink without reauthorization until 1999.

The era of age-based benefits under the OAA is essentially over. Only information and referral regarding social insurance programs (Social Security and Medicare) are readily available and suited to the needs of non-poor seniors through senior centers. Other significant bright lines in aging policy also are blurring. For example, the eligibility age for Social Security is creeping upward month by month according to a formula adopted by Congress, so that in 2006 the retirement age will be sixty-eight. Medicare, the social insurance program for both the aged and persons with long-term disabilities, covers a shrinking portion of beneficiary health care costs. The combination of deductibles, co-payments, and non-covered health care expenses, such as prescription and non-

104. Id. § 3303-d.
105. This is theoretically still true since the policy underlying the OAA has not changed. The choice of services and food, and the company, makes congregate sites well targeted for poor, ethnic minority seniors.
106. Elderlaw, supra note 7, at 397. State suits challenging the targeting of funds for services to the elderly living alone and those age seventy-five and older were successfully challenged because of their frequent invalidity when applied to minority elderly. Id.
107. The OAA, through its Title III community-based services program, continues to serve the purpose of maintaining independence among the aged and to formally prohibit means testing. See Developments in Aging, supra note 68, at 253–55, 259–65.
108. Robert B. Hudson, The History and Place of Age-Based Public Policy, 19 GENERATIONS, 1, 5–10 (1995) (noting that the U.S. is distinctive among developed nations in providing substantially more social welfare benefits for the aged than others).
109. Beginning in 2000, the normal retirement age (NRA) is increasing in two-month increments until the NRA is sixty-seven in 2002. Elderlaw, supra note 7, at 164. Thus, everyone born in 1960 or later has an NRA of sixty-seven.
prescription drugs, has reduced average Medicare coverage to just under half of total beneficiary health care costs.\textsuperscript{110}

The aged, as a group, are no longer the objects of society's guilt and generosity. The political will to use age as a proxy for need has faded, along with much of the will to provide support without obligation on the part of the recipient. That is, the aged who do their part (or have the Social Security record to show they have done so) and those who have significant special needs such as physical illness or frailty are likely to benefit from a renewed spirit of benevolence.\textsuperscript{111}

\textbf{C. The Limitations on the ADA}

The definition of an "individual with a disability" is the most debated term in the ADA's history.\textsuperscript{112} A disabled person is one who has a physical or mental impairment that substantially limits one or more of the individual's major life activities.\textsuperscript{113} Substantial limitation means that the person is unable to perform a major life activity the average person in the general population can perform, or is significantly restricted as to the condition, manner, or duration in which the person can perform the activity.\textsuperscript{114} In the employment context, a person is significantly restricted in the ability to perform either a class of jobs, or a broad range of jobs in various classes, compared to the average person with comparable training, skills, and abilities.\textsuperscript{115} If a disabled person holds or desires a particular job, the employee or prospective employee must be "qualified," which means able to perform the essential functions of the job held or sought.\textsuperscript{116} Essential functions takes into account those in any written job description and gives deference to the

\textsuperscript{110} Id. at 211.
\textsuperscript{111} The likely errors and unwanted effects of such views were explored in the symposium issue on aging and public policy in \textit{19 Generations} (1995).
\textsuperscript{112} The notable case of \textit{Bragdon v. Abbott}, 524 U.S. 624 (1998), first announced who is an "individual with a disability." The Court held that Sydney Abbott, an individual with asymptomatic HIV, is a person with a disability in that she is substantially impaired in a major life activity, reproduction. \textit{Id.} She, therefore, had standing to challenge her dentist's decision to fill her cavity in a hospital rather than in his office, as discrimination under the ADA. \textit{Id.}
\textsuperscript{113} 42 U.S.C. § 12102(2).
\textsuperscript{114} 29 C.F.R. § 1630(j)(1) (2001).
\textsuperscript{115} \textit{Id.} § 1630(j)(3)(i).
\textsuperscript{116} \textit{Id.} § 1630.2(m).
employer's view of essential tasks. Under the Title I regulations, essential functions are those that the position was created to perform, or a limited number of employees are available to perform, or the functions are highly specialized so the worker is hired for his or her particular expertise or ability.

The ADA requires more of covered entities, including employers, than the ADEA. The employer and employee are to engage in a dialogue to determine whether there is any "reasonable accommodation" necessary to enable the individual to perform job functions. Reasonable accommodation may include adjustments to the job application process to enable a person to be considered (as described above), modifications to the work environment or the circumstances under which the work is usually performed, or adjustments that enable a person to enjoy equal benefits and privileges of employment.

In 1999, the U.S. Supreme Court decided three cases that must surely have a profound impact on the course of ADA litigation. In each, the plaintiffs had chronic disabilities that were significantly corrected by drugs, assistive devices, or natural compensation by the senses for lost capabilities. The Suttons, twin sisters and qualified pilots, had eyesight that was correctable to 20/20; truck driver Kirkingberg had "monocular vision" because of one eye with extreme nearsightedness, but had an excellent driving record that suggested that he compensated with depth perception based on perception other than binocular vision; and, mechanic Murphy had severe high blood pressure that was lowered by the use of medication.

