

## AGE DISCRIMINATION IN EMPLOYMENT AND THE AMERICANS WITH DISABILITIES ACT: “A SECOND BITE AT THE APPLE”

Constance Kleiner Hood

*The Age Discrimination in Employment Act (ADEA) prohibits an employer from discriminating against an older employee because of that employee's age, except where age constitutes a “bona fide occupational qualification” (BFOQ). The ADEA also permits an employer to consider reasonable health factors in its employment decision. Many older employees have lost age discrimination suits where employers have persuaded courts that good health was necessary for the job and that age-based employment decisions were justified because older employees were less healthy than younger employees. However, since Congress enacted the Americans with Disabilities Act (ADA), an employer has been required to make reasonable accommodations for disabled persons. Ms. Hood considers whether the ADA would make a difference in these types of age discrimination cases.*

*Ms. Hood argues that the ADA can help an employee who faces age discrimination when the employer uses age to approximate an employee's health status. She first discusses the history of the ADA and the Supreme Court's narrow construction of BFOQ. She then discusses the ADEA's definition of a disabled person and its requirement that employers make reasonable accommodations for disabled persons. Ms. Hood points out that although disability may correlate with age, the ADA itself specifically prohibits age from being considered a disability in itself. Next, Professor Hood explains the evidentiary framework used for employment discrimination cases and examines scenarios where a court does, and where a court does not, permit age to be used as a proxy for health. She concludes that in both scenarios a BFOQ would*

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*likely not survive an ADA challenge. Last, Ms. Hood compares the procedures for a person bringing both ADA and ADEA claims, determines when an employee can file both claims simultaneously, and discusses the available remedies.*

## I. Introduction

Prior to the enactment of the Age Discrimination in Employment Act of 1967 (ADEA),<sup>1</sup> many employees, aged forty and older, faced the very real possibility of losing their jobs or facing other adverse employment decisions for no reason other than the fact that they were getting older. Congress intended the ADEA to be a potent weapon for older Americans to use in their fights to keep their jobs.<sup>2</sup> However, the ADEA did not leave employers defenseless. Employers may consider age in employment decisions if it constitutes a "bona fide occupational qualification (BFOQ)."<sup>3</sup> This defense has proven successful, particularly where the job relates to public safety.<sup>4</sup> Employers may also base their employment decisions on "reasonable factors other than age,"<sup>5</sup> most notably health.<sup>6</sup> Because a decision based on health is not a decision based on age, even though it may correlate with age, many employers have successfully terminated older employees and made other adverse employment decisions against them.<sup>7</sup>

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1. Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1994)).

2. See 29 U.S.C. § 621 (1994).

3. *Id.* § 623(f)(1).

4. See, e.g., *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (bus transportation); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974) (bus transportation); *EEOC v. New Jersey*, 620 F. Supp. 977 (D.N.J. 1985) (law enforcement).

5. 29 U.S.C. § 623(f)(1).

6. An employee's health encompasses more than just physical and mental ailments. A health problem that affects an employee's job performance may lead the employer to use an excuse of inadequate job performance to justify dismissing the employee. A health problem may also cause an employee to miss a significant amount of time at work, leading the employer to dismiss the employee for "excessive absenteeism," even where the employee's job performance is satisfactory.

7. "In § 623(f)(1), to be sure, Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence." *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979); see also *Weihaupt v. American Med. Ass'n*, 874 F.2d 419 (7th Cir. 1989) (prostate cancer); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161 (8th Cir. 1985) (heart condition); *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271 (7th Cir. 1978) ("medical reasons"); *Bishop v. Jelleff Assoc.*, 398 F. Supp. 579 (D.D.C. 1974) (aneurysm, crippling arthritis).

Older employees who fell within the health exception had no means of counterattack until 1990. In 1990, Congress enacted the Americans with Disabilities Act (ADA).<sup>8</sup> Under certain circumstances, the ADA requires employers to refrain from making adverse employment decisions by accommodating the health factor.<sup>9</sup> Thus, the ADA can potentially change the face of the age war by expanding the arsenal available to older employees. Employees who at one time would have been summarily dismissed at the courthouse steps, because their employers had easy defenses under the ADEA, may now have a "second bite at the apple" under the ADA.

## II. The Age Discrimination in Employment Act

During consideration of the Civil Rights Act of 1964,<sup>10</sup> congressional proposals to include age in the list of prohibited criteria set forth in the Act's employment provision<sup>11</sup> were rejected for reasons such as those expressed by Representative Celler: "What age? Some men are old at 20. Others are young at 70. At what age would discrimination occur? I think we would be entering into a thicket of difficulties if we adopted the amendment."<sup>12</sup> However, Congress did direct the Secretary of Labor to determine whether age discrimination in employment existed and to make recommendations for dealing with the problem if it did.<sup>13</sup> In 1965, the labor secretary reported that ageism was a significant problem.<sup>14</sup> In his "Older American" message on January 23, 1967, President Johnson noted that many unemployed older Americans found themselves victims of age discrimination and urged Congress to take action.<sup>15</sup> Congress heeded his message and jumped into the thicket with the ADEA. When the House bill lowered

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8. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (1994)).

9. See 42 U.S.C.A. §§ 12131-12134.

10. Pub. L. No. 88-352, 78 Stat. 265 (codified at 42 U.S.C. §§ 2000a-2000h-6 (1994)).

11. Representative Dowdy's amendment was rejected by a vote of 123-94. See 110 CONG. REC. 2596-99 (1964), and Senator Smathers's amendment was rejected by a vote of 63-28. See *id.* at 9911-13; *id.* at 13,490-92 (1964).

12. *Id.* at 2596.

13. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (codified at 42 U.S.C. § 2000e-14 (1994)).

14. See generally SECRETARY OF LABOR, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT (1965).

15. See 1967 U.S.C.C.A.N. 2213, 2214; see also 113 CONG. REC. 34749 (1964).

the age at which the ADEA would apply from forty-five to forty,<sup>16</sup> it became clear that Congress had significantly changed its attitude about age discrimination in employment.

The congressional debates about the ADEA discussed the paradox faced by older workers: employers valued older employees as prized workers because they had better attendance records, fewer injuries, and better skills, training, and knowledge than younger workers, but employers despised older employees as new hires because of stereotypes about failing health, inflexibility, and low productivity.<sup>17</sup> Representative Celler's attitude, which derided the age amendment to the Civil Rights Act in 1964, turned to support the purpose and intent of the ADEA in 1967. Because some men are old at twenty and others young at seventy, arbitrary age discrimination in employment should be prohibited and older persons should be judged based on their individual abilities, not their age.<sup>18</sup>

The ADEA originally covered workers aged forty to sixty-five.<sup>19</sup> It did not protect persons under the minimum or over the maximum age limits. Some members of Congress advocated abolishing the upper age limit altogether, but that view did not carry the day.<sup>20</sup> The ADEA, as originally enacted in 1967, only protected persons between the ages of forty-five and sixty from age discrimination by employers<sup>21</sup> with respect to hiring, firing, or deciding any terms, conditions, and privileges of employment.<sup>22</sup>

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16. "The bill as originally introduced provided for an age limit of 45 to 65. The House provided for an age limit of 40. In the executive committee hearings, the full Committee . . . unanimously voted to accept the House figure of 40 years of age . . . ." 113 CONG. REC. 31,253 (1964).

17. Employers have, in many cases, contradictory attitudes toward older workers. While employed, the employer regards the older employee as experienced, reliable, a good producer and as an employee with a good attendance record. But, as soon as this worker becomes unemployed and becomes an applicant for a new job for which he is fully qualified, the employer's attitude changes. The stereotype of an inflexible person, in physical decline, capable of only low productivity, bars the employer from a fair evaluation of the applicant's actual ability and performance record.

113 CONG. REC. 34,746 (1964).

18. See 29 U.S.C. § 621(b).

19. See Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607.

20. See 113 CONG. REC. 31,256-57 (1967).

21. Under the ADEA, an employer is "a person engaged in an industry affecting commerce who has 20 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 29 U.S.C. § 630(b).

