

**NELCO**  
**NELCO Legal Scholarship Repository**

---

New York University Law and Economics Working  
Papers

New York University School of Law

---

3-1-2010

# Antidiscrimination in Employment: The Simple, the Complex, and the Paradoxical

Samuel Issacharoff

*New York University School of Law*, [Issacharoff@exchange.law.nyu.edu](mailto:Issacharoff@exchange.law.nyu.edu)

Erin Scharff

*New York University School of Law*, [erin.scharff@gmail.com](mailto:erin.scharff@gmail.com)

Follow this and additional works at: [http://lsr.nellco.org/nyu\\_lewp](http://lsr.nellco.org/nyu_lewp)



Part of the [Labor and Employment Law Commons](#), and the [Law and Economics Commons](#)

---

## Recommended Citation

Issacharoff, Samuel and Scharff, Erin, "Antidiscrimination in Employment: The Simple, the Complex, and the Paradoxical" (2010).  
*New York University Law and Economics Working Papers*. Paper 209.  
[http://lsr.nellco.org/nyu\\_lewp/209](http://lsr.nellco.org/nyu_lewp/209)

This Article is brought to you for free and open access by the New York University School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Law and Economics Working Papers by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact [tracy.thompson@nellco.org](mailto:tracy.thompson@nellco.org).

# **Antidiscrimination in Employment: The Simple, the Complex, and the Paradoxical**

Samuel Issacharoff<sup>1</sup> and Erin Scharff<sup>2</sup>

A paradox lies at the heart of employment discrimination law. Why would an employer choose to discriminate against any qualified potential employee? After all, any unilateral employer decision to limit the range of potential qualified applicants necessarily constricts the supply of labor. Any employer indulging such a “taste for discrimination” (Becker, 1957) on the basis of antipathy for a particular group (as with black applicants) or a mistaken indulgence in stereotyped thinking about the abilities of a group to perform certain work (as with women) would find the applicant pool limited and the cost of labor correspondingly increased. To the extent that such discriminatory behavior was widespread, the wage premium to the preferred group would also then rise.

Under such circumstances, the market should serve as a strong corrective force. Any employer freed from the stereotyped rejection of qualified employees would find a broader pool of potential workers and would presumably save on labor costs. Without having to pay the premium for this undesirable indulgence in discrimination, the tolerant employer would have an advantage in the market for goods and services. Generalized across the economy, a competitive market should squeeze the margins necessary for any employer’s willingness to indulge inefficient discrimination.

Despite the logic of the market, discrimination abounds in employment markets around the world. Employers may be cushioned from market accountability by customer prejudices, coworker prejudices or even legalized mechanisms of discrimination, as in the Jim Crow South, that prevented potential black employees from acquiring the skills necessary to participate in the workforce. Hence the need for employment discrimination laws. By prohibiting employers from using certain protected characteristics as a basis for employment decisions, these laws condemn the subjugation of protected groups for a variety of reasons—prejudice, fear, unconscious motivations, cognitive distortions, and assumed characteristics. They even prohibit capitulation to these biases among coworkers, customers, or the

---

<sup>1</sup> Reiss Professor of Constitutional Law, New York University School of Law.

<sup>2</sup> J.D. Candidate 2011, New York University School of Law.

public at large.<sup>3</sup> This anti-subjugation principle is rooted in the promise of the Equal Protection Clause<sup>4</sup> and has been applied, through the Commerce Clause,<sup>5</sup> to correct discriminatory distortions in the private markets.<sup>6</sup>

But employment discrimination laws are not merely exhortations against the wrongs occasioned by retrograde views. All employment discrimination laws are, at least implicitly, redistributive. There is a tacit understanding that there are classes of persons who have benefitted by the privileged social status of their group and corresponding classes who are on aggregate worse off. Without mandating redistribution, the cumulative effect of employment discrimination laws must be to redress some of the historic advantages and disadvantages resulting from ingrained past injustices. After all, there would be no compelling reason for antidiscrimination laws' sweeping intrusion into market-based employment decisions about hiring, promotion and pay, unless there were a corresponding belief that the revealed market preferences are somehow wrong. Even Title VII of the Civil Rights Act of 1964,<sup>7</sup> the most axiomatic of nondiscrimination laws, was more than a statement that hostility to blacks in the workplace is opprobrious.<sup>8</sup> Rather, advocates hoped that Title VII would also address the lack of employment opportunity for blacks. First and foremost among these consequences was the denial of jobs, promotions, and income as a result of invidious discrimination.

While even Title VII claims occasionally floundered when they forced the courts to confront directly the question of who should bear the costs of remedying past racial discrimination,<sup>9</sup> the tension between the anti-

---

<sup>3</sup> See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”).

<sup>4</sup> U.S. CONST. amend. XIV, § 1.

<sup>5</sup> U.S. Const. art I, § 8, cl. 3.

<sup>6</sup> See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 548 (1976) (Stevens, J. concurring) (“[T]he commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment and, therefore provides the necessary support for the 1972 Amendments to Title VII.”); *id.* at 458 (Brennan, J., concurring) (“Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause.”); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249-62 (1964) (citing legislative history to find the Civil Rights Act of 1964 a valid exercise of Commerce Clause powers).

<sup>7</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. & 42 U.S.C.).

<sup>8</sup> See Civil Rights Act of 1964, tit. VII, 42 U.S.C. §2000e-2 (2006); see also 110 CONG REC. 6548 (noting that Title VII’s focus was on opening employment opportunities for blacks in occupations traditional closed to them, in part to combat “the plight of the Negro in our economy”). This pattern is repeated with other major employment discrimination statutes. See, e.g., Age Discrimination in Employment Act, 29 U.S.C. § 621(b) (2006) (noting that the congressional purpose is to “promote employment of older persons”).

<sup>9</sup> See, e.g. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 270-73, 283 (1986) (ejecting an affirmative action policy in which teachers of color were given protection from layoffs over non-minority teachers with greater seniority because it “impose[d] the entire burden of

subordination and redistributive goals of employment discrimination law reveal themselves most clearly in the jurisprudence of other protected classes: pregnant women, older workers, and people with disabilities. In place of the original civil rights syllogism, which argued that *but-for* invidious discrimination, employers would treat members of protected classes just like any other job candidate or employee, these new protected classes require not equal treatment, but rather special treatment to ensure equal opportunities for workforce participation. In these cases, discrimination might be economically rational. Thus, for example, even benevolent employers might worry about the productivity losses inherent in maternity leave (whether paid or unpaid) or the fixed costs of making an office or store accessible to an employee with a disability.

With the passage of the Pregnancy Discrimination Act (PDA),<sup>10</sup> the Age Discrimination Employment Act (ADEA),<sup>11</sup> and the Americans with Disabilities Act (ADA),<sup>12</sup> antidiscrimination law was forced to confront its redistributive norm and to struggle with the difficult question of who should bear the costs of providing equal opportunity. In this Chapter, we explore at some length the problems of pregnancy discrimination, age discrimination and disability discrimination to highlight claims that are not easily resolved within the traditional civil rights paradigm of antidiscrimination law. These claims strain the boundaries of antidiscrimination law because they push to the foreground questions of cost allocation and the accompanying policy judgments that tax the institutional capabilities of courts. Instead of relying on a conventional equality of treatment model of antidiscrimination, which focuses on combating discrimination that was at its core economically irrational, newer legislation sought to provide workforce opportunities to specific groups deemed vulnerable in the labor market raise difficult policy issues not easily handled by employment discrimination law.

Part I of this Chapter will offer a broad overview of the development of employment discrimination law as it moves from problems of subordination and irrational discrimination to issues of redistribution and economically rational discrimination. Part II addresses the strains placed on employment discrimination law as it confronted demands of accommodation increasingly removed from a simple *but-for* model, looking specifically at the PDA, the ADEA, and the ADA. Finally Part III offers suggestions for future development of this area of law.

---

achieving racial equality on particular individuals, often resulting in serious disruption of their lives.”)

<sup>10</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 95 Stat. 2075 (codified at 42 U.S.C. §2000e(k) (2006)).

<sup>11</sup> Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (2006)).

<sup>12</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. §§ 12101-213 (2006) (amended 2008)).

### I. The *But-For Model* and Its Demise

In its first and most successful iteration, employment discrimination law targeted the most blatant, and most vulnerable, form of categorical discrimination against blacks. Such discrimination also proved to be economically irrational discrimination. These cases followed the simple syllogism that *but-for* irrational discrimination, two employees (or potential hires) would be judged as equals and would move toward equivalent positions in the labor market.

In this phase, Title VII addressed forcible occupational segregation by race such that black employees were hired only for the lowest-paying and most unattractive jobs. The presumption of these cases was that irrational discrimination explained differences in the labor market distribution of black and white workers. Only discrimination, not personal preference, could explain why white workers took jobs as over-the-road truck drivers while black workers were over-represented among the lower-paid local delivery drivers. Absent discrimination, the syllogism would presume that black workers, just like white workers, would prefer the better paid job; black workers would prefer to move into the skilled trades in the steel industry rather than serve in the dirty and dangerous position of coal shovelers.<sup>13</sup> These early cases were relatively easy to prove since the discrimination was oftentimes notoriously overt and the resulting workforce segregation was oftentimes absolute.