The Court reviewed the plaintiffs' ADA claims, taking particular interest in the threshold question of whether they qualified as claimants to protection under the ADA. The Court ruled that establishing that the plaintiff is a person with a disability is necessary. A negative answer to this question cuts off further inquiry into whether the employer excluded the individual based

117. Id. § 1630.2(n).
118. Id. § 1630(n)(2).
119. Id. § 1630.2(o).
120. Id.
122. Sutton, 527 U.S. at 475.
123. Kirkingberg, 527 U.S. at 559-60.
124. Murphy, 527 U.S. at 520.
125. Id. at 524-25.
upon disability. That is to say, the employer is free to exclude an applicant for many reasons, including matters of physical capability, provided the person is not within the class protected by the law. For example, an employer is free to prefer a taller applicant because being moderate in height is not a substantial impairment in a major life activity. Similarly, an employer generally is free to prefer a slimmer applicant because being moderately overweight is not a disability.

If, however, the obesity of a competitor in the hiring pool is a disability under the ADA, a number of requirements must be met before that overweight applicant can be excluded on the basis of being overweight. Specifically, the employer must not set up entrance tests that tend to exclude overweight persons. The employer must not conclude that a person is medically disabled without a specific reason and/or demonstration that obesity impairs the applicant’s ability to perform the duties of the job. Rather, the employer must determine specifically that this individual cannot perform the job even with reasonable accommodation, or poses an immediate threat to others, or the accommodations needed to enable the individual to perform the essential functions of the job pose an undue burden to the employer.

In each case, the Court held that the plaintiff was not a person with a disability, explaining that the determination must be made based on the person’s condition with any mitigating measures, such as, drugs, aids or other tools that might be used to alleviate the effects of the disability. Thus, the Suttons’ contact lenses, 133

126. Id.
127. 29 C.F.R. § 1630.10 (2001).
128. Id. § 1630.14(a).
129. Id. § 1630(o).
130. Id. § 1630.2(r) (stating that a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation). The statute, 42 U.S.C. § 12113, excludes only individuals who are a direct threat to others on the job. The EEOC regulations, 29 C.F.R. § 1630.15(b)(2) (2001), expanded the description to “the individual and others,” an interpretation that went unchallenged for a decade. Recent cases have challenged the paternalism of excluding a person with a disability from filling a position that might endanger his or her health (but poses no threat to others on the job). See Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1072 (9th Cir. 2001) (divided court holding that plaintiff, Mario Echazabal, who had worked at the refinery as an employee of various maintenance contractors for more than twenty years, cannot be excluded on the basis of disability when he applies to work for the refinery itself, on the basis that the work might aggravate a chronic condition that quite possibly has developed due to exposure to solvents in the refinery).
132. Sutton, 527 U.S. at 488; Kirkingburg, 527 U.S. at 563; Murphy, 527 U.S. at 521.
133. Sutton, 527 U.S. at 475.
Kirkingberg's natural visual compensation,\textsuperscript{134} and Murphy's medications\textsuperscript{135} negated any claims they might have brought under the ADA. In Sutton, the Court referred to the plaintiffs' "hypothetical uncorrected state,"\textsuperscript{136} as though disability had been eliminated from their lives, while the employers' reason for excluding them was the existence of disability.

ADA commentators have sharply criticized these decisions.\textsuperscript{137} Each case raises somewhat different questions. While it might be reasonable that the Suttons do not come under the protection of the ADA because of their corrected vision, the Court ignored the fact that they were rejected not for their corrected vision but rather for their uncorrected eyesight in the better eye, which did not meet the employer's standard of 20/100.\textsuperscript{138} The employer required better vision than the Federal Aviation Administration regulations,\textsuperscript{139} suggesting that the exclusion was not solely based on a safety standard, or at least the best substantiated safety standard. Further, the Suttons were excluded from the hiring process specifically because of their physical impairment: poor uncorrected vision.\textsuperscript{140}

The other cases are equally frustrating. Kirkingberg could not claim the ADA's protection though he was excluded because of his monocular vision, despite the fact he had no impairment from his monocular vision.\textsuperscript{141} The Court stated that it did not need to reach the question of whether Kirkingberg is qualified because he is disqualified on the basis of Department of Transportation (DOT) regulations regardless of a DOT waiver program that allowed Kirkingberg to drive for another employer while the case was

\textsuperscript{134} Kirkingburg, 527 U.S. at 567.
\textsuperscript{135} Murphy, 527 U.S. at 521.
\textsuperscript{136} Sutton, 527 U.S. at 482.
\textsuperscript{138} Sutton, 527 U.S. at 476.
\textsuperscript{139} Id. at 475-76.
\textsuperscript{140} The Court observed, with some truth, that the impairment alleged by each of the plaintiffs affected the major life activity of "working," and that the category necessarily involves some circular reasoning. Id. At 493. For example, the plaintiff alleges the employer did not hire him because the employer discriminated on the basis of disability or perceived disability. That is, both the impairment and the evidence of the discrimination involved difficulty with the major life activity of "working." Id. This observation, however, became more attenuated when the Court asserted that the employers did not discriminate because they did not believe plaintiffs were substantially impaired in the major life activity of working, only that the plaintiffs were physically incapable of working for them. See id.
\textsuperscript{141} Two of the three plaintiffs also argued they were "regarded as" persons with disabilities. Id. at 489. The Court in each rejected these arguments as creating no cause of action. See id. at 489-91; Murphy, 527 U.S. at 521-22.
Thus, he was not a person with a disability, rather he was excluded from work because of his disability, and he was given a waiver to pursue that same work in spite of his disability.