22. See Age Discrimination in Employment Act § 4, 81 Stat. at 603.



In 1978, Congress amended the ADEA by raising the maximum age of protected employees to seventy.<sup>23</sup> Although Congress acknowledged scientific studies which showed that age was a poor indicator of job performance,<sup>24</sup> Congress did not abolish the upper age limit. Some representatives advocated eliminating the upper age limit. Others argued that the upper age limit should remain at sixty-five because increasing the age limit might decrease employment opportunities for young people and decrease business efficiency.<sup>25</sup> Setting the upper age limit at seventy was a compromise between those who favored removing the age limit entirely and those who feared the consequences of changing the age limit from sixty-five.<sup>26</sup> Congress agreed that setting an upper age limit at seventy would allow the legislature to gather more information to better evaluate the benefits and detriments of eliminating mandatory retirement completely.<sup>27</sup> Congress thus directed the Secretary of Labor to undertake further studies on the effects of completely abolishing the upper age limit.<sup>28</sup>

In 1986, after almost twenty years of experience with the ADEA, Congress finally abolished the upper age limit<sup>29</sup> with little debate or fanfare. Thus, it appeared that the ADEA would remove age discrimination from the workplace entirely by prohibiting employers from using age in any employment decisions for those age forty and older. However, the ADEA did not leave employers without powerful defenses to age discrimination claims. From its inception, the ADEA has provided employers with two exceptions with which an employer may escape liability, even where their actions would otherwise be prohibited under the ADEA. These exceptions include: (1) the "bona

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23. See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 12(a), 92 Stat. 189, 189.

24. See S. REP. NO. 95-493, at 2-3 (1978), reprinted in 1978 U.S.C.C.A.N. 505, 506.

25. See 123 CONG. REC. 29,005 (1978) ("[The opponents of this bill] fear, unjustifiably, its effect on job opportunities for youth, business efficiency and other concerns.").

26. See H.R. REP. NO. 95-527, pt. 1, at 7 (1978).

27. See *id.*

28. See Age Discrimination in Employment Act Amendments of 1978 § 6(a)(1), 92 Stat. at 192.

29. See Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 2(c), 100 Stat. 3342, 3342. Mandatory retirement, however, was still permitted for police officers, fire fighters, and tenured faculty. Those exceptions expired on December 31, 1993. See *id.*

fide occupational qualification”<sup>30</sup> and (2) “reasonable factors other than age.”<sup>31</sup> Employers have used these exceptions to their advantage.

### A. Bona Fide Occupational Qualification

Section 623(f)(1) of the ADEA provides that “it shall not be unlawful for an employer . . . to take any action otherwise prohibited [by the ADEA] where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.”<sup>32</sup> The Equal Employment Opportunity Commission (EEOC)<sup>33</sup> has stated that the exception shall be narrowly construed.<sup>34</sup> An employer asserting a BFOQ defense must first prove that the age limit is reasonably necessary to the essence of the business.<sup>35</sup> Second, the employee must prove either (1) that “all or substantially all persons excluded from the job are in fact disqualified”; or (2) “that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.”<sup>36</sup> If the employer’s goal is public safety, the employer must prove that its age-based decisions effectuate that goal and that no acceptable alternative exists which better advances public safety or advances that safety equally but with less discriminatory impact.<sup>37</sup>

The U.S. Court of Appeals for the Fifth Circuit has elaborated on those standards in a trilogy of cases.<sup>38</sup> The Fifth Circuit’s standards

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30. 29 U.S.C. § 623(f)(1) (1994).

31. *Id.*

32. *Id.*

33. The EEOC promulgates regulations related to the ADEA and enforcement of the ADEA. Regulation and enforcement of the ADEA were initially committed to the Secretary of Labor, *see* Pub. L. No. 90-202, § 7, 81 Stat. 602, 604 (1967), but were transferred to the EEOC on January 1, 1979. *See* Reorganization Plan No. 1 of 1978, Pub. L. No. 95-599, § 2, 92 Stat. 3781, 3781. Subsequent legislation authorized the EEOC to enforce the ADEA. *See* Ratification of Reorganization Plans as Matter of Law, Pub. L. No. 98-532, 98 Stat. 2705 (1984) (codified at 5 U.S.C. §§ 901-911 (1994)).

34. *See* 29 C.F.R. § 1625.6(a) (1996).

35. *See id.* § 1625.6(b).

36. *Id.*

37. *See id.*

38. *See Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). At issue in two of the cases was gender discrimination under Title VII of the Civil Rights Act. However, Title VII analysis has been applied routinely to other discrimination statutes, including the ADEA. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992); *Richmond v. Board of Regents of the Univ. of Minn.*, 957 F.2d 595, 598 (8th Cir. 1992); *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1420 (9th Cir. 1990).

and reasoning have now been adopted by the U.S. Supreme Court.<sup>39</sup> In *Weeks v. Southern Bell Telephone & Telegraph Co.*,<sup>40</sup> Southern Bell refused to consider a female employee for the switchman's position because, the company explained, the job was "strenuous."<sup>41</sup> Southern Bell argued that gender discrimination was a BFOQ under those circumstances.<sup>42</sup> The Fifth Circuit noted that the BFOQ exception was to be construed narrowly<sup>43</sup> and analyzed the facts under the "all or substantially all" prong of the EEOC's BFOQ test.<sup>44</sup> Southern Bell had not shown any evidence that a switchman's duties were so strenuous that all, or substantially all, women would be unable to perform them.<sup>45</sup> Southern Bell argued that the court could assume that women, by their nature, would be unable to perform the "strenuous" switchman's work.<sup>46</sup> However, because gender stereotyping is precisely what Title VII was intended to eradicate, the court found that Southern Bell had not proven a BFOQ defense.<sup>47</sup>

*Diaz v. Pan American World Airways, Inc.*,<sup>48</sup> was the second case in the Fifth Circuit trilogy. In that case, a man was refused a flight attendant job by Pan American Airways (Pan Am).<sup>49</sup> Pan Am argued that hiring only female flight attendants was necessary because only women could calm and nurture airline passengers, who were usually bored and anxious.<sup>50</sup> The court analyzed this case under the "reasonably necessary to the essence of the business" prong of the BFOQ test.<sup>51</sup> The court characterized the essence of the airline's business as the safe air transportation of passengers and found that because there was no evidence that gender discrimination reasonably advanced that safety interest, Pan Am failed to establish a BFOQ.<sup>52</sup>

Last in the trilogy was *Usery v. Tamiami Trail Tours, Inc.*,<sup>53</sup> an age discrimination case. There, the Fifth Circuit found that the employer

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39. See *Western Airlines v. Criswell*, 472 U.S. 400 (1985).

40. 408 F.2d 228 (5th Cir. 1969).

41. See *id.* at 234.

42. See *id.* at 232.

43. See *id.*

44. See *id.* at 235.

45. See *id.*

46. See *id.* at 235-36.

47. See *id.* at 236.

48. 442 F.2d 385 (5th Cir. 1971).

49. See *id.* at 386.

50. See *id.* at 387.

51. See *id.* at 387-88.

52. See *id.* at 388-89.

53. 531 F.2d 224 (5th Cir. 1976).

bus company did establish a BFOQ based on age.<sup>54</sup> Tamiami would not hire persons over forty years old as extra-board bus drivers. Tamiami argued that extra-board<sup>55</sup> driving was strenuous, that it required healthy drivers, and that medical science could not accurately distinguish between chronological age and functional, or physiological, age.<sup>56</sup> Tamiami argued that it needed to use age as a proxy for individual health testing.<sup>57</sup> The Fifth Circuit agreed.<sup>58</sup> The court noted that, like the *Diaz* case, the essence of Tamiami's business was the safe transportation of passengers.<sup>59</sup> Tamiami's job qualifications were reasonably necessary because passengers' safety depended upon the skill, training, and physical fitness of the driver.<sup>60</sup> Tamiami did not try to establish a factual basis for believing that all, or substantially all, applicants over forty years old would be unable to drive buses safely.<sup>61</sup> Instead, Tamiami argued that age was a proxy for health.<sup>62</sup> Tamiami argued that many persons over forty years old had passenger-endangering characteristics but that these characteristics could not be determined practically by a test.<sup>63</sup> Therefore, Tamiami had to exclude persons based on their age.<sup>64</sup> The court accepted Tamiami's medical evidence that physiological and psychological changes accompany the aging process which decrease an individual's ability to drive safely and that even refined examinations could not detect these

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54. *See id.* at 238.