Further, employer resistance was undermined by the fact that ending discrimination increased market efficiency. When employers constrict the full range of employees as a result of either their own discrimination or that of co-workers or customers, the market exacts costs—higher wages due to their demand from a smaller supply of labor. Absent a legal requirement of equal treatment, even employers who were not themselves prone to be discriminatory had reasons to be concerned over a unilateral decision to integrate their labor forces. They feared revolt from their employees that might decrease productivity and sanctions from consumers that could lead to decreased demand. Title VII offered employers an excuse to do what had long been in their ultimate economic self-interest.<sup>14</sup>

---

<sup>13</sup> See, e.g., *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 348-49 (1977) (holding that a promotion system effectively “freezing” minority workers into undesirable positions by maintaining the status quo violated Title VII); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (stating the purpose of Title VII was to “eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens”).

<sup>14</sup> Professor Epstein (1992) has extended this argument to claim that all employment discrimination laws should be repealed on the grounds that market pressures will eliminate irrational tastes for discrimination. Per Epstein, such economically irrational discrimination is often the by-product of restrictive laws or other coercive entry barriers.

Title VII's removal of the discriminatory barriers proved the underlying premise of equal aspirations among black and white workers to be strikingly robust; racial prejudice blocked black workers' access to more desirable positions, and Title VII was remarkably successful in weeding out these inefficient market preferences (Heckman and Verkerke, 1990; Heckman and Payner, 1989). The perfectly predictable consequence was a corresponding redistribution of income and opportunity. (Donohue, 2007; Donohue and Heckman, 1991).

That comfortable alliance between equal opportunity and labor market efficiencies did not readily carry forward past the early cases. The key to the effectiveness of these early Title VII cases was the ease with which the *but-for* syllogism fit the problem of racial discrimination in hiring: *but-for* the invidious discrimination, blacks and whites would be similarly situated and would obtain an equitable distribution of social opportunities. Second generation discrimination law struggled to address personnel decisions and employment policies that did not fit as well into this *but-for* model. Complications arose in reaction to several changes in both doctrine and litigation trends.

In many of these second generation cases, employers could point to legitimate economic rationales for treating employees or job applicants differently. While the effectiveness of first generation discrimination claims rested on discrimination law's general alignment with employer self-interest, second generation claims often conflicted with employers' bottom lines. Further, the law's anti-subordination norms served to camouflage these differences and the potential redistributive effects of requiring employers to treat unequal employees as equals.

Four changes in particular proved especially difficult to wrestle with in the context of the simple syllogism: (1) the shift to disparate treatment rather than disparate impact claims; (2) the increasing emphasis on the need for diversity in the workforce and the resulting increase in workplace affirmative action programs; (3) the shift in the Title VII docket toward oftentimes nuanced firing and promotion claims and away from categorical hiring discrimination; and (4) the expansion of antidiscrimination law to cover workers whose unequal workforce participation could not be explained solely by invidious discrimination, such as pregnant women or older workers.

The first major challenge to the *but-for* syllogism was the shift toward disparate impact claims. Early cases recognized expansive statistical proof under disparate impact theory and held employers to a high burden of justification for any claimed hiring requirements above the bare minimum needed to perform the tasks at hand. In the blue-collar jobs commonly at issue in these cases, this standard of proof easily fit patterns of discrimination and protected black applicants from the compounding effects of broader societal discrimination.

The key legal ruling came in 1971 when the Supreme Court in *Griggs v. Duke Power Co.*,<sup>15</sup> first recognized disparate impact claims under Title VII. In *Griggs*, black workers challenged Duke Power Co.'s hiring requirement of a high school diploma or minimum score on a standardized intelligence test for certain skilled positions. The Court accepted the plaintiffs' argument that high school graduation was not necessary to perform the relevant jobs and that the diploma requirement disproportionately disqualified otherwise capable black workers from these more skilled positions.

Unlike disparate treatment claims, which can be defeated by the establishment of a non-discriminatory justification for a personnel decision, disparate impact claims can be sustained even in the presence of such justification if a hiring qualification was not deemed a truly necessary precondition for a particular job. Thus, disparate impact claims could reach personnel policies enacted in the absence of discrimination. For example, the doctrine of disparate impact denies employers the option of taking advantage of a surplus of overqualified workers and demanding higher-level credentials in their workforce, or even of paying a wage premium for overqualified employees in the hopes that their productivity gains outweigh the concomitant increase in wages. By reducing hiring criteria to the minimum level of competence rather than the most credentialed employees the employer could attract or might be willing to pay for, the early disparate impact cases anticipated some of the potential economic losses associated with later reasonable accommodation demands under the disability discrimination laws (Jolls, 2001).

Affirmative action programs further complicated the *but-for* paradigm. As disparate impact law took hold, the absence of women or minorities from the workforce began to create an informal presumption that the hiring criteria might be suspect. In turn, the composition of the workforce provided a safe haven for claims of discrimination since it forced any claim of discrimination from the statistically-driven disparate impact line of cases into the more difficult proof of invidiously-motivated disparate treatment. Employers turned increasingly to affirmative action to buttress the representation of historically excluded groups, thereby altering the composition of their workforce. This created pressure for the preferential hiring and retention of qualified applicants from historically excluded groups, even if they were not the most qualified by existing employment standards (some of which, but certainly not all of which, were subject to challenge for their true job relatedness). The effect was to level the qualifications standards that employers could seek, presumably having some adverse effects on efficiency. At the very least, the employers were forced by the pressures for diversification of their workforces to depart from the criteria that they believed best served their hiring needs, even if the requirements of test

---

<sup>15</sup> 401 U.S. 424, 434, 436 (1971).

performance, educational attainment, or job-related experience may have in themselves had no relation to any overt or even covert discriminatory objective.

The third major challenge confronted in the second generation was the shift from point-of-hire to promotion and retention claims. Because early Title VII cases focused primarily on point-of-hire employment decisions, courts could for the most part avoid the hard question of how to distribute the costs of their findings of discrimination. Employers, paying damages to individual plaintiffs, bore the costs of their discriminatory decisions and the altered hiring practices had a diffuse effect on unspecified other applicants in the labor pool. By 1971, however, the number of Title VII claims based on retention decisions exceeded the number of claims based on discrimination in hiring, and this divergence continued to widen over time (Donohue and Siegelman, 1991). This trend has continued (Nielson et al., 2008; Neumark, 2008). With this shift, discrimination law became a form of incumbency protection for covered workers, and this raised the distributive stakes of employment discrimination law, particularly since non-covered employees were subject to the general legal presumption of at-will employment.

This change was probably inevitable once the early cases of outright refusal to hire women or minorities began to fade away. When dealing with individual claims, a refusal-to-hire case is much more difficult to prove, especially when the number of applicants outnumbers positions available and when many factors unknown to the potential litigant could have been taken into consideration. In contrast, a terminated employee has nothing to fear from and plenty of animosity toward her former employer and can more easily build a case of discrimination. It is unusual for “[a]n individual who is not hired [to] build up the bitterness and hostility toward the prospective employer that is necessary to carry a suit through trial” (O’Meara, 1989, 28). Compounding these difficulties of proof, the monetary stakes in failure to hire claims (especially when plaintiffs can find other, comparable work) are lower than those in wrongful termination cases (Posner, 1995). Thus, potential plaintiffs in discharge cases are more likely to seek out representation and to find lawyers willing to take such cases under the contingency success fee of the employment discrimination laws.

While the shift to termination claims has happened across the board, it has been most noticeable in the ADEA context, where plaintiffs are end-stage employees at the peak of their earnings history – the economics of which we address below. An opportunistic firing feels like a betrayal of trust, leaving employees bitter and essentially unemployable because no other employer would assume the burden of a high-wage, late-stage employee. While this pattern is perhaps most obvious in the ADEA context, other workers can advance claims of wrongful termination under other anti-

discrimination statutes.<sup>16</sup> Older white male workers turn to the ADEA because it is the one piece of federal legislation that protects them.

Finally, newly protected classes brought an even more significant challenge to the *but-for* syllogism's success in the second generation of employment discrimination laws. The ADEA and the PDA are both examples of second generation employment discrimination's attempt to fight a two-front battle. There is no question that some personnel decisions involving the hiring, promotion and retention of pregnant and older workers were premised on unfounded stereotypes reflecting ageism and sexism, and these decisions fit the *but-for* model. As Paul Samuelson once remarked, women are just men with less money. Nevertheless, many (perhaps most) personnel decisions targeted by the ADEA and PDA's bans on age and pregnancy discrimination were not economically irrational.