The Murphy case is perhaps the most chilling miscarriage of a threshold standing determination. Murphy suffered from extreme high blood pressure, the Court reports, since he was ten years old. His blood pressure, as reported, varied from high to dangerous, even when he took medication. Thus, he must be a person with a disability since such high blood pressure creates great risks of cerebrovascular accidents and organ damage, which can be assumed to progress whenever he is insufficiently medicated. Alternatively, his medications were almost certainly potent enough to create such symptoms as disorientation, fatigue, impotence, and other symptoms that might readily be considered a substantial impairment in a major life activity.

Numerous experts reject the validity of the Court's analysis. The Court's dividing line between the threshold for "individuals with disabilities" under the Act creates unprecedented difficulties. An individual must be sufficiently affected by a disability to be considered "substantially impaired in a major life activity" despite the use of mitigating measures that one would normally choose. Yet, the same individual in that mitigated state must be

142. See Kirkingburg, 527 U.S. at 560.
143. See Murphy, 527 U.S. at 521 (noting that Murphy's case came from the only circuit requiring assessment of disability with mitigating measures).
144. Id. at 519.
145. See The Epidemiology of Aging, in Principles of Geriatric Medicine and Gerontology, supra note 72, at 207 tbl.15-1 (incidence of hypertension and cerebrovascular disease by age, by race); Julius I. Ancheta & Michael J. Reding, Stroke Diagnosis and Treatment: A Multidisciplinary Effort, in Principles of Geriatric Medicine and Gerontology, supra note 72, at 1239 (finding that the effects and treatment of strokes do not differ significantly by age).
148. See Issacharoff & Nelson, supra note 7, at 329–31 (advancing two primary flaws in the Court's decisions: 1) the Court presumes the fungibility of jobs in asserting that employers did not regard the plaintiffs as disabled in general, but found them unable to do the particular job for which they applied; 2) the Court's construction of the employers' decisions, taken at face value, excludes virtually all plaintiffs because no employer ever determines that an employee is unfit for work anywhere in the employer's industry). See generally Melissa Cole, The Mitigation Expectation and the Sutton Court's Closeting of Disabilities, 43 How. L.J. 499 (2000) (asserting that the Supreme Court's emphasis on the threshold definition of "individual with a disability" serves to trap people with disabilities in a category separate from others, contrary to the most basic purposes of the ADA).
able to perform all the essential functions of the job. The class of persons helped enough by accommodations to reach this level of capability while remaining substantially impaired is relatively small. The Court’s analysis makes it impossible for most people with disabilities of body systems other than perceptive organs and skeletal-muscular systems to qualify under the Act if they utilize drugs and devices appropriately. For example, the diabetic using insulin effectively may no longer be a person with a disability. Yet, if the individual stops using insulin, he or she would quickly become unable to do any job, and die. The analysis ignores the effect of some conditions, such as some diabetes, to shorten life and cause organ damage. Even an amputee might no longer have a discrimination claim, if he or she uses a prosthesis to perform major life activities about as well as others.

The criticisms of the Court’s decisions build on a groundswell of questions regarding lower courts’ handling of ADA cases. Professor Colker’s research found cause to question the federal district courts’ handling of ADA claims. Over ninety-three percent of ADA cases are decided for the defendant. Professor Colker suggests two principal reasons why the findings differ significantly from Rehabilitation Act results, despite the similarity of the laws. First, she cites the relative weakness of the EEOC, which was charged with writing the regulations for ADA Title I, while Rehabilitation Act regulations were promulgated in large part by the Department of Health and Human Services. Lack of regard for the EEOC’s authority stems from the limited mandate provided the agency under the Civil Rights Act of 1964, a status that has made courts disinclined to give deference to its civil rights regulations.

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149. See Cole, supra note 148, at 535.
150. Employers may not exclude applicants or take adverse action against employees on the basis of fear of higher health care costs. If consideration of the extreme likelihood of future harm or shortened lifespan are not evidence of effects of a disability that substantially impairs a major life activity, it is possible that a cause of action is unavailable after the 1999 Supreme Court decisions.
152. See id. at 109.
153. See id. at 109–10.
154. See id. at 133–41.
155. See id. at 139–50 (tracing the path of non-deference to EEOC regulations from the weak mandate in Title VII through ADEA decisions).
Secondly, Colker asserts that the courts may be quick to dismiss the plaintiff with summary judgment, "ignoring the elementary principles of who bears the burden of proof." Colker theorizes that district courts are unwilling to send ADA cases to juries, choosing instead to find no genuine issue of material fact and decide the case as though the issues presented were entirely questions of law.

Issacharoff and Nelson explain the reasons for such unusual treatment, shedding light on Colker's conclusions by observing that the ADA is a potent tool for the redistribution of wealth and opportunity. Its effects are far greater than the Civil Rights Act or even the ADEA. The theory resonates with Colker's concern to create awareness that ADA litigation is erroneously characterized as a source of riches for plaintiffs. That is, employers and the public perceive the ADA as a tool for employees and applicants to harass and bully others into providing special treatment.