55. "Extra-board" drivers fill in for regular drivers on vacation or sick leave, or drive the extra buses that are added to regularly scheduled runs. They are on call 24 hours a day, seven days a week, and must be prepared to travel anywhere in the continental United States on short notice. Assignments are made on a first-in, first-out basis: drivers' names are kept on a list, and as a run comes up, the driver at the top of the list is called first. The extra-board driver's name is placed at the bottom of the list when he returns. Extra-board drivers do not have enough seniority to obtain a regularly scheduled run. At Tamiami, it takes seven to twelve years to attain sufficient seniority to bid on a regular run. *See id.* at 231.

56. *See id.* at 237.

57. *See id.*

58. *See id.* at 238.

59. *See id.* at 236.

60. *See id.* at 233 (detailing Tamiami's testing procedures).

61. *See id.* at 236.

62. *See id.* at 237.

63. *See id.*

64. Many later cases have held that Tamiami's argument is no longer satisfactory because reliable tests for predicting health problems now exist, such as serum cholesterol testing to predict the risk of heart disease. These cases have held that age cannot be used as a proxy for health and that individualized testing is required. *See, e.g., Gately v. Massachusetts*, 2 F.3d 1221 (1st Cir. 1993); *EEOC v. Tennessee Wildlife Resources Agency*, 859 F.2d 24 (6th Cir. 1987), *cert. denied*, 489 U.S. 1066 (1989). However, not all courts have subscribed to this theory. *Cf. EEOC v. New Jersey*, 620 F. Supp. 977 (D.N.J. 1985).

changes.<sup>65</sup> Because the court believed that individual testing could not identify Tamiami's valid health concerns, it permitted age to be a proxy for a health-related test.<sup>66</sup>

In *Western Airlines, Inc. v. Criswell*,<sup>67</sup> the U.S. Supreme Court followed the holdings in the Fifth Circuit trilogy,<sup>68</sup> but concluded that Western Airlines failed to establish a valid BFOQ defense.<sup>69</sup> Western required all flight engineers to retire at sixty years old, even though the Federal Aviation Administration (FAA) did not require mandatory retirement and other airlines hired flight engineers over sixty years old.<sup>70</sup> Western also required all pilots and first officers to pass individual fitness exams.<sup>71</sup> The Court adopted the *Tamiami* two-part inquiry of the BFOQ defense.<sup>72</sup> The first inquiry is whether the job qualification relates to the essence of the business.<sup>73</sup> The second question is whether the age qualification is reasonably necessary for the operation of the business.<sup>74</sup> The Court stated that reasonable necessity could be shown in two ways.<sup>75</sup> The employer could show either (1) a factual basis for believing that all, or substantially all, persons over the age qualification would be unable to perform the duties of the job safely and efficiently or (2) that age is a legitimate proxy for the safety-related job qualification by proving that it is impossible, or highly impractical, to deal with older employees on an individual basis.<sup>76</sup>

In *Criswell*, the parties agreed that the "qualification of good health for a vital crew is reasonably necessary to the essence of the airline's operations."<sup>77</sup> To establish a defense, however, Western had to show that age qualifications were reasonably necessary for safe transportation. Western did not argue that all, or substantially all, flight engineers over the age of sixty could not perform their job du-

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65. *Tamiami*, 531 F.2d at 238. The court also considered the testimony of older drivers who were on regular runs who testified that they could not return to extra-board work and maintain the safety of their passengers. *See id.*

66. *See id.*

67. 472 U.S. 400 (1985).

68. *See id.* at 412-17.

69. *See id.* at 423.

70. *See id.* at 407.

71. *See Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 555 (9th Cir. 1983).

72. *See Western Airlines, Inc.*, 472 U.S. at 416.

73. *See id.* at 413.

74. *See id.* at 414.

75. *See id.*

76. *See id.*

77. *Id.* at 418.

ties.<sup>78</sup> Instead, Western argued that age was a necessary proxy for good health.<sup>79</sup> The Court did not believe this argument because Western already tested the fitness of pilots and first officers, yet Western could not explain why it could not also test its flight engineers.<sup>80</sup> In addition, Western could not explain why it could not hire persons over sixty when the FAA did not require the mandatory retirement of flight engineers at age sixty and when other airlines permitted flight engineers to continue working until at least age seventy.<sup>81</sup>

These cases show that employers try to use age as a proxy for the health of older workers. The argument assumes that as people age, they experience physiological changes which negatively affect their job performance and that these changes cannot be detected on an individual basis. Therefore, the argument concludes, employers should be given carte blanche to base a mandatory retirement policy on age. Where the job relates to public safety, this argument is generally accorded deference.<sup>82</sup> However, it is not clear whether this argument will withstand the provisions of the Americans with Disabilities Act (ADA), as will be discussed in part III.

## **B. Reasonable Factors Other Than Age**

Section 623(f)(1) of the ADEA also provides that an employer may take any actions prohibited under the ADEA "where the differentiation is based on reasonable factors other than age."<sup>83</sup> Neither Congress nor the EEOC have provided guidance on the meaning of this section or how courts should determine its violations. Consequently, courts have given employers great deference.<sup>84</sup> The U.S. Supreme Court has even held that adverse employment decisions which are based on factors correlating with age, such as pension vesting rights, are not decisions based on age and thus may not be used as evidence of discrimination.<sup>85</sup> Some of the reasons employers have given to ter-

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78. See generally *id.*

79. See *id.* at 413.

80. See *id.* at 418.

81. See *id.*

82. See *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974); *EEOC v. New Jersey*, 620 F. Supp. 977, 998 (D.N.J. 1985).

83. 29 U.S.C. § 623(f)(1) (1994).

84. See generally *Weihaup v. American Med. Ass'n*, 874 F.2d 419 (7th Cir. 1989); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161 (8th Cir. 1985); *Loeb v. Textron Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271 (8th Cir. 1978); *Bishop v. Jelleff Assoc.*, 398 F. Supp. 579 (D.D.C. 1974).

85. See generally *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

minate employees under this defense include reductions in force,<sup>86</sup> lack of qualification,<sup>87</sup> elimination of plaintiff's position,<sup>88</sup> inadequate performance,<sup>89</sup> and health.<sup>90</sup> However, the ADA may come to the rescue of older workers who were ostensibly terminated for health reasons.

### III. Americans with Disabilities Act

At the time of the ADA's enactment, approximately forty-three million Americans suffered from a physical or mental disability.<sup>91</sup> These disabled individuals faced discrimination in virtually all aspects of their lives—employment, public accommodation, transportation, telecommunications, recreation, health services, voting, even government services—but had no legal recourse.<sup>92</sup> In 1990, Congress determined the time had come to help disabled persons. As stated by Senator Durenberger:

[I]n 1964, we passed civil rights protections based on race, color, religion, sex or national origin. In 1967, under the Age Discrimination and [sic] Employment Act we added age. Nearly a quarter of a century later, it is time to complete that commitment to individual rights we began so long ago and add persons with disabilities to the list of those protected from unjust discrimination.<sup>93</sup>

Congress already had some experience in this area with the Federal Rehabilitation Act of 1973 (FRA),<sup>94</sup> which protected federal employees and employees of federal contractors from disability discrimination.<sup>95</sup> The ADA's employment provisions were modeled after the FRA<sup>96</sup> and afford analogous protection in the private sector. The ADA makes it

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86. See *Holley*, 771 F.2d 1161; *Bishop*, 398 F. Supp. 579.

87. See, e.g., *Weihaupt*, 874 F.2d at 422.

88. See, e.g., *Holley*, 771 F.2d at 1163; *Marshall*, 572 F.2d at 1272-73; *Bishop*, 398 F. Supp. at 587-90.

89. See, e.g., *Weihaupt*, 874 F.2d at 422; *Marshall*, 572 F.2d at 1272-73; *Bishop*, 398 F. Supp. 587-90.

90. See, e.g., *Marshall*, 572 F.2d at 1272.

91. See 135 CONG. REC. E1575-01 (daily ed. May 9, 1989) (statement of Sen. Coelho); 42 U.S.C. § 12101(a)(1).

92. See 42 U.S.C. § 12101(a)(2), (4) (1994).

93. 135 CONG. REC. S10,708, S10,721 (daily ed. Sept. 7, 1989) (statement of Sen. Durenberger).