As we will discuss more extensively below, employers had real reasons to be concerned about retaining older worker at wage levels that reflected years of experience and not necessarily increases in productivity. They also worried about the productivity costs in hiring women who, because of family obligations, were significantly more likely to leave the workforce than their male counterparts. Invidious discrimination does not fully explain employer preferences for younger workers and workers not likely to bear children. Instead, employers are relying on what has come to be called "statistical discrimination," in which a job candidate is judged not solely on her own merits but also on common characteristics of her class. Such statistical discrimination may be perfectly rational; it is simply cheaper and more reliable for employers to rely on the statically defensible heuristic that women are more likely to leave the workforce rather than try to get a truthful response from a female potential-hire as to her true intentions about remaining with a particular firm.

As it confronted these challenges, the *but-for* model began to hang on second generation discrimination claims like an ill-fitted suit, still wearable, but not particularly dashing. By the third generation, however, the claims no longer fit at all. The ADA jettisoned the *but-for* model completely. Recognizing that differences between workers with recognized disabilities and those without such disabilities cannot be explained simply by invidious discrimination and that equal treatment will not suffice to open the labor market to this protected class, the ADA affirmatively requires accommodation for workers with disabilities. The tacit cost burden of accommodation that was implicit in the *Griggs* command that the baseline for employment decisions be the minimum level of competence suddenly

---

<sup>16</sup> However, succeeding on an ADEA claim does offer a significant benefit. Unlike Title VII, the ADEA's right to back pay is not discretionary; it is a matter of right. Further liquidated damages provide double recoveries where the employer committed a willful violation of the statute and awards of back pay include damages for lost wages, pension benefits, and insurance benefits.

came to the fore. The difficult question in all ADA suits was the reasonableness of the cost of accommodation, a question which had been studiously avoided in the early disparate impact cases.

The *but-for* model worked well initially, especially in the context of invidious racial discrimination. In this first generation, employment discrimination law was unusually successful for market regulation; it freed employers to make economically rational choices. As second generation employment discrimination law shifted to tackling issues of equity that could only partially explained through the *but-for* model and its emphasis on invidious discrimination, regulatory solutions became more complicated. By the third generation, employment discrimination law abandoned its mandate of equal treatment. The next section of this essay focuses on the ways new protected classes challenge the *but-for* model.

## II. Cracks in the Model

We now turn to three examples of the broader reaches of employment discrimination law to explore civil rights legislation that protects pregnant women (the PDA), older workers (the ADEA), and people with disabilities (the ADA). All three of these efforts invoked the inclusive equality concerns of the Civil Rights Movement, yet each tests the core premise of equality of opportunity that characterized, at least rhetorically, the initial model.

### A. The Pregnancy Discrimination Act

Under the terms of the Pregnancy Discrimination Act of 1978 (PDA),<sup>17</sup> any employment-based classification based on pregnancy is presumptively unlawful.<sup>18</sup> The fundamental assumption of the PDA is that obstacles to equal workforce participation by women of child-bearing age are primarily based on invidious employer discrimination against such women. Accordingly, the literal terms of the Act prevent the contemplation of pregnancy status in the allocation of any job-related benefits or responsibilities.

If, however, pregnancy is a likely source of workforce disruption for women of child-bearing age, there are two possible employer reactions. An employer who provides maternity leave could face legal repercussions if such leaves were expressly triggered by pregnancy – meaning that under the statute there could be liability if such a benefit were allowed only for women. Such an employer could potentially avoid liability by allowing family leave, thereby making those men who are willing to stay at home for child care the

---

<sup>17</sup> Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 95 Stat. 2075 (codified at 42 U.S.C. §2000e(k)) (2006).

<sup>18</sup> This subpart draws on material from Samuel Issacharoff and Elyse Rosenblum (1993).

beneficiaries of the law. But more centrally, what of an employer who provided no leave for pregnancy or childbirth? That would clearly have an adverse impact on the ability of women to work continuously and acquire firm and professional seniority. Yet, under the strict equal treatment mandate of the PDA, such a policy would face no legal prohibition.

The affirmative need for some form of pregnancy accommodation shows the strained match between the equal treatment premise of Title VII and problems occasioned by actual biological differences between the sexes which require affirmative steps to accommodate the career goals of working women. Pregnant workers and their employers incur real, economic costs as a result of the childbirth, and the antidiscrimination model is at best a clumsy vehicle for addressing the difficult question of resource allocation that is necessarily implicated in accommodating employees who face specific and predictable obstacles to achieving security in the workplace.

Women (and their families) pay a price, in reduced wages and reduced career opportunities, because of the combined demands of childbearing and modern workforce participation. While the pay equity gap has narrowed since the 1970s, the average man still makes more than the average woman.<sup>19</sup> This persistent pay gap cannot be attributed solely to invidious discrimination, but also result from women's discontinuous participation in the workforce (Blau & Kahn, 2000). This is not, however, a new problem; as economist Solomon Polachek explained in 1975:

The result of this discontinuous labor force participation is that females both enter occupations requiring lesser amounts of training and train less even when in professions typified by much on the job training. As a result, we observe females being overrepresented in lower-paying occupations while also receiving lower pay in the higher-paying professions.

Continuous workforce participation continues to play an important role in perpetuating the wage gap (O'Neill, 2003), and this is especially true for higher skilled workers (Blank and Shierholz, 2006). This discontinuous workforce participation by women corresponds to the demands of childbirth and childcare. In light of the strong effects that childbearing has on women's participation in the workforce, it is unsurprising that businesses would be concerned about young female hires' likely permanence in the workforce. In those positions in which employers must invest in training or job-specific

---

<sup>19</sup> According to the Bureau of Labor Statistics in the Department of Labor, in 2008, the most recent year available, women working full-time earned 79% of their male co-workers. In 1979, the first for which such data is available, women made 62% as much as men. The narrowing has not been continuous. In the more economically prosperous years of 2005 and 2006, women earned 81% of men's wages. (BLS 2009).

skills, shorter anticipated workforce participation translates into a shorter time period in which to recoup training costs.

The expectation of shorter female job tenure is reflected in the behavior of women who are in the workforce and those who are entering it. Women may logically respond to the expectation of leaving the workforce by reducing their investment in training or pre-workforce education, i.e. human capital formation in economic terms. It is also reflected in the actions taken by firms in anticipation of sex-differentiated participation patterns in the workforce. Firms may similarly face incentives to track women away from certain career ladders.

Thus pregnancy discrimination law must fight a battle on two fronts. First, the law must protect women against statistical discrimination, i.e., an employer's assumption that because a woman is of childbearing age, she is likely to become pregnant. Second, the law must counteract an employer's rational concerns about the costs associated with employing a pregnant woman (including health care costs, temporary labor costs, and retraining costs if the woman decides not to return to the workforce). The *but-for* model, however, responds in cases of invidious stereotype, not real differences in cost.

Not surprisingly, the theoretical difficulties in the application of the simple antidiscrimination model to pregnancy accommodation are reflected in the case law from the PDA. Because the PDA focuses on combating employers' invidious discrimination, the model applied was an equal treatment approach in which the objective was equality of opportunity. Consequently, the law failed to explicitly address the question of whether classifications that benefit working women were permissible, particularly in cases in which additional benefits were provided in order to facilitate continuous female employment. This silence led to inevitably conflicting judicial constructions of the Act, as the courts struggled to apply this anti-subordination framework to what is essentially a redistributive problem that tries to address the accommodation of women's distinct issues in the workforce.

In *California Federal Savings & Loan Ass'n v. Guerra*,<sup>20</sup> the Supreme Court confronted Californian legislation aimed at assisting working women that mandated up to four months of unpaid pregnancy and maternity leave for childbirth, with the a right of reinstatement at the conclusion of that period. Since the pregnancy of an employee was the triggering event for the benefit, the Californian statute was presumptively in direct violation of the PDA's strictures against all pregnancy-based classifications. Only by disregarding the plain language of the PDA and transforming it into an awkwardly framed pregnancy benefits bill did the Supreme Court save the Californian legislation from the PDA's rigid antidiscrimination model.

---

<sup>20</sup> 479 U.S. 272 (1987).

Following *Guerra*, one might have expected that the Supreme Court would continue to interpret the PDA in a way that would permit special treatment of pregnancy. That expectation was not realized when the Court next fronted a special treatment policy. In *UAW v. Johnson Controls*,<sup>21</sup> the Court struck down a company-imposed “fetal protection” program that excluded all fertile women from certain job categories on the grounds that the Pregnancy Discrimination Act forbids all pregnancy classifications, regardless of source or motive. In contrast to the majority reasoning in *Guerra*, the Court relied heavily on the language and legislative history of the PDA to mandate unequivocal equal treatment of pregnancy. This approach, while consistent with the language of the PDA, simply restated the problem of applying a simple antidiscrimination norm outside of its natural boundaries.