Issacharoff and Nelson believe that the perception of the ADA's effects may be skewed by its redistributive effects, which are overwhelming the justifications for enacting the law. They assert that the "inherent uncertainty in the obligation to provide 'reasonable accommodation'" creates for courts a reluctance to follow the implications of the statute and regulations because the underlying theory allocating costs to the employer is novel and unexplained. Title VII, they observe, created no independent measure of how

156. See Colker, supra note 151, at 101.
157. Colker, supra note 151, at 110–27. Rothstein, supra note 10, at 230–81, presents a series of cases illustrating the provision and denial of accommodations are presented. Seven of the ten cases discussed were decided on summary judgment at the district court level and affirmed by the circuit court. Id. The exceptions were brought under the Rehabilitation Act. Id. Two of the cases presented facts that weigh heavily against the plaintiffs, both of whom had bipolar illness and seek positions that were very sensitive and potentially dangerous to themselves or others. Id. Yet the courts carefully examined the question of what, if any, reasonable accommodation might enable the plaintiffs to fill the jobs they sought. Id. The courts' careful scrutiny of the facts was the distinguishing factor. Despite better facts, ADA cases nevertheless received short shrift.
159. Id.
160. See, e.g., Tom Kertscher, Owner to Argue Dog Needed for Disability, MILWAUKEE J. SENTINEL, Mar. 23, 2001, at A1 (describing affluent condominium owner who had been denied an exception to an association rule. The rule restricted dogs to twelve inches in height. The owner sought to bring suit to require the association to allow the dog as a reasonable accommodation for her disability of depression. Despite this author's repeated assertions that neither the ADA nor the state or federal fair housing laws applied to the situation, the front page story talked only about the ADA and disability discrimination as though it supported such a marginal case.).
161. Issacharoff & Nelson, supra note 7, at 310.
much redistribution is appropriate, in that any redistribution of wealth results from a judgment finding unlawful discrimination. A

ADA cases, in contrast, most typically cause redistribution by finding that the employer failed to accommodate the plaintiff. That is to say, the employer erroneously refused to reach agreement with an employee who is a person with a disability, with regard to changes in work schedule or workplace barriers or equipment, or other aspects of work that a court determines would allow an employee to work and would not unduly burden the employer and the employer’s organization. As a result, the employer should either be compelled to make accommodation by injunction, or made to pay damages, or both.

Van Detta and Gallipeau have yet another explanation for cases decided on summary judgment: bad lawyering. They agree with the general premise that the Supreme Court is off base in its 1999 holdings, reaching results contrary to the common law tradition that courts should act in accord with the spirit of the law, rather than relying on any strained interpretation of the statutory language. They capture the threads of Colker’s argument about judicial disregard of EEOC regulations. However, they further assert that the principal reason is that a significant number of plaintiffs’ attorneys mistakenly assume that their clients’ own characterization of their physical or mental limitations is sufficient to satisfy the burden of proof that they are “substantially impaired in a major life activity.” The EEOC regulations, if properly consulted, would inform an attorney of the need for expert testimony on the meaning of substantial impairment in the context of working.

162. *Id.* The authors trace the simpler form of a Title VII discrimination lawsuit, in which the only reason for discrimination is a social norm that places the plaintiff at a disadvantage with regard to some other applicants or employees. There is no issue as to whether the plaintiff is expected to be qualified to do the job. The ADEA, in contrast, presents a more difficult case in that the older applicant or employee may in fact bring significantly different qualifications and attributes to the job. *Id.* at 314.

163. 29 C.F.R. § 1630.2(o) (2001).

164. Under the ADA, it would appear that the “regarded as” and “record of” prongs of the definition of “individual with a disability” are more similar to the simple prejudice-based case of employment discrimination. Curiously, cases on these bases are relatively rare and seem to cause considerable confusion in the courts.

165. Van Detta & Gallipeau, *supra* note 147, at 515.

166. *Id.* at 514.

167. *Id.* at 517.

168. A plaintiff is substantially impaired in the major life activity of working if the plaintiff is
Rather than choosing among these explanations for such poorly justified holdings, it seems likely that each contributes to an understanding of the reasons to refuse the spirit of the ADA. Each of the arguments plausibly suggests that more than one thing has gone wrong. The very power of the ADA has caused contrary political ideology to cut it down to size. Undoubtedly, in a given case, one or more of the reasons for a negative decision for the plaintiff may predominate. The assertion that cases can proliferate is not without foundation, since ADA litigation, with its mandate for individualized evaluation, is in large part confined to its facts. Thus, cases have little precedential value, and each new situation might require, if not litigation, at least negotiation between the person with a disability and a reluctant employer.

District court judges who have little patience with the ADA's theory and fail to require more competent representation in their courts show a disregard for the law similar to the disregard shown by the Supreme Court in its recent decisions against discrimination plaintiffs. The seed of change existed in the earlier case of Bragdon v. Abbott, in which the Court observed that a sound

significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3) (2002); see also Van Detta & Gallipeau, supra note 147, at 521.

169. Some hostility to the volume of cases and even to the claims of persons with disabilities generally may play a role. Van Detta & Gallipeau cite open hostility from federal judges:

This Court agrees with the Pedigo court's observation 'that the ADA as it [is] being interpreted [has] the potential of being the greatest generator of litigation ever . . . . [It is doubtful] whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker's compensation claim into a federal case . . . . The court doubts that the ultimate result of this law will be to provide substantial assistance to persons for whom it was obviously intended . . . . [O]ne of the primary beneficiaries of [the ADA] will be trial lawyers who will ingeniously manipulate [the ADA's] ambiguities to consistently broaden its coverage so that federal courts may become mired in employment injury cases, becoming little more than glorified worker's compensation referees.'


interpretation of the ADA must effect the purposes of the Act without causing too great an interruption in society.\textsuperscript{171} It appears, however, that part of society now believes that the disruption has been too great.