94. Pub. L. No. 93-112, § 500, 87 Stat. 355, 390 (codified as amended at 29 U.S.C. § 791 (1994)).

95. See 29 U.S.C. §§ 791-794.

96. See Federal Rehabilitation Act § 504, 87 Stat. at 504 (codified at 29 U.S.C. § 794).

unlawful for an employer<sup>97</sup> to discriminate against "a qualified individual with a disability" because of that person's disability.<sup>98</sup>

The ADA defines a disabled person as one who<sup>99</sup> either (1) has an actual physical or mental impairment<sup>100</sup> that substantially limits one or more major life activities;<sup>101</sup> or (2) has a record or past history of an impairment that substantially limited a major life activity;<sup>102</sup> or (3) is regarded as having an impairment that substantially limits a major life activity.<sup>103</sup> For example, an employer may not discriminate against an employee either because (1) the employee has cancer (an actual physical impairment); or (2) the employee was treated for cancer but is now cured (a past impairment); or (3) the employer wrongly believes that the employee had or has cancer (regarded as being impaired).

A disability must not only affect a major life activity, but must also substantially limit that activity.<sup>104</sup> Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."<sup>105</sup> A disability is substantially limiting if it significantly restricts the way that person can perform a major life activity as compared to the average person in the general population.<sup>106</sup> Temporary, nonchronic problems such as sprained joints, broken bones, and the flu, are not considered disabilities.<sup>107</sup> With respect to an individual's work life, an individual is presumed to be limited in his or her ability to work if another major life

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97. The ADA makes it unlawful for a "covered entity" to discriminate against a qualified individual with a disability. See 42 U.S.C. § 12112(a). A "covered entity" includes an "employer." See *id.* § 12111(2). An "employer" is "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." See *id.* § 12111(5).

98. See *id.* § 12112(a).

99. See *id.* § 12102(2).

100. "Actual impairments" are not limited to physiological disorders or diseases. They include cosmetic disfigurements, amputations, and any mental or psychological disorders. See 29 C.F.R. § 1630.2(h) (1997). In determining whether a disability exists, corrective measures or aids such as medicines, hearing aids, canes, walkers, or artificial limbs, must be excluded from consideration. See *id.* app. § 1630.2(h). For example, an individual who wears a hearing aid is still disabled because his ability to hear is limited, regardless of whether the hearing aid gives him perfect hearing.

101. See 42 U.S.C. § 12102(2)(A).

102. See *id.* § 12102(2)(B).

103. See *id.* § 12102(2)(C).

104. See *id.* § 12101(2).

105. 29 C.F.R. § 1630.2(i).

106. See *id.* § 1630.2(j).

107. See *id.* app. § 1630.2(j).



activity is significantly affected.<sup>108</sup> For example, a blind or paralyzed person is substantially limited in the major life activities of seeing or walking and therefore is presumed to be limited in the ability to work. A person who is not limited in other major life activities besides working is not presumed disabled. Instead, the court must assess that person's individual capabilities.<sup>109</sup>

A "qualified individual with a disability" is a disabled person who can perform the essential functions of the job with or without reasonable accommodation.<sup>110</sup> Accommodations may include job restructuring, reassignment, special aids and services, special training, and access to employer-provided cafeterias, lounges, and fitness facilities.<sup>111</sup> The need for the "reasonable accommodation" and the "essen-

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108. *See id.*

109. *See id.* The assessment includes consideration of (1) the geographical area to which the person has reasonable access; (2) the job from which the person has been disqualified; (3) the number and types of other jobs in the area that require similar skills from which the person will also be disqualified because of the disability; and (4) other available jobs in the area that do not require those skills from which the person will be disqualified because of the disability. *See id.* § 1630.2(j)(3)(iii). Thus, an individual is not substantially limited in working because he is unable to perform a particular job for one employer. He must be unable to perform a class of jobs for many employers in the area to which he has reasonable access. *See id.* For example, if an employee is restricted in the amount of weight that he can lift due to a back condition, and his training and job skills are such that he is employed in a stockroom, which is essentially unskilled labor, the restriction eliminates a broad range of jobs from many employers, not just the job held by the employee prior to his back injury.

110. *See* 42 U.S.C. § 12111(8) (1994).

111. *See id.* § 12111(8); 29 C.F.R. app. § 1630.2(o). Accommodations include any changes in the workplace or in the way things are usually done that enable a disabled employee to enjoy equal access employment opportunities and accoutrements. *See* 29 C.F.R. app. § 1630.2(o). Employers may have to accommodate the application process or the job functions and help the person to enjoy employment benefits and privileges including nonwork facilities. *See id.* EEOC guidelines contemplate that the employer and employee should cooperate to find reasonable accommodations. The employer and the employee should (1) determine the job's purpose and essential functions, (2) ascertain the precise limitations imposed by the disability, (3) determine how the limitations may be overcome, (4) identify potential accommodations and assess the effectiveness of each, and (5) consider the employee's preference as to which accommodation would be the most appropriate. *See* 29 C.F.R. app. § 1630.9.

Employers are forbidden from requiring preemployment or employment physical exams, except within carefully defined parameters. *See* 42 U.S.C. § 12112(d). An employer may require a preemployment physical only after an offer of employment has been made and only if it requires all new employees to have physicals. *See id.* § 12112(d)(3). An employer may withdraw an employment offer because of the results of the physical exam only if the reason is job-related and consistent with business necessity, and if the employer cannot reasonably accommodate the employee. *See* 29 C.F.R. § 1630.14(b)(3). An employer may only require a physical during employment if there is a business necessity. *See* 42 U.S.C. § 12112(d)(4)(A). Employers are also forbidden from making inquiries re-

tial functions of the job” requirements is well illustrated by the testimony before the Committee on Labor and Human Resources prior to the enactment of the ADA:

One [client] was applying after working as a group counselor in Juvenile Hall for 10 years as a volunteer because he did not have the nerve to apply because he had epilepsy and had faced so much discrimination; finally did apply, got the highest ratings on the entrance exam; was all set to start work when it was discovered that he did not have a driver's license because of his epilepsy. The driver's license requirement was there because the employer—even though the primary function of the job was to counsel youth in Juvenile Hall, there was a driver's license requirement in case a group counselor would be asked to do an occasional errand. And this man who had volunteered [sic] for ten years at Juvenile Hall, who was perfectly capable of working and did not possess a driver's license because he had epilepsy was denied the position even though he could do 99.9 percent of the job, which was counsel youth at Juvenile Hall because he could not jump in a car and do an occasional errand.

We filed suit on that case, and what happened was we entered a settlement. Afterwards, there were years and years and years of experience where Juvenile Hall itself realized it had been so inflexible in its requirement because it was very, very easy to get another counselor to do that occasional errand and jump in his car.<sup>112</sup>

In ADA terms, the essence of the job was youth counselling. Performing occasional errands was only a marginal function. Juvenile Hall easily accommodated this individual by simply having another counselor perform occasional errands.

However, like the ADEA, the ADA does not leave the employer defenseless. An employer need not make reasonable accommodations where it would create an undue hardship.<sup>113</sup> Undue hardship requires that the accommodation would be very difficult, expensive,<sup>114</sup> unduly extensive, substantial, disruptive of the workplace, or would require a fundamental alteration of the business's nature or operation.<sup>115</sup> An employer also need not hire an employee who poses a

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garding a disability unless it is regarding the person's ability to perform job-related functions. *See id.* § 12112(d)(2); 29 C.F.R. app. § 1630.14(b).

112. *Hearings Before House Comm. on Labor & Human Resources*, 101st Cong. 52-53 (1989) (statement of Ms. Mayerson, from the Disability Rights Education and Defense Fund, Berkeley, Cal.).

113. *See* 42 U.S.C. § 12112(5)(A); *see also id.* § 12111(10)(A).

114. Difficulty and expense depends upon the nature and cost of the accommodation, the financial resources of the employer, and the effect on the employer's expenses, resources, and operation. *See id.* § 12111(10)(B).