Further, even when the question is equal treatment, courts have also been reluctant to draw an easy inference of invidious motive in claims of disparate treatment based on pregnancy. A striking example is found in *Troupe v. May Department Stores*,<sup>22</sup> where the Seventh Circuit held that termination of an employee based on a belief that she would not return to work following maternity leave did not, in itself, violate the PDA.<sup>23</sup> In *Troupe*, a pregnant woman who had been late to her job on several occasions because of severe morning sickness was fired the day before she was scheduled for extended maternity leave. Writing for the court, Judge Posner explained that in order to prevail under the PDA, the plaintiff would have to demonstrate not merely that her discharge was related to her pregnancy, but that she had been treated differently from a hypothetical Mr. Troupe, who was about to take an extended medical leave, or some other employee who had actually taken such a leave. The plaintiff would prevail if, and only if, she could show that the defendant would not have fired Mr. Troupe, or some other similarly-situated male who was thought unlikely to return to work after an extended leave. Since no such showing had been made, the plaintiff could not prevail. Judge Posner expressly rejected what he termed feminists’ “urgings”—an interpretation of the PDA which would require an employer to “make it as easy [for female employees], say, as it is for their spouses to continue working during pregnancy.”<sup>24</sup> Thus, the court emphasized that the PDA does not require employers to accommodate pregnancy in any way – an approach that would require subsequent amendment through legislative initiatives like family leave, and will be discussed below.

*B. The Age Discrimination in Employment Act*

---

<sup>21</sup> 499 U.S. 187 (1991).

<sup>22</sup> 20 F.3d 734 (7th Cir. 1994).

<sup>23</sup> See *id.* at 738.

<sup>24</sup> *Id.* at 738.

Federal age discrimination legislation is characterized by a similar disjuncture between the legislative model and the underlying problem of discrimination the legislature addresses.<sup>25</sup> In 1967, Congress passed the Age Discrimination in Employment Act (ADEA).<sup>26</sup> Modeled on Title VII of the Civil Rights Act, the ADEA made it illegal for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.”<sup>27</sup> The group the ADEA sought to protect, however, lacked the discrete and insular quality of other protected groups, such as racial minorities or even women. The elderly represent the normal unfolding of life’s processes for all persons and all employees may at some point be expected to move within that category.

Though the language of the ADEA tracked the original language of Title VII, Congress recognized that the Act addressed something other than traditional discrimination. The legislative history reflects Congress’s understanding that age discrimination in employment is complex and necessarily “based on many interrelated factors.”<sup>28</sup> Unlike the victims of traditional forms of discrimination, the labor market did not pay aging employees, as a class, lower wages. Since wages tend to rise with time in the firm or in continuous workforce employment, “it costs more money to employ [older workers].”<sup>29</sup>

The economics of age discrimination account for the marked disparity between the stated congressional aim of redressing barriers to job acquisition by older employees and the actual effect of the statute. Congress initially set its sights on workforce exclusion of older employees triggered presumptively by some irrational bias. Any employment offering that stated “No applicants over 50” would seemingly be offensive to an equality of treatment norm, and would be redressible through the same prohibitions as were used in Title VII. Though the Act had an immediate impact on formal barriers to employment, such as maximum age listings for job openings, the removal of the barriers failed to solve, or even reduce, the problem of long-term unemployment among older workers. During periods of economic contraction, including in the current recession, older workers have enjoyed the advantages of seniority and have been better able to avoid layoffs than their younger co-workers, but once unemployed, older workers face a much more difficult time in the job market (Kazzi and Madland, 2009). As a result, older workers are over-

---

<sup>25</sup> This subpart draws on material from Samuel Issacharoff & Erica Worth Harris (1997).

<sup>26</sup> Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (2006)).

<sup>27</sup> 29 U.S.C. § 623(a)(1).

<sup>28</sup> See *Age Discrimination in Employment: Hearing on H.R. 3651, H.R. 3768, and H.R. 4221 Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90<sup>th</sup> Cong. 6 (1967) (comments of Rep. John H. Dent).

<sup>29</sup> *Id.* at 69 (statement of Peter J. Pestillo, U.S. Chamber of Commerce).

represented among the long-term unemployed, those without a job for six months or more (Kazzi and Madland, 2009; PBS Newshour, 2009).

The career-term model of employment that was the norm in American labor markets until the 1980s explains some of the protective effects of job tenure and also some of the particular vulnerability of older employees in the labor market. Standard neoclassical models would view employment as a spot market in which a quantum of work was exchanged for a corresponding quantum of pay, presumably renegotiated each day (at least tacitly) between the employee's willingness to arrive for work and the employer's willingness to pay. As in all such markets in which price is set at the margin, the greater the marginal product, the greater the marginal pay. The at-will rule of freely terminable employment relationships corresponded to the notion that, in the absence of an express contract for a fixed term, both employees and employers freely renegotiated their employment relationship on a daily basis and there was no more reason to restrict the free sale and purchase of labor than there was to restrict the exchanges held daily at the corner greengrocer.

Observed reality in the U.S. in the period after World War II was largely to the contrary. Long-term employment relationships were better analogized to "relational contracts" that adjust for the long-term expectations of the parties. The career-wage market rewarded longevity in the workplace by providing what was in effect an annuity for contributions to the firm during an employee's years of peak productivity (Schwab, 1993). Employee wages went up over time, terminating at the point of mandatory retirement. In the early stages of a career, an employee was paid below his marginal productivity, but recouped that in later years as productivity leveled off, while wages continued to rise. Under this theory, any disruption to a career-wage profile has adverse effects on an employee's long-term employment prospects, regardless of whether an employee is discharged late in the career cycle (Jacobson et al., 1993) or simply does not build up labor force continuity.

An employee under this arrangement faces distinct risks. The primary risk is that an employer under financial stress may come to see an expensive senior employee as an unaffordable luxury, regardless of implicit contractual obligations. Traditionally, employers refrained from this opportunistic behavior because of the adverse impact on employee morale and the firm's reputation; encouraging highly productive mid-stage employees to stay with the firm would be difficult if they observed widespread termination of employees at the next stage of employment (Rock and Wachter, 1996). Nonetheless, competitive pressures for downsizing in the 1980s and an increase in global competition provided sufficient incentive for employers to engage in such opportunistic breaches of obligations to long term employees. The temptation to discharge long-term employees was compounded by the mergers and acquisitions boon of the 1980s, as the management that inherited these obligation viewed itself as divorced from, and consequently not subject to, them. This trend was accentuated in 1986 with an amendment

to the ADEA that forbade mandatory retirement for all but a small number of employees.<sup>30</sup> Without a natural termination point for long-term employment relations, employers faced increasing competitive pressures to remove older employees from their payrolls, which in turn prompted not only more ADEA litigation but common law wrongful termination claims, as the career-wage model would predict.

A second risk directly tied to the first is that if an employee were to lose her job, there would be a strong disincentive to any subsequent employer hiring her. Any new employer hiring an older worker at her then-current wage scale would be assuming a wage premium for services delivered in the past to another employer. An older employee already at (or near) the end stage of the employment cycle would present an unduly expensive investment for a new employer. The employer would have to invest in firm-specific training of the older worker, the worker would expect a higher wage, and the new employer would not be able to realize the pay-in represented by the earlier stages of the employee's career. For an employer to hire an older employee at the wage such an employee would normally command within the firm's employment scale would be economically irrational. Further, because a reduction in pay to a level approximating productivity would appear to be a dignitary affront to the employee and would be potentially disruptive within the firm, the life-cycle wage pattern had the predictable effect of freezing unemployed older workers out of the job market altogether.

The 1967 Act, which set its sights on express age discrimination in hiring, was insufficient to solve the problem of long-term unemployment. The "No Elders Need Apply" signs came down, but the reluctance to hire older workers remained. As might be expected, the tension between the simple antidiscrimination form of the ADEA and the complicated economic underpinnings played out doctrinally as well. The problem is highlighted by the comparison of age cases to the early race discrimination cases. In *Furnco Construction Corp. v. Waters*, then-Justice Rehnquist articulated the justification for the relaxed use of presumptions of discrimination in favor of black plaintiffs:

A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus . . . it is more likely

---

<sup>30</sup> Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2, 100 Stat. 3342, 3342 (1986) (codified as amended at 29 U.S.C. § 623 (2006)).

than not the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.<sup>31</sup>

Justice Rehnquist's attention in *Furnco* focused on the shifting of the burden of production upon a relatively minimal plaintiff's showing, which is known as the *McDonnell Douglas* approach in Title VII law.<sup>32</sup> While the *Furnco* rationale may hold in the context of race or even sex, it fails to justify a presumption of age discrimination.<sup>33</sup> Unlike race or sex,<sup>34</sup> age is not a constitutionally protected class<sup>35</sup> nor has there been a credible claim made that older Americans are subject to arbitrary state laws inspired purely by animus.<sup>36</sup> In age cases, as opposed to racial discrimination claims, the alternative explanation is ever present. In simple doctrinal terms, courts have been forced to recognize that cost-based discrimination may serve as a defense to an age-based classification in circumstances in which comparable defenses would be unavailing were the challenged classifications to be triggered by race or sex. For example, several courts have held that a legitimate business reason or economic purpose could justify a differentiation in benefits based on age.<sup>37</sup>

---

<sup>31</sup> 438 U.S. 567, 577 (1978) (citation omitted).