\textit{D. The Present Limits}

Interpretation of the law reflects society, its values, politics, and financial resources. The means the federal courts have used to contain the social impact and judicial burdens of ADA claims are troubling because they denigrate the very substance of legal interpretation. Yet, if the problem of judicial vigilantism is not widespread, bad judging has greater implications for the current judiciary than for the issues in the long run. Given the political will, Congress could instruct the Court about its wishes by amending the ADA to require that persons claiming disability be evaluated for substantial impairment in their unmitigated state. To accomplish this, Congress could simply endorse the carefully drafted EEOC regulations that provide instruction regarding the elements and burdens of proof, or might draft some replacement provisions with more patient involvement from the business community.

Yet, legislators are reluctant to open up the issue of ADA requirements by introducing an amendment that invites debate and possible repeal of ADA provisions. The judicial decisions limiting ADA claims seem to reflect impatience with the liberal political left and its inclination to redistribution; voices from that quarter would loudly support more liberal implementation of ADA principles. To some extent, the decisions may also manifest irritation with public responsibility for people in poverty, whatever the reasons, who have ill-prepared legal counsel and who personally fail to reflect the values of those on the bench. Such considerations would never be articulated by the courts in the context of disability discrimination litigation. Yet, those very considerations place the ADA as a civil rights statute squarely with Title VII, a characterization that departs from its bipartisan support at its enactment a dozen years ago.

\textsuperscript{171} See 524 U.S. at 631 (reviewing the purposes of the Act, the regulations and guidelines, and considerable expert opinion regarding asymptomatic HIV, the Court affirmed the Court of Appeals judgment that the plaintiff was a person with a disability, though differing with the judgment below that the conclusion could be reached as a matter of law).
People with disabilities, as a group, are different from other disadvantaged groups in their impact on the workplace. People with disabilities come from the widest range of backgrounds and experiences, some of which contribute to a sharp perception of exclusion by their own social and economic group. Some people with disabilities feel that exclusion in the form of a strong sense of being owed some compensation by society. The ADA is the means to demand some compensation in the form of accommodation and compliance with the law. Perhaps it is a problem that the cost comes from the individual employer, rather than society’s coffers.

The requirement for reasonable accommodation at the employer’s expense may cause employers to pay more for employees who are less capable than they could otherwise hire. Sometimes employers are surprised by claims of their bad behavior (and the costs of litigation) when their sole intention was to hire or retain the best workers. Regardless of one’s empathy for persons with disabilities, both generally and specifically, it is easy to understand the groundswell of frustration among those regulated by this remarkable law. It has eroded benevolence as well as raising awareness and combating prejudices.

A core value of the ADA cases remains, that the law contemplates individuals with objectively measurable disabilities who need assistance to overcome prejudice, stigma, physical barriers, and unnecessarily burdensome job schedules to get and keep good jobs. The majority of ADA plaintiffs, however, have less objectively measurable disabilities, many having back conditions and mental impairments. Further, most already have jobs and seek accommodation within their current environment. For some employers, therefore, the comparison between the employee before the disability claim and after is measured in compelled expenditures that erode anticipated financial well-being, without the reassuring certainty that the accommodation is necessary, benevolent and useful. To some extent, employer pessimism is the legacy of excluding people with disabilities, and must be endured. To some extent, it is realistic doubt about the outcome of making accommodations, particularly those that appear to favor the person with disabilities over other employees in such quality of life matters as job duties, scheduling, and work space assignments.

There is no absolute optimum definition of the people who should receive the protection of the ADA. Indeed, the right to sue should depend finally upon the potential for some plaintiffs to cause real disruption in society. The right of the individual to
income, job security, and choice of activities, after all, rests on the assumption of society's ongoing stability. Arguably, even the broadest interpretation of the ADA can cause no such cataclysmic result as social instability, unlike, perhaps, such social wrongs as exclusion by race or gender. The right interpretation of the ADA, instead, varies with the time and will change again.

The ADA's marginalization could be altered by a change in the law, or the regulatory agency, or in the nature of the plaintiffs themselves. An analysis of which change is most likely to happen, and which might succeed, can provide guidance that might hasten a return to sound law and implementation of the benevolence and social optimism of the ADA's purposes. It is unlikely that political change is possible in the foreseeable future, since it was rejected even at a time of remarkably robust need for workers in the mid to late-1990s. Empowering the regulatory agency, the EEOC, while it is under a Republican administration at least until 2005, seems most unlikely.

The change in the nature of the plaintiffs themselves is likely to revitalize the law of disability discrimination and provide for the continuing employment of older workers. Envisioning such a future creates a greater likelihood that the right steps can be recognized and taken, the right cases filed, and the right advocacy directed towards Congress, at times that are most effective.