115. *See* 29 C.F.R. app. § 1630.2(p).

direct threat to the health and safety of others if the threat cannot be eliminated through reasonable accommodation.<sup>116</sup>

#### IV. Age and the ADA

Although aging in and of itself does not cause disabilities, the frequency of disabilities does increase with age. Only 5.2% of the general population have a physical disability, but this figure increases to 45.4% for those sixty-five to sixty-nine years old and 55.3% for those seventy to seventy-four years old.<sup>117</sup> As of 1991, 60% of the disabled persons in the United States were forty-five years old or older.<sup>118</sup> A study of 13,000 persons aged fifty-one to sixty-one noted the correlation between disability and aging, and the impact on continued employment.<sup>119</sup> The study reported that approximately 10% of employed persons have a health condition that limits work, but 40% of unemployed persons have a health condition that limits work.<sup>120</sup> In addition, the primary reason nonworking individuals left their last job was because they suffered from poor health.<sup>121</sup> The four most common health problems were back problems, heart conditions, diabetes, and chronic lung disease.<sup>122</sup>

The plain language of the ADA and EEOC regulations exclude age from being a disability. The Senate Report expressly states that age is not a disability;<sup>123</sup> EEOC guidelines omit advanced age as an impairment.<sup>124</sup> All is not lost, however. As Senator Harkin stated: "Who are these 43 million Americans with disabilities, one out of every six of our citizenry? First of all, they are not strangers to us. It could be an elderly grandmother with arthritis, but determined to

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116. See 42 U.S.C. § 12111(3). A direct threat is a "significant risk of harm to the health and safety of others" and is determined by considering (1) the nature and severity of the harm, (2) the duration of the harm, (3) the likelihood that the harm will occur, and (4) the imminence of the harm. 29 C.F.R. § 1630.2(r). Evaluations of direct threats must be made on an individual basis and must be grounded on objective, factual evidence such as medical analysis. See *id.*

117. See J. Kenneth L. Morse & Sharon Rennert, *Older Americans and the Americans with Disabilities Act of 1990: Title 1*, CSG BEST PRACTICE NOTES, Mar. 1994, at 2.

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.*

123. See S. REP. NO. 101-116, at 22 (1989).

124. See 29 C.F.R. app. § 1630.2(h) (1997).

fend for herself and live her retirement years in dignity . . . .”<sup>125</sup> The Senate Report which indicated that age is not a disability also stated, “[O]f course, if a person who has [this] characteristic also has a physical or mental impairment . . . the person may be considered as having a disability [f]or purposes of this legislation,”<sup>126</sup> and EEOC guidelines provide, “various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part.”<sup>127</sup> What does this mean to an elderly grandmother with arthritis who is trying to fend for herself? Without the ADA, her employer would have been able to deny or terminate her employment, and successfully defend an ADEA claim on the basis of “reasonable factors other than age,” namely health. Now, however, that same employer may be liable under the ADA if it could reasonably accommodate her arthritis on the job.

## V. The Framework for Analyzing Employment Discrimination Cases

Under employment discrimination law, a plaintiff can establish a claim in two ways.<sup>128</sup> First, a plaintiff may present direct evidence of discrimination, usually statements by the employer that evidence discrimination based on a prohibited trait such as race, gender, age, or disability.<sup>129</sup> However, a plaintiff is often unable to present direct evidence of discrimination.<sup>130</sup> The alternative method requires the use of indirect evidence.<sup>131</sup> Two Supreme Court cases established the paradigm for cases involving indirect evidence of discrimination under Title VII.<sup>132</sup> This paradigm has been applied to other discrimination statutes, including the ADEA and the ADA.<sup>133</sup>

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125. 135 CONG. REC. S10,710-11 (daily ed. Sept. 7, 1989) (statement of Sen. Harkin).

126. S. REP. NO. 101-116, at 22.

127. 29 C.F.R. app. § 1630.2(h).

128. See *West v. Russell Corp.*, 868 F. Supp. 313, 317 (M.D. Ala. 1994). See generally *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609-10 (1993).

129. See *West*, 868 F. Supp. at 317.

130. See *id.*

131. See *id.*

132. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

133. See *West*, 868 F. Supp. at 317 (discussing ADA analysis); see also *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) (applying the *McDonnell Douglas/Burdine* approach to Title VII and the ADEA); *Richmond v. Board of Regents of the Univ. of Minn.*, 957 F.2d 595 (8th Cir. 1992) (applying the *McDonnell Douglas* analysis to Title VII, § 1981, § 1985, and the ADEA).

In *McDonnell Douglas Corp. v. Green*,<sup>134</sup> the Supreme Court held that the employee carries the initial burden of establishing a prima facie case of discrimination, and must show: (1) that the employee has a protected trait or is a member of a protected class (race, gender, religion, national origin, age, or disability); (2) that the employee was qualified for the position; (3) that the employee suffered an adverse employment decision; and (4) that the employee's position was filled by a person who did not have the protected trait or was not a member of the protected class.<sup>135</sup> The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for rejecting the employee.<sup>136</sup> If the employer is able to articulate such a reason, the employee must then show that the reason given by the employer was not the true reason, but merely a pretext for discrimination.<sup>137</sup>

In *Texas Department of Community Affairs v. Burdine*,<sup>138</sup> the Supreme Court fleshed out its discrimination paradigm more fully. The Court explained that the employee's prima facie case establishes a presumption of discrimination.<sup>139</sup> If the employer does not articulate any reason for the adverse action taken against the employee, the employee is entitled to judgment as a matter of law because no issue of

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134. 411 U.S. 792 (1973).

135. *See id.* at 802.

136. *See id.* Employers have tried to use "after-acquired" evidence as their legitimate, nondiscriminatory reason for termination. That is, evidence that the employer discovered after the employee was terminated for which the employer could have legitimately terminated the employee. However, the Supreme Court has recently held that such evidence does not refute the employer's unlawful act, but can be considered to determine the appropriate remedy. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995).

137. *See McDonnell Douglas*, 411 U.S. at 804-05. The Fourth Circuit has made it more difficult for an ADEA plaintiff to persuade the court that an employer was motivated for discriminatory reasons, where the person taking the adverse action against the employee is also the person who hired that employee. *See Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 214-15 (4th Cir. 1994). The court stated that there is a powerful inference that discrimination did not motivate the employer where the person hiring and firing are one and the same. *See id.* However, this inference of nondiscrimination in ADEA cases may not apply to ADA cases. *See Susie v. Apple Tree Preschool & Child Ctr.*, 866 F. Supp. 390, 396 (N.D. Iowa 1994). In that case, the court stated that an inference of nondiscrimination arose because age is a constant factor which the employer knew at the time of hiring. *See id.* at 397. Because the employer hired the employee knowing that trait, the court believed it unlikely that the employer would fire the employee for that same trait. *See id.* However, the court noted that disabilities are not always known at the time of hiring. *See id.* at 396-97. It also noted that the employee's ability, the nature and scope of the disability, and the reasonable accommodations needed may vary greatly from hiring to firing. *See id.* at 397.

138. 450 U.S. 248 (1981).

139. *See id.* at 254.

fact remains.<sup>140</sup> Thus, the burden shifts to the employer to provide a legitimate, nondiscriminatory explanation for its actions.<sup>141</sup> When the employer provides such an explanation, the presumption of discrimination that was established by the employee's *prima facie* case is rebutted, and, in effect, disappears.<sup>142</sup> The employee then has the burden of persuading the court, by a preponderance of the evidence, that the reasons given by the employer were not the employer's true reasons.<sup>143</sup> The employee can refute the employer's explanation by showing either that the employer was motivated by discriminatory reasons or that the employer's explanation is not credible.<sup>144</sup> Although the burden of production shifts during the case, the burden of persuasion does not;<sup>145</sup> it remains with the employee.<sup>146</sup>

## VI. BFOQ and the ADA

In determining whether the BFOQ defense established under the ADEA would survive a challenge under the ADA, two different scenarios must be considered: one where courts have permitted age to be a proxy for health without individual testing and one where courts have required individual health testing.

### A. Age as a Proxy for Health: No Individualized Testing Required

Courts that have not required individualized testing have allowed BFOQ defenses against ADEA claims based on arguments that physiological deterioration accompanies aging;<sup>147</sup> that functional age cannot be separated from chronological age;<sup>148</sup> and that testing cannot accurately determine which individuals will suffer from health problems such as heart attacks or strokes on the job.<sup>149</sup> However, facts that establish a BFOQ defense under the ADEA establish a *prima facie* case of discrimination under the ADA. First, older employees have a

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140. *See id.*

141. *See id.*

142. *See id.* at 255.

143. *See id.* at 256.

144. *See id.*

145. *See id.* at 253, 256.

146. *See id.* at 253.

147. *See Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 229 (5th Cir. 1976).

148. *See Hodgson v. Greyhound Lines, Inc.*, 449 F.2d 859, 864 (7th Cir. 1974).