<sup>32</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (setting forth burden shifting under Title VII disparate treatment claims). But see *St. Mary's Ctr. v. Hicks*, 509 U.S. 502, 506-12 (1993) (restricting *McDonnell Douglas* burden shifting by forcing plaintiff to prove ultimate issue of discriminatory treatment even when defendant has failed to discharge intermediate burden of production).

<sup>33</sup> Almost immediately after the decision in *Furnco*, courts began to question the applicability of the strict *McDonnell Douglas* test to age discrimination cases. As expressed by the Sixth Circuit, "[t]his factor of progression and replacement is not necessarily involved in cases involving the immutable characterizes of race, sex, and national origin. . . . Thus we do not believe that Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age." *Laugesen v. Anaconda Co.*, 510 F.2d 307, 313 n.4 (6th Cir. 1975).

<sup>34</sup> See, e.g. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007) (citing precedent to reaffirm that race is a suspect class); *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (describing heightened scrutiny accorded to facial sex discrimination).

<sup>35</sup> See *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976) (per curium) (rejecting age as heightened scrutiny classification).

<sup>36</sup> This concept of state action that is comprehensible only on the grounds of class based animus was the rationale by which the Supreme Court struck down a Colorado constitutional amendment limiting conferral of legal benefits to homosexuals. See *Romer v. Evans*, 517 U.S. 620, 631-32 (1996). The Court did so despite the fact that gays and lesbians as such do not enjoy constitutional protection as a discrete and insular group.

<sup>37</sup> See e.g., *Potenze v. New York Shipping Ass'n*, 804 F.2d 234, 238 (2nd Cir. 1986) (ruling that plan that offset Social Security benefits for those workers over 60 choosing to participate in the employee retirement incentive program (ERIP) was not subterfuge because plan was justified by legitimate business reasons); *Cipriano v. Board of Educ.*, 78 F. 2d. 51, 57-58 (2nd Cir. 1986) (reasoning that ERIP with age ceiling would not constitute subterfuge to avoid ADEA if employer could provide legitimate reason for excluding workers over 60 from

In its most recent ADEA decision, *Gross v. FBL Financial Services*, the Supreme Court made clear that doctrinally the ADEA is its own boat, separate from the Title VII jurisprudence.<sup>38</sup> At issue in *Gross* was the relationship between the ADEA and a 1991 amendment to Title VII that ensured plaintiffs could still establish discrimination claims under Title VII even when an employer was acting with mixed motivations. As amended, Title VII allowed the plaintiff to establish his or her claim with evidence “that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice.”<sup>39</sup> In *Gross*, the court rejected this mixed-motive analysis in the context of the ADEA, insisting that “a plaintiff must prove that age was the ‘but-for’ cause of the employer’s adverse decision.”<sup>40</sup>

The Court thus confirmed what first became apparent after *Furnco*. Differences between age considerations and the categories that typically give rise to societal animus would lead to doctrinal distinctions between the ADEA and other strains of employment discrimination law. *Gross* strengthened the *but-for* rule the Court had established in *Hazen Paper Co. v. Biggins*,<sup>41</sup> which rejected a “finding of disparate treatment under the ADEA when the factor motivating the employer was some feature other than the employee’s age”<sup>42</sup>—even if that feature happened to correlate with age. *Hazen* doomed attempts to prove a prima facie case of age discrimination by showing that employer reliance upon a proxy for age—such as seniority, income level, or pension status—was sufficient to establish the discriminatory intent necessary for liability under the Act.

This result in turn exposes the paradox of the ADEA. Concern about employer opportunism against older employees may prove to be well founded. For long-term employees, the source of vulnerability is that financially strapped employers, having enjoyed the period of superprofits during the middle stages of employee careers, might seek to evade the obligations that underlie the career-wage relationship. This contractual opportunism may be wrong, but it is not at the core of the anti-subjugation principles of Title VII. Moreover, because the employer can assert that it is acting for apparently rational economic considerations, the relaxed evidentiary burdens of Title VII do not apply. Like the PDA, the ADEA

---

participating); *Crosland v. Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 215 (4th Cir. 1982) (holding that provision excluding workers over 55 from pensions plan was not illegal if “the provision was motivated by a legitimate business or economic purpose which, objectively assessed, reasonably justified it”); *see also* 29 U.S.C. § 623(f)(2)(B) (2006) (allowing age-based discrimination when observing terms of bona fide employee benefit plan).

<sup>38</sup> 129 S.Ct. 2343 (2009).

<sup>39</sup> 42 U.S.C. § 2000e-2(m) (2006) (emphasis added).

<sup>40</sup> *Gross*, 129 S. Ct. at 2350.

<sup>41</sup> 507 U.S. 604 (1993).

<sup>42</sup> *Id.* at 609.

attempts to end discrimination against a protected class but fails to tailor its redress to the kind of discrimination faced by this class.

*C. The Americans with Disabilities Act*

Like the PDA and the ADEA, the Americans with Disabilities Act (ADA) patterned itself after Title VII.<sup>43</sup> The Act proclaims as its primary purpose providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>44</sup> The statute begins simply enough by invoking the standard antidiscrimination formula by making it illegal for an employer to “discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>45</sup> This language is accompanied by florid claims in the legislative history drawing an unbroken line from the Civil Rights Act of 1964 to the ADA.<sup>46</sup>

This analogy works in so far as people with disabilities, though not a constitutionally recognized class,<sup>47</sup> can lay claim to the “discreteness and insularity” that characterizes heightened scrutiny classes. Certainly, there is a long history of irrational animus impeding the integration of people with disabilities into the workforce. Particularly when the disabilities are manifest, a host of unjustified reactions, ranging from presumptions about overall capacity to perform, termed a “spread effect” by Samuel Bagenstos (2000), to visceral rejection, may serve as a barrier to the integration of prospective employees fully capable of performing the job in question.

Nevertheless, the ADA is a departure from the prevailing nondiscrimination norm of equal treatment. The Act defines its objectives not simply in terms of combating the irrational barriers created by animus, but as the failure to reasonably accommodate differences. Though the issue of accommodation is essential to the PDA and redistributive questions are at the core of the ADEA, neither law explicitly requires employers to accommodate members of its protective class, and, in both cases, subsequent judicial interpretation have limited the laws’ protections. Thus, the ADA should be seen as the high water mark of redistribution in nondiscrimination law. It is the first employment discrimination law that does not attempt, even

---

<sup>43</sup> This subpart draws on material from Samuel Issacharoff & Justin Nelson (2001).

<sup>44</sup> 42 U.S.C. § 12101(b)(1) (2006 and Supp. 2008).

<sup>45</sup> § 12112(a).

<sup>46</sup> Senator Edward Kennedy directly invoked Dr. Martin Luther King as the symbol for greater inclusiveness, 136 CONG. REC. 17,360-61 (1990), while Senator Robert Dole drew a direct analogy to the 1964 Civil Rights Act. 136 CONG. REC. 18,879 (1990).

<sup>47</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-43 (1985) (refusing heightened scrutiny for the developmentally disabled).

as a formal matter to derive redistributive objective from a simpler equality of treatment command.

From the outset, the ADA defines disability discrimination as a failure of redistribution, not invidious discrimination.<sup>48</sup> While the core of the anti-subjugation command is that similarly-situated persons should be treated similarly, the ADA is concerned with equal opportunity for people not similarly situated.<sup>49</sup> The basic accommodation claim under the ADA accepts the employer's ability to measure productivity while simultaneously arguing that there is an intervening duty to alter the work environment,<sup>50</sup> even if a disabled employee may never be as productive as a non-disabled potential employee. Thus, the claim, at least, in part, is not that employers are enslaved to irrational preconceptions, but that even if the preconceptions reflect actual differences in productivity, there is an independent duty to accommodate a job candidate with a disability at some unspecified cost to the employer.

There are two critical levers in the application of the ADA: the definition of disability and the question of what constitutes a reasonable accommodation. The questions of how much accommodation is due and at what cost put courts in an uncomfortable regulatory role, with little to guide them from other branches of discrimination law. Accordingly, the initial attempts to grapple with the scope of the ADA turned primarily on the question of what constituted a covered disability, a matter left open by the original statutory language of the ADA (Harris, 1998) and by the interpretative guidelines issued by the Equal Employment Opportunity Commission (EEOC).<sup>51</sup>

In a series of cases, the Supreme Court and lower courts limited the reach of the act by narrowing the triggering conditions for a disability. For example, in *Sutton v. United Air Lines*, two sisters applied for pilot positions with United and were rejected because of their poor eyesight. The sisters argued that their eyesight was correctable and that United denied them reasonable accommodation due to their disability or perceived disability. The Supreme Court rejected their claim, holding that poor vision was not a disability under the ADA.<sup>52</sup> In *Toyota Motor Manufacturing, Kentucky, Inc.*

<sup>48</sup> Michelle T. Friedland (1999) argues that the ADA requires affirmative accommodation rather than simply the prevention of discrimination. Thus, an employer failing to conform to this affirmative command is not discriminating, per se, but rather failing to properly redistribute according to the ADA's mandate (Travis, 2000).