III. NEGOTIATING THE FUTURE: DISABILITY AND THE BABY BOOMERS

The nature and needs of older people, including those with disabillities, will inevitably change. The first generation to experience an extended retirement, living to great age in unprecedented numbers, is reaching its hundredth birthday. None could, during their working years, anticipate the time they might spend being old, being retired. While the upper limits on natural lifespan are
much debated, the better health and fitness of retirees today as compared with those retiring in the 1960s and 1970s is clear. Better nutrition, decreases in smoking and excessive drinking as a social recreation, and huge strides in health care efficacy have extended the years of vitality for the older population. In the foreseeable future, senior citizens are likely to be active across much of their lifespans.

Because advances in medical science will keep people alive longer, there are greater chances for elders to develop disabilities. Individuals who might have died in early adulthood from accidental trauma such as auto accidents are more likely to survive. Those who would die at mid-life from an accumulation of effects from workplace hazards or destructive lifestyle choices can receive rehabilitation and medication, and live. In mid to later life, the first organ to become cancerous, succumb to infection, or fail in its function can be treated or replaced. Thus, the presence of older workers, those active well past the traditional retirement age, results from a confluence of social and scientific success.

A. Aging Will Be Different (It Already Is)

It is a virtual certainty that as baby boomers begin to reach retirement age in 2010, the number of older participants in all spheres of life will grow rapidly. For most, disabilities associated with aging will not begin for at least a decade from the age of retirement, so there will be little incentive to slow down. Therefore,
regardless of when chronic impairments arrive, only severe problems are likely to cause many baby boomers to stay home.

This generation, born to the returning soldiers of World War II and their spouses eager to reestablish domestic life, has a number of attributes. Baby boomers belong to a uniquely huge age group—aptly described as the basketball moving through a python. Two results are common: First, many baby boomers identify strongly with the interests and activities of their peers rather than looking to older generations for guidance; and second, many baby boomers have had to compete fiercely with their peers for their achievements.\footnote{178}

The resulting views can only be catalogued from anecdotal observations and generalizations. While these views are not entirely true in defining any single individual, they capture the distinguishing characteristics of the group. Baby boomers have been perceived as hard working and hard playing, pursuing recreational and fitness activities their parents would not have considered at a similar age. The reverse explanation is that baby boomers are Peter Pans who resist unwelcome realizations of their own aging. Some attribute their unwillingness to step quietly aside for the younger generation to the intense interest their parents took in their war-delayed offspring. Baby boomers' experiences as young Americans support the notion that they should be integrated into the activities of the moment, to be central to the significant events of the day.

By 2030, those over age sixty-five will be twenty percent of the U.S. population, with baby boomers among those age sixty-five to seventy-five.\footnote{179} These baby boomers will not be excluded from the activities they have pursued throughout their adult lives, including both work and recreation. Because they bring different characteristics to the negotiation of employment, the ADA may support their intention when they need accommodation for disabilities.

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\footnote{178. \textit{See 65+ in the United States, supra} note 15, at 7-1–7-2 (citing \textit{Cheryl Russell, 100 Predictions for the Baby Boom} (1987)).}

\footnote{179. \textit{Federal Interagency Forum on Aging Related Statistics, supra} note 102, at 2.}
Many retirement-age baby boomers will be in the workforce. Some will continue for employment satisfaction, either because of a lifetime of habit, or from dedication to particular work or goals that have not been fully realized by the traditional time of retirement. Some will choose the routine human interaction work can provide, even if their careers provided no great advancement or reward. Other older people will need to work. Recognizing the inadequacy of Social Security and the lack of pensions for many, Congress has already abolished disincentives to employment by repealing the forfeiture of Social Security benefits.

With time, chronic conditions will make it more difficult for some seniors to continue in the work force. Yet employers are likely to recognize many retirees as desirable workers. They have, as long-term employees, a history of work that can be assessed, and possibly positions of skill and judgment that are seldom found in the younger population. A large number of jobs depend less on physical strength and more on such characteristics as poise, dependability, and maturity traits for which older workers have often been valued.

Retirement-age workers also have access to resources that are not available to younger persons, particularly those who never


181. See Alison Barnes, From the Editor, ELDER'S ADVISOR, Vol. 1, No. 2 (Fall, 1999) at iii, iv (citing Employee Benefits Research Institute Issue Brief 206 and a 1998 EBRI survey). Sixty percent of older respondents to 1998 study said that a major reason to remain in the workforce after retirement age was they enjoyment of work, and the desire to stay involved. Id.; cf. Dana Burr Bradley, A Reason to Rise Each Morning: The Meaning of Volunteering in the Lives of Older Adults, 23 GENERATIONS 45, 48 (1999-2000) (stating that “[t]he routine of daily telephone calls, weekly rehearsals, or monthly board of directors meetings gives a sense of direction and accomplishment to the volunteer”).