149. *See EEOC v. New Jersey*, 620 F. Supp. 977, 991 (D.N.J. 1985).

protected trait,<sup>150</sup> as they are regarded as having a disability and thus are suffering from the myths, fears, and stereotypes which the ADA was intended to combat.<sup>151</sup> Second, older employees have suffered from an adverse employment decision,<sup>152</sup> as they have either been discharged, mandatorily retired, demoted, not hired, or not promoted. Third, older employees are qualified for the position, with or without reasonable accommodations.<sup>153</sup> The employers can have no factual basis for determining older employees unqualified where the employer uses age as a proxy for an individual evaluation of each affected employee. Finally, older employees are replaced with people the employer believes to be nondisabled.<sup>154</sup>

Applying the ADA to the *Tamiami* case<sup>155</sup> illustrates the usefulness of the ADA to age discrimination cases. In that case, the Fifth Circuit upheld a BFOQ based on age and permitted the Tamiami bus company to refuse to hire applicants over forty years old because they could not withstand the rigors of extra-board driving.<sup>156</sup> Thus, the court permitted age to be used as a proxy for health under the ADEA. However, applicants over age forty may have had a "second bite at the apple" under an ADA analysis. Tamiami regarded older applicants as having disabilities.<sup>157</sup> Tamiami made an adverse employment decision based on this perception in that Tamiami only hired persons who did not have a perceived disability. Assuming that older applicants have the requisite licenses and experience for driving a tour bus, they possess the requisite skills to perform the essence of the job, which is driving. Therefore, they are qualified applicants. Tamiami's defense under the ADEA was that the rigors of the job make all, or substantially all, older employees unsafe.<sup>158</sup> The job requires that extra-board drivers be on call twenty-four hours a day, seven days a week, and that they make runs lasting as long as thirty days.<sup>159</sup> The company operates on a first in, first out basis, so that as a driver re-

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150. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (discussing racial minorities in Title VII claims).

151. See S. REP. NO. 101-116, at 9-12 (1989).

152. See *McDonnell Douglas*, 411 U.S. at 802 (stating that an adverse employment decision is required to establish a prima facie case of race discrimination).

153. See *id.*

154. See *id.*

155. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1978).

156. See *id.*

157. See 42 U.S.C. § 12102(2)(C) (1994).

158. See *Usery*, 531 F.2d at 228.

159. See *id.* at 231.

turns from a run, his name goes at the bottom of the list, and the next driver at the top of the list takes the next available run.<sup>160</sup>

Under the ADA, the older applicants who were denied access to these driving positions could show that Tamiami could reasonably accommodate them. Tamiami could hire more drivers to have a longer interval between runs; assign specific drivers to be on call on specific days; shorten the length of runs; or, staff another driver on longer runs. Tamiami could not likely show a legitimate, nondiscriminatory reason for its policy of discriminating against older applicants without reference to their perceived disability.<sup>161</sup> Indeed, the purpose of such broad-based, age-related policies is to focus on the perceived disability. Tamiami's only possible defenses are (1) that regardless of accommodations, older persons pose a direct threat to the health or safety of others or (2) that accommodating older persons would impose an undue hardship.<sup>162</sup> Showing undue hardship requires analysis of the nature and cost of the accommodations, Tamiami's financial resources, and the effect on Tamiami's expenses, resources, and operations.<sup>163</sup> Determining undue hardship also requires demonstrating that the suggested accommodation would be unduly extensive, substantial, or disruptive of the workplace; or would fundamentally alter the nature or operation of the business.<sup>164</sup> Tamiami's operations consist of providing bus transportation for the general public in Florida, South and Central Georgia, and part of Alabama.<sup>165</sup> The bus company conducts scheduled runs, sight-seeing tours, and other special operations for the traveling public.<sup>166</sup> The proposed accommodations would not alter the nature of Tamiami's business, only its operation. Although fundamental operational changes would not be reasonable,<sup>167</sup> a court could easily determine that giving drivers certain scheduled days to be on call, rather than keeping them on call for twenty-four hours, falls within the bounds of reasonable accommodations.<sup>168</sup>

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160. *See id.*

161. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

162. *See* 42 U.S.C. § 12112(b)(5)(A).

163. 29 C.F.R. app. § 1630.2(p) (1997).

164. *See id.*

165. *See* Usery v. Tamiami Tours, Inc., 531 F.2d 224, 230 (5th Cir. 1978).

166. *See id.*

167. *See* 29 C.F.R. app. § 1630.2(p).

168. An economic analysis would have to be done to determine the impact of the proposed accommodations on Tamiami's resources. *See id.*



Traditional public safety work, such as police work, may present harder cases under the ADA. In *EEOC v. New Jersey*,<sup>169</sup> the district court determined that police work was too rigorous for employees over fifty-five years old, so mandatory retirement for such employees was proper.<sup>170</sup> Still, even these employees may have a "second bite at the apple" under the ADA. As in *Tamiami*, applying the ADA to this case would prove useful to the plaintiff. The police department regarded older officers as having a disability. The department made adverse employment decisions based on that perception. The department replaced departing employees with employees who do not have the perceived disability. Because these employees were considered qualified the day before their fifty-fifth birthdays, it is unlikely that they lost the requisite skills for their jobs upon their fifty-fifth birthdays. Thus they were qualified when discharged.

The police department argued that police officers must be physically fit to apprehend felons (which may involve chasing suspects on foot) and to assist motorists (which may involve pushing disabled vehicles).<sup>171</sup> In other words, officers have to be fleet and fast, and can endanger the public if they have a coronary while in pursuit of these activities. However, the ADA would enable the retiring officers to argue that the department could reasonably accommodate them. The department can perform physical examinations to determine individual officers' abilities and test cholesterol levels to measure the risk of heart disease. In addition, less healthy officers can assume administrative positions and thus remain employed.

To withstand an ADA challenge, the police department would have to show: (1) that there was a legitimate nondiscriminatory reason, entirely unrelated to the disability, for its policy (which is not likely to prevail for the reasons expressed in the *Tamiami* example); or (2) that despite the proposed accommodations, older officers still pose a direct threat to the health or safety of others;<sup>172</sup> or (3) that accommodating older officers would pose an undue hardship on the department.

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169. 620 F. Supp. 977 (D.N.J. 1985).

170. See *id.* at 998.

171. See *id.* at 988.

172. This would be hard to do if the officer is relegated to desk duty.

## B. Individualized Testing Required

In cases where the court has not permitted age to be a proxy for health, and has required individual employee testing before mandatorily retiring employees, the ADA still accords some relief. In those instances, employees are either retired or refused consideration for employment because health tests revealed an ailment that the employer considers to effectively disqualify them from the position. The employees are therefore regarded as disabled and replaced by nondisabled persons. Prior to the ADA, these persons had no legal recourse because employers had no duty to make reasonable accommodations for their disabilities. The ADA may give them a chance to retain their jobs.

For example, in *EEOC v. Florida Department of Highway Safety & Motor Vehicles*,<sup>173</sup> the district court struck down the Florida Highway Patrol's requirement that officers retire at age sixty-two.<sup>174</sup> The patrol made the same arguments that the *EEOC v. New Jersey*<sup>175</sup> court accepted: that age was the best indicator of coronary heart disease and that functional age could not be separated from chronological age.<sup>176</sup> However, the court found that other factors, including gender, family history, serum cholesterol level, blood pressure level, blood sugar level, personality type, smoking habits, diet, exercise, and alcohol consumption, were significant in calculating the risk of heart disease and coronary events.<sup>177</sup> The court held that age was not a BFOQ and that an employer must individually test an applicant's or employee's health prior to making an adverse employment decision based on age.<sup>178</sup>

Even if medical tests did show that an officer was at high risk for heart disease, could the patrol terminate him for health reasons? An officer with the appropriate training and skills for the job could still argue that reasonable accommodations are possible. The patrol could transfer him to administrative or supervisory duties, or grant him leave to undergo treatment to reduce his cholesterol level or other predictors to medically acceptable levels. The patrol would have to show that the department has a legitimate, nondiscriminatory reason

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173. 660 F. Supp. 1104 (N.D. Fla. 1986).

174. *See id.* at 1110.

175. 620 F. Supp. 977 (D.N.J. 1985).

176. *See Florida Dep't of Highway Safety*, 660 F. Supp. at 1106-07.

177. *See id.* at 1107.