<sup>49</sup> See also *Erickson v. Bd. of Governors*, 207 F.3d 945, 949, 951 (7th Cir. 2000) ("The ADA's main target is an employer's rational considerations of disabilities . . . . The ADA goes beyond the antidiscrimination principle . . . ."). But Professor Bagenstos (2004a) has questioned this distinction between accommodation and antidiscrimination.

<sup>50</sup> See *Erickson*, 207 F.3d at 949 ("Title I of the ADA, by contrast, requires employers to consider and to accommodate disabilities, and in the process extends beyond the antidiscrimination principle.").

<sup>51</sup> See 29 C.F.R. § 1630.2(h)(1)-(2) (2000).

<sup>52</sup> 527 U.S. 471, 481-89 (1999).

*v. Williams*, a worker with carpal tunnel syndrome sued under the ADA after being fired from her quality inspection job. The Court held that an inability to perform certain work activities did not, in of itself, constitute a disability under the ADA if the plaintiff could still perform household chores.<sup>53</sup> Other cases similarly restricted the ADA's reach.<sup>54</sup> Congress responded to these judicial limitations when it enacted the ADA Amendments Act of 2008, significantly expanding and clarifying the definition of disability.<sup>55</sup> In addition to explicitly overruling the courts decisions in *Sutton* and *Williams*,<sup>56</sup> the new law defines a disability as a "a physical or mental impairment that substantially limits one or more major life activities of such individual"<sup>57</sup> and, unlike previous law, also defines major life activities.<sup>58</sup> As a result, ADA litigation is expected to shift away from its prior focus on the threshold disability determination and toward developing a more robust jurisprudence around reasonable accommodation (Hensel 2009).

As noted, the reasonable accommodation requirement represents the ADA's unique contribution to antidiscrimination law, explicitly requiring the court to weigh the costs of accommodation with the benefits of inclusion.<sup>59</sup> The statute rejects equal treatment as a defense to liability and indeed defines liability by a refusal to treat disabled employees with sufficient levels of specific accommodation. The ADA directs that the finding of a disability that substantially limits a major life activity triggers a duty of reasonable accommodation, and now that Congress has expanded the definition of disability, the statutory pressure will move to a determination of the level of accommodation required.

Congress intended that courts use a case-by-case approach in analyzing reasonable accommodations, as evidenced by the plain language and the legislative history of the ADA. For example, the statute expressly defines reasonable accommodations to include:

---

<sup>53</sup> 534 U.S. 184, 199-202 (2002) ("There is also no support in the Act . . . for the . . . idea that the question of whether an impairment constitutes a disability is to be answered only by analyzing the effect of the impairment in the workplace.").

<sup>54</sup> See *Murphy v. United Parcel Service*, 527 U.S. 516, 521-25 (1999) (denying coverage for high blood pressure); *McKenzie v. EAP Mgmt. Corp.*, 40 F. Supp. 1369, 1375-76 (S.D. Fla. 1999) (steel rod in limb); and *Kidwell v. Shawnee County*, 928 F. Supp. 2d 1201, 1219-20 (D. Kan. 1998) (breathing difficulties around smoking).

<sup>55</sup> The ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

<sup>56</sup> Findings and Purposes of ADA Amendments Act of 2008, Pub. L. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553.

<sup>57</sup> *Id.* (to be codified at 42 U.S.C. 12102(1)(A)).

<sup>58</sup> *Id.* (to be codified at 42 U.S.C. 12102(1)(B)).

<sup>59</sup> There is a significant empirical debate about the success of the ADA in increasing the workforce participation of people with disabilities. Studies suggest that since the implementation of the ADA, their workforce participation has decreased, but there is much dispute about the causal relationship in the drop (Jolls and Prescott, 2004; Acemoglu and Angrist, 2001).

[J]ob restructuring, part-time or modified work schedules, reassignments to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodation for individuals with disabilities.<sup>60</sup>

The legislative history further confirms that Congress intended this formulation to be illustrative as the “other similar accommodation” formulation would indicate.<sup>61</sup> This case-specific approach is also reflected in the ADA’s safe harbor provision, which allows employers to claim that an unreasonable accommodation “would impose an undue hardship on the operation of [its] business.”<sup>62</sup>

The professed antidiscrimination norm of the statute does nothing to clarify the extent of the burden demanded by its redistributive obligations. Like other antidiscrimination legislation, the burden to comply with the ADA’s employment provisions is triggered by the existence of a job applicant or an employee who is a member of a protected class, but only the ADA defines discrimination to include a firm’s failure to accommodate productivity costs due to a member of the protected class’ employment. As a result, the ADA distributes the burden of paying for necessary accommodation based on the happenstance of which applicant happens to apply where, a cost burden that may fall arbitrarily.<sup>63</sup> Any individual employer may be subject to costs of unknown dimensions while her competitors are not. Further, the extent of the accommodation standard is defined not by a uniform obligation across all employers, but by the ability of

---

<sup>60</sup> 42 U.S.C. § 12111(9)(b) (2006).

<sup>61</sup> The Senate noted that its list of illustrations was “not meant to be exhaustive; rather it is intended to provide general guidance about the nature of the obligation . . . [T]he decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case.” S. REP. NO. 101-116, at 31 (1990) (Sup. Docs. No. Y1.1/8:101-4.85/pt.3). In fact, this passage expressly adopts the history of the prior disability acts as its model: “This fact-specific case-by-case approach to providing reasonable accommodation is generally consistent with interpretation of this phase under sections 501, 502, and 504 of the Rehabilitation Act of 1973.” *Id.*

<sup>62</sup> 42 U.S.C. § 12112(b)(5)(A) (2006); *see also id.* § 12111(10) (defining undue hardship). This defense is no less fact-specific than any other provision of the ADA. The statute identifies numerous factors to be weighed, including “the nature and cost of the accommodation needed,” “the overall financial resources of the facility,” and “the type of operation or operations of the covered entity.” 42 U.S.C. § 12111(10)(B)(i)-(iii).

<sup>63</sup> Congress does subsidize some costs of compliance for small businesses. *See* I.R.C. § 44 (2006) (providing a tax credit equivalent to 50% of ADA compliance costs in excess of \$250 but less than \$10,250 for businesses with gross receipts of less than \$1 million or who employ less than 31 full-time workers).

any employer to pay, regardless of fault or ensuing competitive disadvantage (Kelman, 2000).

### III. The Limits of the Antidiscrimination Norm.

Congress has, on some occasions, responded to the limits of the antidiscrimination model by directly mandating accommodation and facing up to at least some of the cost consequences of such statutory regimes. In contrast to the limited nondiscrimination norm of the PDA, for example, we have the Family Medical Leave Act of 1993 (FMLA), which seeks to provide actual benefits to pregnant women and working parents.<sup>64</sup> This much-heralded legislation was designed in large part to provide some accommodation to working women for the time of childbirth and recovery.<sup>65</sup> The FMLA allows permanent employees to take unpaid leave for serious domestic emergencies, including not only pregnancy but also family crises, such as the illness of a close family member.<sup>66</sup> Although working women were the intended primary beneficiaries, the FMLA was designed to be “non-discriminatory” in its provision of benefits. Part of this is an artifact of Congress seeking to legislate under the powers constitutionally conferred over interstate commerce, rather than the more limited confines of the Equal Protection Clause. But part as well was a broader commitment to inaugurating a broader set of safety valves for working people faced with domestic dislocations. Accordingly, the FMLA does not specifically focus on women. Instead, pregnancy is addressed as part of a broad pattern of leave provisions for family related emergencies.<sup>67</sup>

That said, in acknowledging the costs associated with a direct accommodation benefit, the FMLA then places the costs on the employees

---

<sup>64</sup> 29 USC §§ 2601 et seq (2006).

<sup>65</sup> The Act was prompted by Congressional concern that women of childbearing age were increasingly likely to be in the workforce. A Congressional report found, for example, that 57.5% of married women with children under the age of three were in the workforce in 1992, as opposed to 32.6% in 1975. See H.R. Rep. No. 8 103d Cong., 1<sup>st</sup> Sess., pt. 2, at 11-12 (1993).

<sup>66</sup> See 29 U.S.C. § 2612(a) (2006). The FMLA provides that an eligible employee is entitled to 12 workweeks of unpaid leave during any 12-month period if the employee gives birth or fathers a child, adopts, or accepts a child into foster care; or cares for a seriously ill employee unable to perform the functions of the position of such employee. See *id.* To qualify for leave, an employee must have been working with that employer for twelve months and for at least 1,250 hours of service. Employees are eligible if at least 50 people work at their worksites or if their employers employ more than 50 people with 75 miles of their worksites. See § 2611(2). The FMLA was recently amended to provide additional benefits for family members of injured military service members and for families of service members called on duty. See National Defense Act of 2010, Pub. L. No. 111-84, 123 Stat. 2309 (to be codified as amended at 29 U.S.C. §§ 2611-13).