182. Very few workers in 2001 are able to take early retirement because of inadequate pensions and the need for health care coverage. See Walsh, supra note 180, at A13 (reporting that “[t]oday, only 10 percent of workers are able to take early retirement,” due in part to inadequate pensions and the need for health care coverage). A significant factor is the shift of retirement plans from defined benefits to defined contributions. Barnes, supra note 181, at iv. In the 1998 EBRI study, thirty-eight percent of respondents identified the need to earn to make ends meet, while twenty-six percent expected to support family members. JOSEPH F. QUINN, RETIREMENT PATTERNS AND BRIDGE JOBS IN THE 1990s, Employee Benefit Research Institute Issue (EBRI) Brief No. 206, Feb. 1999.

have been able to work steadily. Many baby boomers, who have had the opportunity to foresee the possibility of their own extreme old age, will bring with them economic security from a lifetime of accumulated retirement assets, however modest. While retiree incomes tend to be low as compared with those of mid-life workers, many will have savings and investments that are held unspent. Many will own a home, some of which will be without a mortgage.184

Those resources and skills together represent the opportunity to address resistance to accommodation for people with disabilities. Anecdote and likelihood of a satisfactory agreement, the fundamentals of changing perception, will most likely support a different characterization of an important segment of workers with disabilities, older workers. In most cases, the interaction between employee and employer will take place entirely in the private sphere, though disability discrimination law will inevitably be a presence underlying their discussions. Since older employees are more likely to become impaired over a relatively short period of employment, a decade or so, the volume of instances required to change perception is likely to come rapidly. The instances of failed negotiation because an employer refuses to participate in negotiation or reasonable accommodation are likely to come quickly as well.

The possibilities for successful negotiation are strong because there are positive motivations on the employer's side, and knowledge and familiarity that presumably are positive motivations on the employee's side, plus room for negotiation of a non-coerced and functional accommodation for both. The conclusion of the calculation of "undue hardship," which relieves the employer of any responsibility for continued relationship with the employee or applicant, is multi-faceted and somewhat subjective.185 If the em-

184. The author believes that retiree home ownership in the early 1990s was upwards of about seventy-five percent, most of them without a mortgage. Given more frequent changes of location, and less family stability for baby boomers, it is unlikely that so much capital will be held in the form of a home. It is possible that many will have stocks and other investments, instead.

185. 29 C.F.R. § 1630.2 (2002). Factors to be considered in determining whether an accommodation would impose an undue hardship include "i) The nature and net cost of the accommodation needed . . . ; ii) the overall financial resources of the facility or facilities involved in the provision of the accommodation . . . ; iii) the overall financial resources of the covered entity. . . ; iv) the type of operation or operations of the covered entity. . . ; and v) the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business." Id. § 1630.2(p)(2).
ployer never concludes that the burden is unjustified, the possibilities for compromise remain as open as the employee or applicant wants them to be.\textsuperscript{186}

Thus, discussions can proceed as the ADA regulations instruct:

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.\textsuperscript{187}

The tenor of such an exchange is, at best, a mutual search and, at worst, a less imbalanced negotiation between an older employee recently disabled and an employer who values that employee. The mutual search is more likely when both parties are seeking solutions that will enable continuing employment. Consider, for example, the discussion of accommodation in which employers and employees consider the reasonableness of substantial costs (say, $5,000 for a chairlift for an employee who cannot use the stairs). It may well be reasonable for an older worker to pay some portion of the cost of accommodation, and the employer may be more willing to shoulder the rest once assured the worker has a commitment to the needs of employment.

Consider, also, the satisfaction of joint investment in the costs when an employee with a disability proposes to resume work that must take place entirely at home, leaving unaccounted for interactions that would take place spontaneously in the workplace. Such a change represents a loss that may be difficult to quantify or describe with particularity. Courts have found such an accommodation might be reasonable, leaving for the future the circumstances in which telecommuting and various forms of long distance information provision might make it so.\textsuperscript{188} Thinking of such agreements in terms of mutual investments and obligations fortifies the ongoing employer-employee relationship.

\textsuperscript{186} This consideration raises the distinct likelihood that a minor amendment to the ADA is necessary to assure that offers made in the negotiations cannot be used in subsequent litigation to show the opinion of the employer that an accommodation offered was reasonable or that contribution offered by the employee indicated recognition of an undue burden.

\textsuperscript{187} \textsuperscript{29} C.F.R. § 1630.2(o)(3) (2001).

\textsuperscript{188} See, \textit{e.g.}, Vande Zande v. Wis. Dept. of Admin., 44 F.3d 538, 544–45 (7th Cir. 1995).
This is not to say that the ADA’s instruction on funds for reasonable accommodation should be altered from the original language. The balance of “reasonableness” should be struck, in negotiation or by the courts, to allow the employment of an individual with disabilities even though that person lacks resources. The person with a disability should never be required to contribute to the cost of an accommodation that is “reasonable.” Rather, the arrival of the aged baby boomer worker provides an opportunity to reconsider the positive values of accommodation to facilitate employment for people with disabilities.

Industry’s desire to employ elder workers is already apparent. New patterns of employment are already appearing, including so-called “bridge jobs” that provide freedom that was elusive in continuing in a full time career. For employers, such jobs might utilize the experience of older workers, while providing opportunities for younger workers to step into positions of executive power.

These changes projected for the future job market inevitably have a darker side that bears careful monitoring. Two effects, both of which disadvantage younger participants in the workforce, are readily foreseeable. Widespread willingness to provide accommodations for older workers may open a door to revitalization in discrimination on the basis of ethnicity, rather than an innocent preference for the known and competent worker. That is, the older worker may in many cases prompt empathy, in significant part because he or she may represent the employer’s parent or future self. Such empathy for older people and their impairments is in itself positive, but it cannot be considered laudable when the reverse is a failure to empathize with younger adults of different backgrounds because their lives and activities have not mirrored that of the employment decision-maker.