178. *See id.* at 1110.

for terminating the officer; that the officer still posed a direct threat to the health or safety of others; or that accommodating the disability would pose an undue hardship.

An example of disability accommodation in action is *Betts v. Hamilton County Board of Mental Retardation*.<sup>179</sup> The plaintiff, Mrs. Betts, worked as a speech pathologist for the Board. When she could not satisfactorily perform her duties for medical reasons,<sup>180</sup> she voluntarily transferred to a workshop specialist position. When Mrs. Betts was no longer able to perform those duties, she voluntarily accepted a position as a teachers' aide.<sup>181</sup> And when she was no longer able to perform those duties, she retired at age sixty-one.<sup>182</sup> This case illustrates how the ADA should work: when Mrs. Betts could not perform the duties of the position for which she had been hired, her employer accommodated her disabilities by transferring her to various other positions until her disabilities became such that she could no longer work at all.

## VII. "Reasonable Factors Other Than Age" and the ADA

The ADA would apply where health constitutes the "reasonable factor other than age" found in the ADEA defense. In this situation, employers argue that they terminated the employee not because of age, but because of the employee's health.<sup>183</sup> Courts have routinely accepted this argument and have upheld the terminations on the ground that "Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence."<sup>184</sup> Congress's enactment of the ADA indicates that it has changed its mind. Thus, the ADA should be of great benefit to plaintiffs in responding to this argument. Now, employers will be unable to shout "health!" and walk out of the courthouse scot-free. They cannot argue some other legitimate, nondiscriminatory reason because their actions are based on their perceptions of disability. They must refute the employee's contentions that reasonable accommoda-

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179. 631 F. Supp. 1198 (S.D. Ohio 1986) (The focus of the case was discrimination in disability benefits based on age.).

180. See *id.* at 1201.

181. See *id.*

182. See *id.*

183. See *supra* note 7 and accompanying text.

184. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979).

tions were feasible by showing that the accommodations imposed undue hardships or that the employee posed a direct threat to the health or safety of others.

For example, in *Cova v. Coca-Cola Bottling Co. of St. Louis, Inc.*,<sup>185</sup> Coca-Cola contended that it dismissed the sixty-two-year-old plaintiff who had been recently blinded in one eye because the company believed that the injury affected his ability to work.<sup>186</sup> Although the company offered no evidence of how the employee's blindness affected his work,<sup>187</sup> the Eighth Circuit Court of Appeals accepted this argument on its face and upheld the termination.<sup>188</sup> With an ADA claim, this case would not have ended at that juncture. This plaintiff clearly had a disability, suffered an adverse employment decision, and most likely was replaced by a nondisabled person. If the plaintiff could show either that he was still qualified for his job or that he could become qualified with reasonable accommodations, the burden would have been upon Coca-Cola to explain why accommodations were not reasonable.

Similarly, in *Bishop v. Jelleff Associates*,<sup>189</sup> a retailer fired a number of older employees who were covered under the ADEA, ostensibly for health reasons. The company contended that a sixty-one-year-old saleswoman was fired because her crippling arthritis rendered her work performance unsatisfactory.<sup>190</sup> The company also contended that it fired a fifty-five-year-old stock person because of excessive absenteeism due to allergies<sup>191</sup> and a fifty-one-year-old buyer recovering from an aneurysm because the buyer would have only been able to work part-time days for at least four to six weeks.<sup>192</sup> The district court accepted the company's health arguments and upheld the terminations.<sup>193</sup>

Under the ADA, this employer could not have walked away so easily. The employer clearly regarded the saleswoman with crippling arthritis as disabled and most likely replaced her with a younger, nondisabled person. As part of her *prima facie* case, the saleswoman

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185. 574 F.2d 958 (8th Cir. 1978).

186. *See id.* at 961.

187. *See id.*

188. *See id.*

189. 398 F. Supp. 579 (D.D.C. 1974).

190. *See id.* at 587.

191. *See id.*

192. *See id.* at 588.

193. *See id.* at 587-88.

would need to show either that she was still qualified to do her job or that she could become qualified with reasonable accommodations, such as switching to departments where she could more easily handle the sales items or reassigning those tasks she could not perform. The company would then have to show that such accommodations would have posed an undue hardship.

The employer also regarded the buyer with the aneurysm as disabled and most likely replaced her with a nondisabled person. There was no indication that the buyer could not satisfactorily perform her job when she did work, only that she could not yet work full days.<sup>194</sup> Because the buyer's job required overnight trips and long hours,<sup>195</sup> a reasonable accommodation might have been to restructure her job so that she could share responsibilities with another person. Another accommodation might have been to transfer her to another position where she could make use of her skills. In either case, the employer would have the burden of showing why such accommodations were unreasonable or would pose an undue hardship.

The stock person with allergies may also have been able to show that her allergies were a disability because they limited her ability to perform any type of work.<sup>196</sup> If the stock person did not work for this company, she would likely miss the same amount of time from another job, and she therefore could be impaired in the major life activity of working. She was likely replaced with a nondisabled person. There was no indication that, when she did work, she did not adequately perform her job. There may have been a reasonable accommodation for her. For instance, her employer might have allowed her to use her vacation time to compensate for her missed work days.

In fact, the court in *Dutton v. Johnson County Board of County Commissioners*<sup>197</sup> held that substituting vacation days for sick days could be a reasonable accommodation.<sup>198</sup> Dutton was terminated for excessive use of unscheduled leave due to debilitating headaches, but he performed his job satisfactorily when he did work.<sup>199</sup> The court con-

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194. See *id.* at 588.

195. See *id.*

196. A disability must affect a "major life activity." See 42 U.S.C. § 12102(2)(A) (1994). Major life activities include working. See 29 C.F.R. § 1630.2(i) (1994). For a discussion of the considerations involved in determining whether an individual is limited in the major life activity of working, see *supra* notes 100-09 and accompanying text.

197. 859 F. Supp. 498 (D. Kan. 1994).

198. See *id.* at 508.

199. See *id.* at 507.

cluded that if the defendant were willing to allow Dutton to use his vacation time to compensate for his unscheduled leave, then Dutton could successfully perform the essential functions of his job.<sup>200</sup>

Under the ADA, it is no longer acceptable for an employer to claim that an ADEA claimant was terminated for medical reasons and expect the courts to uphold the termination on those magic words alone. Now, if an employee can establish a *prima facie* case of discrimination based on health reasons under the ADA and suggest a reasonable accommodation, the employer will have to show why it could not make accommodations for the employee.

### VIII. Procedural Issues

It is clear from the foregoing analysis that the substantive provisions of the ADA may provide ADEA claimants with a second chance to retain their jobs or otherwise combat adverse employment decisions. In addition, the mechanisms for enforcing these claims can run in tandem, thereby providing the proverbial "second bite at the apple" procedurally as well.

#### A. Enforcing ADA Claims

Title VII claim procedures also govern ADA employment claims.<sup>201</sup> Although the EEOC enforces the ADA,<sup>202</sup> the procedures are intended to "give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief."<sup>203</sup> Thus, if a state law provides disability discrimination protection comparable to the ADA and a state agency is responsible for enforcing that law, the ADA charge must first be filed with the state agency.<sup>204</sup> The state agency has exclusive jurisdiction over the ADA charge for sixty days,<sup>205</sup> after which the charge may be filed with the EEOC.<sup>206</sup> In a jurisdiction which effects this type of deferral, the deadline for filing a discrimination claim with the EEOC is three hundred days from the date the alleged discriminatory act occurred, or thirty days after receiving notice that the state

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200. *See id.*

201. *See* 42 U.S.C. § 12117(a) (1994).

202. *See id.*

203. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979).

204. *See* 42 U.S.C. § 2000e-5(c).

205. *See id.*; 29 C.F.R. § 1601.13(3)(ii) (1996).