<sup>67</sup> For an argument that providing parental leave equitably to both mothers and fathers is essential to ensuring gender equality in the workplace and ending gender stereotypes, see *Nev. Dep’t of Res. v. Hibbs*, 538 U.S. 721, 968, 969 (2003).

themselves. Any leave under the FMLA is unpaid. Few women can afford to take three months off of work without pay, especially at the same time that their households (and household expenses) are growing. Second, the FMLA covers only those firms with more than fifty employees.<sup>68</sup> This limitation means that almost 40% of the workforce is unaffected by the legislation,<sup>69</sup> and these smaller firms are the ones that are least likely to offer such benefits absent this regulation.

Even this limited benefit, however, is costly to the smaller employers it does cover. The FMLA provides that the employer must continue payment of benefits during the period of leave.<sup>70</sup> In addition, there are likely to be search and training costs associated with finding temporary replacements for permanent employees. Moreover, to the extent that the work of a firm is not routine but depends on personal client connections or specific employee skills, temporary labor is likely to be far less efficient.

By assigning these secondary costs of leave to firms, particularly the smaller of covered firms, the FMLA reintroduces an incentive to discriminate against women at the hiring stage. For example, during testimony in 1989, the House Subcommittee on Labor-Management Relations was told in no uncertain terms:

Faced with mandated parental leave, a business owner choosing between two qualified candidates—one male and one female—would be tempted to select the male. Direct and hidden costs to employers will compel them to think twice before hiring additional employees.<sup>71</sup>

Thus, the FMLA, like the ADA, requires employers to provide certain reasonable accommodations to their employees with family responsibilities and distributes the cost of those accommodations arbitrarily across employers.<sup>72</sup>

A different approach to the anticipated costs of family leave could accomplish the objective of permitting women not to interrupt their careers at points of childbirth, while also not disincentivizing employers from hiring

<sup>68</sup> § 2611(2)(B)(ii).

<sup>69</sup> *The Fifteenth Anniversary of the Family Medical Leave Act: Achievements and Next Steps: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Education and Labor*, 110th Cong. 53 (2008) (statement of Debra Ness, President, National Partnership for Women & Families).

<sup>70</sup> § 2614(c).

<sup>71</sup> *Family and Medical Leave Act of 1989: Hearing Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 101<sup>st</sup> Cong., 102 (1989) (statement of Dr. Earl Hess, U.S. Chamber of Commerce).

<sup>72</sup> However the duty imposed by the FMLA is less rigorous than that imposed by the ADA, which is triggered every time a job applicant with a disability seeks a job at a particular firm. The FMLA is only triggered after 12 months of employment.

women of childbearing age. For example, it would be possible to construct a social insurance model of pregnancy leave which would tax all employers for the cost of potential leave and then reimburse the firms that confront the actual costs. One approach would be to finance pregnancy leave insurance through the existing unemployment infrastructure, with a uniform employer contribution based on payroll.<sup>73</sup> Such an approach would provide benefits for both pregnant women and the employers who cover them, with the latter benefits helping to ease the dislocation costs of an employee's maternity leave.

While no state has adopted a pregnancy leave model that includes such an employer benefit, several states have adopted some version of social insurance for parental leave. California was the first to adopt a comprehensive system.<sup>74</sup> California's system is based on employee contributions to its State Disability Insurance (SDI) program, with employees able to take up to six-weeks of partially paid leave during each twelve month period.<sup>75</sup> Since then, Washington State<sup>76</sup> and New Jersey<sup>77</sup> have both adopted paid family leave programs. Several other states provide some paid leave through their temporary disability programs.<sup>78</sup>

By contrast, no effective cost allocation mechanisms have emerged in the U.S. for addressing the accommodation of people with disabilities. Academic commentators have long recognized the issue and tried to address the cost consequences. Professors Karlan and Rutherglen (1996), for example, early on argued that the ADA operates as implicit insurance against the common risk that anyone *could have been* the individual with a disability. Others have suggested that the accommodation requirement imposed by the ADA is significantly more limited than the ADA's language suggest. For example, Professor Bagenstros (2004b, 24) argues that the ADA, as interpreted by the courts, "simply demands that defendants provide redress for their own wrongful conduct that uniquely disadvantages a protected class," and that some of the statutory burden be assumed by restructuring other employment related benefits, such as health insurance coverage. This does not appear to have taken hold in the case law under the statute.

There are, however, other approaches within employment law that could encourage either an efficient match between job seekers with disabilities and

---

<sup>73</sup> For a fuller description of this proposal, see Issacharoff and Rosenblum(1993).

<sup>74</sup> Paid Family Leave Act, 2002 Cal. Stat. 901 (codified as amended at CAL. UNEMP. INS. CODE § 3300-06 (Deering 2009)).

<sup>75</sup> The law applies to businesses with at least one employer, though public employees and self-employed individuals are not required to participate (Milkman and Appelbaum, 2004).

<sup>76</sup> See Wash. Rev. Code § 49.86 (2008). Washington's paid leave was supposed to go into effect in 2009, but the State has decided to delay implementation until 2012 because of the recession. See 2009 Wash. Sess. Laws 544.

<sup>77</sup> See N.J. Rev. Stat. § 43:21-25 et seq. (2009).

<sup>78</sup> For a complete list of state family leave legislation, see National Conference of State Legislatures (2008).

employers or an insurance model that spreads costs evenly through the job market. Germany has adopted one such model. German disability employment law is a “pay or play” regime, placing a hiring quota on all public and private employers with more than twenty workers. Currently, the quota requires these employers to ensure that 5% of their workers are people with severe disabilities, and companies that fail to meet this quota must pay fines (International Disability Rights Monitor, 2007; Kock, 2004). Such a system allows employers, workers with disabilities, and the electorate to assess openly the costs, as well as the benefits, associated with employing the severely disabled. Further, because employers have the option of opting out of employing workers with disabilities in exchange for paying a fee to the government, *all* employers contribute toward the admirable societal goal of full employment of those with disabilities, and this ensures these costs are predictable. The penalty that employers must pay goes into a fund which pays for employment benefits for workers with disabilities and their employers (Kock, 2004).

The German system is one example of a legal regime that addresses the unique needs of workers with disabilities without relying on an ill-fitting nondiscrimination model. It does not offer a perfect solution; studies suggest the system has become less successful at improving employment prospects of those with disabilities over time (Bagenstos, 2003). Further, such a system fails one objective of disability rights advocates in that it does not create an across-the-board mandate for integrative mainstreaming. Rather, it would allow an intermediate level of accommodation consistent with some level of cost limitations.

#### **IV. Conclusion.**

There is a world beyond the scope of this Chapter. The antidiscrimination norm draws its force not from its relation to market efficiencies but from the deep moral offense occasioned by historic discrimination. The claim here is not that discriminatory behavior in employment should be either held to or defended by its relation to efficiency or market rationality. Far from it. Rather, it is that the legal intervention to remedy employment discrimination should comprehend the market forces that may help or hinder its objectives. As a general rule, antidiscrimination commands that most correspond to employer economic self-interest are likeliest to sail with the wind at their backs, while those that are indifferent to the cost consequences of claims for accommodation are most likely to falter.

Matching the various stages of employment discrimination law against the economic implications on the labor market helps clarify some of the difficulties with the doctrinal applications across the various statutory frameworks, as with the application of disparate impact to ADEA claims, for instance. As we set out, the key development is the breakdown of the *but-for* model of discrimination as changes in litigation patterns and employment

discrimination law have required the courts to confront labor market inequalities that could not be attributed solely to invidious discrimination either by employers or others. In 1964, few probably could have predicted how quickly the hiring norms of Jim Crow would prove vulnerable to legal challenge. In retrospect, it is perhaps not surprising that employers' disparate treatment in hiring would be easy to root out; aligning regulatory policy with economic self-interest creates a powerful force.

Subsequent generations of employment discrimination law are tackling more difficult, and perhaps more intractable, problems of inequality in the labor market. The remarkable success of the early antidiscrimination cases was attributable to the overt practices challenged (recall the prevalence of signs announcing that no blacks or women need apply) and the close fit between the *but-for* model of discrimination and the actual labor market equity problem faced by workers. As both the cases brought under Title VII and the reach of subsequent antidiscrimination laws began to depart from that fit, discrimination law became less responsive to the problem. Court-enforced regulatory mandates allowed Congress to avoid answering the hard distributive justice questions raised by offers of equal opportunity employment to working mothers and older workers. Third generation discrimination law could not avoid these questions. Since the equal treatment norm would accomplish too little in the disability rights realm, the ADA jettisoned the *but-for* model of discrimination while retaining the rhetorical force of antidiscrimination law.

Perhaps paradoxically, legislation currently pending before Congress reintroduces some of the earliest impulses of employment discrimination law. The Employment Non-Discrimination Act (ENDA) would prohibit employers from discriminating on the basis of sexual orientation and gender identity.<sup>79</sup> Since there would seem to be no economic reason for employers to prefer heterosexual workers or to assume that homosexual employees would self-segregate away from desirable employment, the *but-for* model would suggest that differences in employment patterns may be, at least in part, attributed to discrimination by employers, co-workers, or even customers. Although the current version of ENDA eschews overbroad comparisons to Title VII, there is a strong parallel in providing a statutory club to reinforce the market rationale for hiring from the pool of all potentially qualified employees.