The hiring pool of the future is likely to be filled in large proportion with young immigrant workers, whose values and

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189. See Barnes, supra note 181, at iiv.
190. Japan has institutionalized a system of later career, “step-down” jobs that provide seasoned executives with opportunity to provide wise counsel to younger decision-makers but limit any other leadership powers.
191. Support for those who are likely to be viewed as “the other” requires vigilance because it appears that this impulse is present in most societies and, therefore, needs a target. See generally, Simone de Beauvoir, The Coming of Age (1972) (writing that people view old age as affecting only other people).
expressions of interest are likely to seem unfamiliar to conservative, middle-aged employers. Economic necessity is likely to dictate the inclination to hire the new workers. Yet, the opportunities for young, foreign workers' advancement might be kept artificially low by lack of trust and familiarity, and the lack of need to fill more responsible positions if they are held by long term employees who have no incentives to retire.193 Employers reasonably may be motivated to keep a larger proportion of long-term workers upon whose familiar values and personalities they can rely.194 A balance will need to be struck between opportunities for each group, not only for the goal of avoiding discrimination on the bases of age, disability, or race and ethnicity, but because younger workers do bring valuable different perspectives to their endeavors.

A strong incentive to prefer older workers in the future may already have appeared in the employment patterns adopted in the poor job market of 1993–94. Young professionals in significant numbers were hired as consultants and part-time workers to avoid the costs of benefits and the obligation to provide a continuous flow of work.195 Because full-time jobs with benefits were in very short supply, many capable workers with advanced degrees had no job stability or economic security upon their entry into the market.196 The pattern mirrors the service industry's use of not-quite-full-time workers, scheduling each employee to work slightly less than the requirement to trigger benefits.197

The strategy probably saves from one-third to one-half of additional expenditures for fringe benefits and retirement funds, so it should be very attractive to an employer if good employees are willing to work on this basis. For many older workers, the option of receiving no benefits and the obligation of less than full-time work

will have birth rates that fail to replace current population, but that the U.S. is likely to be unique in having a net gain in population due to immigration).

193. See Carrie Johnson, Hiring of Foreign Workers Frustrates Native Job Seekers, WASH. POST, Feb. 27, 2002, at E1 (noting that the current increase in work visas has given employers the ability to hire more foreign workers).

194. See Louis Uchitelle, These Days, Layoffs Compete With Loyalty, N.Y. TIMES, Aug. 19, 2001, Section 3, at 4 (examining the balance between employee loyalty and an employer's economic necessity).

195. See Margot Slade, At This Firm the Clients Hire Inside Consultants, N.Y. TIMES, Oct. 1, 1993, at B9 (noting that having consultants instead of salaried workers saves the client's money as well as providing jobs).

196. See Bob Herbert, In America: America's Job Disaster, N.Y. TIMES, Oct. 1, 1993, at A23 (examining the difficulty college graduates have finding jobs following graduation).

197. See Lane Evans, For Temporary Workers, A Full-Time Quandary, N.Y. TIMES, May 23, 1999, Section 3, at 36 (describing the tendency of employers to hire workers at less than full time in order to avoid paying benefits).
is very desirable. Older workers have health insurance and a stable basis of income in their Social Security and pensions. The ideal for many is an interesting job that leaves the opportunity for recreation and travel. If such older consultant/managers are a strong presence in the workforce, employers may well be able to offer younger workers similar "bare bones" compensation.

In sum, many retirees bring a long work history to the retirement-age job market, and perhaps their post-retirement employers already know their particular talents. Further, those with the highest education levels are most likely to live longest, maintain good health, and be desirable employees. If they require accommodation and the employer refuses, the older worker is likely to be in a better position to bring a successful action for disability discrimination. This positive track record, though not strong in precedential value, surely can provide opportunity for other plaintiffs with similar disabilities who, regardless of age and work record, want to bring actions seeking similar accommodation. The fact that this development might present new circumstances for discriminatory errors in judgment is reason for vigilance, yet welcome for a substantial number of persons with disabilities.

CONCLUSION

It is good medicine to envision a better time for reversing disability discrimination, and realistic to recognize that changes in financial and political times might make it possible. Sadly, the Supreme Court's recent decisions suggest a slow-down in the number of ADA claims, which will no doubt make it impossible for numbers of people with disabilities to require reasonable accommodation of their employers for some years to come. Working expectations can be lost in a decade of frustration. Recognizing the possibility of demographic changes is not a call for advocates to loaf through the next couple of decades. The lower courts are quite capable of readjusting the barriers to discrimination by, for example, finding that a greater number of claimants are substantially impaired with mitigating measures. Such a change would at least moderate the impact of recent decisions. There is time to test the cases of workers who become impaired in the course of their retirement age work and find their employer unwilling to accommodate their impairments, despite the employee's willingness to negotiate on terms. There is time to
establish that the older plaintiff need only be significantly restricted in the ability to perform as compared with the average person having comparable training, skills, and abilities, rather than as compared with an average person of comparable age.

This vision cannot come into being spontaneously. Rather, it must be part of a collective perception, as well as individual wishes, to utilize the working power of people with disabilities. It is, of course, impossible to say with any certainty whether such a scenario will develop. Factors in the economy, the birth rate, immigration standards, and health care interventions for the aged and people with disabilities may alter a vision so contingent and so far removed. Yet it is only appropriate that older workers have a role in correcting the system to reflect the remarkable intentions of a moment when genuine, uncoerced bipartisan support endorsed a commitment to providing the means for people with disabilities to work and participate fully in society.