206. *See* 42 U.S.C. § 2000e-5(c).

agency has ended its proceedings, whichever date is earlier.<sup>207</sup> However, the Supreme Court has held that these time limits are statutes of limitations, not jurisdictional limits; therefore, the equitable doctrines of tolling, waiver, and estoppel apply.<sup>208</sup> Because the state agency has a sixty-day exclusive jurisdiction period, claimants must file charges with the state agency within 240 days from the date the discriminatory act occurred to provide a sixty-day, state-exclusive jurisdiction window and also be able to file a timely charge with the EEOC.<sup>209</sup> If the plaintiff's state has not designated an agency to handle ADA-type discrimination claims, then the plaintiff must file a claim with the EEOC in the first instance, and within 180 days of the date of the discriminatory act.<sup>210</sup>

If the EEOC finds reasonable cause to believe that discrimination has occurred, it first attempts to resolve the issue through conciliation.<sup>211</sup> If conciliation is unsuccessful, the EEOC may then file a lawsuit.<sup>212</sup> When the EEOC files an action, the claimant may intervene in the EEOC's proceeding but may not file a separate action.<sup>213</sup> If the EEOC does not pursue the matter, it will issue the claimant a right-to-sue letter.<sup>214</sup> The claimant has ninety days from receipt of the right-to-sue letter to file suit in either federal or state court.<sup>215</sup>

## B. Enforcing ADEA Claims

The ADA and ADEA have substantially similar enforcement provisions.<sup>216</sup> However, the ADA and the ADEA have two important

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207. *See id.* § 2000e-5(e)(1).

208. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 388 (1982).

209. *See, e.g., Phillips v. General Dynamics Corp.*, 811 F. Supp. 788, 794 (N.D.N.Y. 1993).

210. *See* 42 U.S.C. § 2000e-5(e)(1).

211. *See id.* § 2000e-5(b).

212. *See id.*

213. *See id.* § 2000e-5(f)(1).

214. *See id.*; 29 C.F.R. §§ 1601.18(e), 1601.28(a)(1) (1997).

215. *See* 42 U.S.C. § 2000e-5(f)(2); 29 C.F.R. § 1601.19(a). An individual need not wait until the EEOC has completed its investigation to file an action. One hundred and eighty days after the filing of the charge with the EEOC, the claimant may demand that the EEOC issue a right-to-sue letter. *See* C.F.R. § 1601.28(a). Again, the claimant has 90 days from receipt of the letter to file an action. *See id.* § 1601.19(a).

216. Like the ADA, an ADEA claimant has 180 days to file a charge with the EEOC in a nondeferral jurisdiction. *See* 29 U.S.C. § 626(d)(1) (1994). An ADEA claimant also has 300 days or 30 days from receipt of a notice from a state agency terminating its proceedings (whichever is earlier) to file a charge with the EEOC in a deferral jurisdiction. *See id.* § 626(d)(2). In addition, if the EEOC finds reasonable cause to believe an ADEA violation has occurred, it will attempt a concilia-

distinctions. First, state agencies do not have a sixty-day exclusive jurisdiction period for ADEA charges.<sup>217</sup> Therefore, ADEA charges can be filed with the state agency and the EEOC simultaneously. Second, an ADEA claimant does not need an EEOC right-to-sue letter to file an action.<sup>218</sup> The claimant need only wait sixty days after filing an EEOC complaint to file an action in court.<sup>219</sup>

### C. Enforcing ADA and ADEA Claims Together

In nondeferral jurisdictions, both the ADA and ADEA require that charges be filed first with the EEOC. Therefore, ADA and ADEA claims can be filed simultaneously. If the EEOC investigates the charges simultaneously and issues right-to-sue letters for both charges, the claimant would have ninety days from receipt of these letters to pursue the claims in either federal district court or state court.<sup>220</sup> In deferral jurisdictions, to keep both claims running concurrently, the plaintiff should first file both claims with the state agency and delay further action for sixty days. This will allow the state agency's exclusive period on the ADA claim and the sixty-day delay period on the ADEA claim to run. After sixty days, the plaintiff should file both charges with the EEOC.<sup>221</sup> The EEOC will hopefully issue a right-to-sue letter on both charges.<sup>222</sup>

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tion. *See id.* § 626(b). Thereafter, it will file an action (thereby precluding the individual from doing so), *see id.* § 626(c)(1), or issue a right-to-sue letter. *See id.* § 626(e) (West Supp. 1997).

217. Compare 42 U.S.C. § 2000e-5 (granting states 60-day exclusive jurisdiction), with 29 U.S.C. § 626 (making no reference to a state exclusivity period).

218. *See* 29 U.S.C. § 626(d).

219. *See id.* § 626(d). The time limit for filing an ADEA action is 90 days after receipt of the right-to-sue letter. *See id.* § 626(e) (West Supp. 1997).

220. *See* 29 U.S.C. § 626(e) (West Supp. 1997). However, if the EEOC finds reasonable cause for one claim, but not the other, the plaintiff will have to pursue the claims separately because the EEOC's action precludes the plaintiff from privately pursuing that claim. *See id.* § 626(c)(1).

221. If there is a deferral jurisdiction for the ADEA claim, but not for the ADA claim, there will be a 300-day limitation period for the ADEA claim and a 180-day limitation period for the ADA claim. However, a plaintiff can easily manage this by filing all charges simultaneously (the plaintiff can file the ADEA charge with the state agency and both charges with the EEOC) because there is no waiting period for filing ADEA claims with the EEOC. However, the reverse circumstances need to be carefully monitored because the ADA claim will have a 60-day exclusive period and a 300-day statute of limitations for filing with the EEOC, while the ADEA claim will only have a 180-day statute of limitations for filing with the EEOC. A plaintiff can manage this by filing the ADA claim with the state agency within 120 days and filing both the ADA and ADEA claims with the EEOC after 60 days. *See* 29 U.S.C. § 626(d).

222. If the EEOC only issues a right-to-sue letter for one charge, the claims would have to be pursued separately because the EEOC's action on one claim



## IX. Remedies

The ADA and ADEA both provide for traditional equitable remedies<sup>223</sup> such as reinstatement, reinstatement, promotion, back pay, front pay, vacation pay, retirement benefits, and retroactive seniority. The primary difference between these statutes is whether traditional legal remedies, namely compensatory and punitive damages, are available. The ADEA does not explicitly provide for compensatory and punitive damages, but it does authorize the court to grant "legal . . . relief as may be appropriate."<sup>224</sup> For willful violations, a successful claimant is entitled to liquidated damages in an amount equal to the back pay award.<sup>225</sup> Prior to the Civil Rights Act of 1991,<sup>226</sup> Title VII did not authorize compensatory and punitive damages. Since the enactment of this Act, the ADA (through Title VII) now permits compensatory and punitive damage awards for intentional discrimination, subject to certain statutory caps.<sup>227</sup>

## X. Jury Trials and Attorneys' Fees

The ADEA provides that a claimant is entitled to a jury trial even where the claimants seek equitable relief.<sup>228</sup> Under the ADA, the claimant is entitled to a jury trial only on the issues of compensatory and punitive damages.<sup>229</sup> Attorneys' fees are available under both statutes.<sup>230</sup>

## XI. Conclusion

Although the purpose of the ADEA was to enable older Americans to be judged on their abilities and to protect them from arbitrary

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precludes the plaintiff from privately pursuing that claim. See 42 U.S.C. § 2000e-5(f)(1); 29 U.S.C. § 626(c)(1).

223. The ADA adopts the remedies available under Title VII. See 42 U.S.C. § 12117(a); *id.* § 2000e-5(g). The ADEA provides that a court may grant such "legal or equitable relief as may be appropriate." 29 U.S.C. § 626(b). Employers can introduce after-acquired evidence in an attempt to reduce an award. See *supra* note 136.

224. 29 U.S.C. § 626(b).

225. See *id.*

226. Pub. L. No. 102-166, 105 Stat. 1071.

227. See *id.* § 102, 105 Stat. at 1073. Compensatory damages include damages for pain, suffering, and other nonpecuniary losses. See *id.*

228. See 29 U.S.C. § 626(c)(2).

229. See Civil Rights Act § 102, 105 Stat. at 1073.

230. See 42 U.S.C. § 2000e-5(k) (1994); 29 U.S.C. § 216(b), incorporated by reference in the ADEA, 29 U.S.C. § 626(b).

age discrimination, the BFOQ and “reasonable factors other than age” exceptions proved devastating to claimants. These exceptions allowed employers to escape liability by focusing on health factors which are closely related to age. The ADA provides employees with a “second bite at the apple” by precluding employers from summarily shouting “health!” and running out of the courthouse. Under the ADA, employers will have to explain why a health factor prevents the employee from doing his job and why the employer cannot make adjustments to accommodate the employee. With the ADA looming over employers’ heads, and an added burden of proof necessary to avoid liability, employers should be more willing to accommodate the health problems of older employees.