As ENDA wends its way through the legislative process, employment law looks back to its most striking successes: enacting bans on economically irrational, invidious discrimination. Nevertheless, the challenges presented by second and third generation discrimination claims will remain and the uncertain relation between accommodation and discrimination will continue to challenge this area of law.

---

<sup>79</sup> H.R. 2981, 11th Cong. (2009); S. 1584, 11th Cong. (2009).

**Cases Cited**

California Federal Savings & Loan Ass'n. v. Guerra, 479 U.S. 272 (1987)  
Cipriano v. Board of Educ., 78 F. 2d. 51 (2nd Cir. 1986)  
City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)  
Crosland v. Charlotte Eye, Ear and Throat Hosp., 686 F.2d 208 (4th Cir. 1982)  
Erickson v. Bd. of Governors, 207 F.3d 945 (7th Cir. 2000)  
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)  
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)  
Griggs v. Duke Power, Co., 401 U.S. 424, 434 (1971)  
Gross v. FBL Financial Servs., 129 S.Ct. 2343 (2009)  
Hazen Paper Co. v. Biggens, 507 U.S. 604 (1993)  
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)  
Int'l Bd. of Teamsters v. United States, 431 U.S. 324 (1977)  
Kidwell v. Shawnee County, 928 F. Supp. 2d 1201 (D. Kan. 1998)  
Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975)  
Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976)  
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)  
McKenzie v. EAP Management Corp., 40 F. Supp. 1369 (S.D. Fla. 1999)  
Murphy v. United Parcel Service, 527 U.S. 516 (1999)  
Nev. Dept. of Res. V. Hibbs, 538 U.S. 721 (2003)  
Palmore v. Sidoti, 466 U.S. 429 (1984)  
Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007)  
Potenze v. New York Shipping Ass'n, 804 F.2d 234 (2nd Cir. 1986)  
Romer v. Evans, 517 U.S. 620 (1996).  
St. Mary's Ctr. v. Hicks, 509 U.S. 502 (1993)  
Sutton v. United Air Lines, 527 U.S. 471 (1999)  
Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002).  
Troupe v. May Department Stores, 20 F.3d 734 (7th Cir. 1994)  
UAW v. Johnson Controls, 499 U.S. 187 (1991)  
United States v. Virginia, 518 U.S. 515 (1996)  
Wygant v. Jackson B.d of Educ., 476 U.S. 267 (1986)

**References**

Acemoglu, Daron and Joshua Angrist. 2001. "Consequences of Employment Protection? The Case of the Americans with Disabilities Act," 109 *Journal of Political Economy* 915-57.

Bagenstos, Samuel R. 2000. "Subordination, Stigma, and 'Disability,'" 86 *Virginia Law Review* 397-534.

Bagenstos, Samuel R. 2004a. "The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination," 55 *Alabama Law Review* 923-949.

Bagenstos, Samuel R. Bagenstos. 2004b. "The Future of Disability Law," 114 *Yale Law Journal* 1-83.

Bagenstos, Samuel R. 2006. "Comparative Disability Employment Law from an American Perspective," 24 *Comparative Labor Law and Policy Journal* 649-68.

Becker, Gary. 1971 (2<sup>nd</sup> ed). *The Economics of Discrimination*. Chicago: University of Chicago Press.

Blank, Rebecca M. and Heidi Shierholz. 2006. *Exploring Gender Differences in Employment and Wage Trends Among Less-Skilled Workers*. National Bureau of Economic Research, Working Paper No. 124949.

Blau, Francine D. and Lawrence M. Kahn. 2000. *Gender Differences in Pay*. National Bureau of Economic Research, Working Paper No. 7732.

Bureau of Labor Statistics (BLS). 2009. "Highlights of Women's Earnings in 2008," Report 1017.

Donohue, John J. & James L. Heckman. 1991. "Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks," 29 *Journal of Economic Literature* 1603-1643.

Donohue, John J. & Peter Siegelman. 1991. "The Changing Nature of Employment Discrimination Litigation," 43 *Stanford Law Review* 983-1033.

Donohue, John J. 2007. "The Law and Economics of Antidiscrimination Law", in A. M. Polinsky & Steven Shavell, eds., *The Handbook of Law and Economics*. Oxford: Elsevier B.V.

Epstein, Richard, 1992. *Forbidden Grounds: The Case Against Employment Discrimination Laws*. Cambridge, Mass: Harvard University Press.

Friedland, Michelle T. 1999. "Note: Not Disabled Enough: The ADA's 'Major Life Activity' Definition of Disability," 52 *Stanford Law Review* 171-203.

- Harris, Erica Worth. 1998. "Controlled Impairments Under the Americans with Disabilities Act: A Search for the Meaning of 'Disability,'" 73 *Washington Law Review* 575-608.
- Heckman, James J. and Brook S. Payner. 1989. "Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina" 79 *American Economic Review* 138-77.
- Heckman, James J. & J. Hoult Verkerke. 1990. "Racial Disparity and Employment Discriminations Law: An Economic Perspective," 8 *Yale Law and Policy Review* 276-298.
- Hensel, Wendy F. 2009. "Rights Resurgence: The Impact of the ADA Amendments Act on Schools and Universities," 25 *Georgia State University Law Review* 641-97.
- International Disability Rights Monitor (IDRM). 2007. *Regional Report on Europe*. Chicago: International Disability Network.
- Issacharoff, Samuel and Justin Nelson. 2001. "Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?," 79 *North Carolina Law Review* 307-358.
- Issacharoff, Samuel and Elyse Rosenblum. 1993. "Women and the Workplace, Accommodating the Demands of Pregnancy," 94 *Columbia Law Review* 2154-2221.
- Issacharoff, Samuel and Erica Worth Harris. 1997. "Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution," 72 *New York University Law Review* 780-840.
- Jacobson, Louis S., et al. 1993. "Earnings Losses of Displaced Workers," 83 *American Economic Review* 685-709.
- Jolls, Christine M. 2001. "Antidiscrimination and Accommodation," 115 *Harvard Law Review* 642-99.
- Jolls, Christine and J.J. Prescott. 2004. *Disaggregating Employment Protection: The Case of Disability Discrimination*. National Bureau of Economic Research, Working Paper No. 10740.

Karlan, Pamela S. and George Rutherglen. 1996. "Disabilities, Discrimination, and Reasonable Accommodation," 46 *Duke Law Journal* 1-41.

Kazzi, Nayla and David Madland. 2009. *Mixed News for Older Workers*. Washington, DC: Center for American Progress.

Kelman, Mark. 1999. *Strategy or Principle? The Choice Between Regulation and Taxation*. Ann Arbor, MI: University of Michigan Press.

Kock, Martin. 2004. "Disability Law in Germany: An Overview of Employment, Education and Access Rights," 5 *German Law Journal* 1373-92.

Milkman, Ruth & Eileen Appelbaum. 2004. "Paid Family Leave in California: New Research Findings, in Ruth Milkman, ed., *The State of California Labor 2004*. Berkeley, Calif.: University of California, Berkeley, Institute of Industrial Relations.

Neumark, David. 2008. *The Age Discrimination in Employment Act and the Challenge of Population Aging*. National Bureau of Economic Research, Working Paper No 14317.

National Conference of State Legislatures. 2008. *State Family and Medical Leave Laws that Differ from the Federal FMLA*. <http://www.ncsl.org/print/employ/fam-medleave.pdf>.

Nielson, Laura Beth, et al. 2008. *Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003*. Chicago: American Bar Foundation.

O'Meara, Daniel P. 1989. *Protecting the Growing Number of Older Workers: The Age Discrimination in Employment Act*. Philadelphia: Industrial Research Unit, Wharton School, Vance Hall, University of Pennsylvania.

O'Neill, June. 2003. "The Gender Gap in Wages, circa 2000," 93 *American Economic Review* 309-14.

PBS NewsHour, 2009. "Older Workers Face New Challenges in a Tough Job Market." PBS Television Broadcast Dec. 10, 2009.

Polachek, Solomon W. 1975. "Discontinuous Labor Force Participation and Its Effects on Women's Market Earnings," in Cynthia B. Loyd ed., *Sex, Discrimination, And the Division of Labor*. New York: Columbia University Press.

Posner, Richard. 1995. *Aging and Old Age*. Chicago: University of Chicago Press.

Rock, Edward B. and Michael L. Wachter. 1996. "The Enforceability of Norms and the Employment Relationship," 144 *University of Pennsylvania Law Review* 1913-52.

Schwab, Stewart J. 1993. "Life-Cycle Justice: Accommodating Just Cause and Employment at Will," 92 *Michigan Law Rev.* 8-62.

Travis, Michelle A. 2000. "Leveling the Playing Field or Stacking the Deck? The 'Unfair Advantage' Critique of Perceived Disability Claims," 78 *North Carolina Law Review* 901-1011.