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AT THE CROSSROADS OF AGE AND DISABILITY: CAN PRACTITIONERS RELY ON THE AMENDED ADA AND THE ADEA TO PROVIDE ADEQUATE RECOUSE FOR THE OLDER DISABLED INDIVIDUAL?

Christopher E. Pashler∗ and Brian C. Lambert∗∗

INTRODUCTION

Consider the role of age in the following hypothetical situations: an older obese man with adult onset diabetes is terminated from his position because his employer believes that he is at an increased risk for cardiovascular disease; an older applicant is turned down for a job because she is experiencing osteoarthritis; and an older employee is terminated because the employer perceives the applicant will be unable to do his job due to vision loss.

These three hypothetical scenarios illustrate that age and disability often are not discrete categories, but rather interconnected, as age can adversely impact an individual's ability to function by accelerating the progression of a physical disability. For an elder law practitioner representing such individuals, two avenues for redress are the Americans with Disabilities Act of 1990† (ADA) and the Age Discrimination in

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Employment Act (ADEA).\textsuperscript{2} Individually, however, these statutes provide an imperfect avenue for an older disabled individual for a number of reasons. Thus, the elder law practitioner must consider whether it would be appropriate to file an ADA claim in addition to an ADEA claim when a client’s case includes issues of both disability and age.

With passage of the Americans with Disabilities Amendments Act of 2008\textsuperscript{3} (ADAAA), Congress has made specific changes to the ADA that have the potential to broaden the scope of the ADA. This article considers the potential impact of the ADAAA on disabled individuals who are bringing age-related ADA claims and contrasts those strategic considerations in bringing similar claims under the ADEA.

For the elder law practitioner representing a client who has suffered discrimination by an employer or potential employer, the ADA may not seem to be an obvious choice. For one, the ADA does not expressly prohibit discrimination on the basis of age.\textsuperscript{4} However, the ADA may provide a viable theory for recovery given that Title I of the ADA prohibits discrimination in “job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, and conditions, and privileges of employment,” and given that the ADA’s extension coverage to employees whose age-related impairments substantially limit a major life activity.\textsuperscript{5} Secondly, age-related disability claims have been negatively impacted by the Supreme Court’s decisions in \textit{Sutton v. United Air Lines, Inc.},\textsuperscript{6} \textit{Murphy v. United Parcel Serv., Inc.},\textsuperscript{7}

\begin{footnotesize}
\begin{enumerate}
\item See generally Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) (As the First Circuit noted, “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.” \textit{id.} at 1016.).
\item 42 U.S.C. § 12112(a).
Bragdon v. Abbott, and Albertson's, Inc. v. Kirkingburg. These decisions effectively held that a court's disability determinations are narrow with regard to what substantially limits major life activities and must be made with regard to a plaintiff's mitigating measures, such as medication (e.g., blood pressure medication) or other assistive devices.

Pleading an ADEA claim in an employment discrimination situation may be the obvious choice given that it is illegal under the ADEA for an employer to "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." Additionally, the ADEA prohibits an employer from acting to "limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of . . . age." However, there are numerous obstacles to maintaining an ADEA claim, whether the claim is premised on a theory of disparate impact or disparate treatment.

Thus, challenges exist for the practitioner in asserting either an ADEA claim or an ADA claim that relates to age and

325, 122 Stat. 3553.
12. Id. (a)(2).
13. Keith R. Fentonmiller & Herbert Semmel, Where Age and Disability Intersect: An Overview of the ADA for the ADEA Practitioner, 10 Geo. Mason U. Civ. Rts. L.J. 227, 284 (2000); see Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (noting that the plaintiff's failure to identify the specific practice being challenged could result in increased liability for employers due to mere statistical imbalances.); see also Kelly v. Drexel Univ., 94 F.3d 102, 109 (3rd Cir. 1996) (rejecting disability plus argument by reasoning that "a person in a group protected from adverse employment actions i.e., anyone, could establish a prima facie discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in the group, e.g., race, age, or sex.").
disability.\textsuperscript{14} The purpose of this article will be to explore the impact of recent ADEA litigation and the ADAAA on practitioners considering pleading either (or both) causes of action.

Section I of this article will consider how the ADAAA broadens the scope of the ADA. Specifically, this section will consider how the courts drastically limited the scope of the ADA, particularly in \textit{Sutton v. United Air Lines, Inc.}\textsuperscript{15} and \textit{Toyota Motor Manufacturing, Kentucky, Inc. v. Williams}.\textsuperscript{16} This section will argue that the legislative history of the ADAAA, which clearly rejects the holdings of both \textit{Sutton} and \textit{Williams}, supports a more liberal interpretation of the "substantially limits" requirement of the ADA that should benefit older disabled individuals.

Section II will consider the obstacles practitioners face in asserting ADEA claims on behalf of older disabled plaintiffs. In particular, this section will consider the viability of disparate impact claims following \textit{Smith v. City of Jackson}.\textsuperscript{17} Additionally, in this section, we will consider the Supreme Court's recent decision in \textit{Meacham v. Knolls Atomic Power Laboratory},\textsuperscript{18} and whether the rejection of the more stringent business necessity defense in favor of the defense of reasonable factors other than age will make it easier for defendants to defend against ADEA claims.

Section III will examine how courts have treated age related impairments, including arthritis, vision loss, and heart disease. Specifically, this section will consider how courts have looked at these impairments through the prism of age in determining whether an impairment substantially limits a major life activity.

\textsuperscript{14} See Barnes, \textit{supra} note 10, at 271.
\textsuperscript{17} See generally \textit{Smith}, 544 U.S. 228.
\textsuperscript{18} See generally \textit{Meacham v. Knolls Atomic Power Lab.}, No. 06-1505, 1128 S. Ct. 2395 (U.S. June 19, 2008).
This section will also analyze what effect the ADAAA is likely to have. In Section IV, we will scrutinize whether Congress' failure to provide instruction as to what constitutes a reasonable accommodation will have a negative impact on older disabled individuals.

SECTION I

Passed by Congress and signed by the President in September 2008, the ADAAA took effect on January 1, 2009.19 It was described by Senator Harkin as a "clarification and instruction" regarding the ADA and was a direct response to decisions of the Supreme Court which had been seen as restricting the original meaning of the ADA.20 Legislative history identifies two particular cases, Sutton v. United Air Lines, Inc.,21 and Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,22 which prompted congressional reaction.23 Commentators have observed that these cases and their progeny have greatly restricted a plaintiff's ability to successfully bring an ADA claim.24

THE PRE-AMENDMENT ADA

Prior to the ADAAA, courts used the language of the ADA to narrow its applicability.25 The Supreme Court often used arguments that were very language specific to develop these

restrictions. Under the ADA, a "qualified individual with a disability" was defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." A disability was similarly defined as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."

In explaining the components of the definition of disability, a physical or mental impairment was defined as

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

"Major life activity" was defined in the Equal Employment Opportunity Commission (EEOC) regulations as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

"Substantially limits" was defined in EEOC regulations as (i) [u]nable to perform a major life activity that the average person in the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29. Id. at § 1630.2(i).
30. Id. at § 1630.2(j)(1) (Section 1630.2(j) continues to define factors to be used in
SUPREME COURT CASES

Over the last decade, significant Supreme Court cases have shaped the restrictive treatment ADA claims have received. In *Sutton v. United Air Lines, Inc.*, the Court held that mitigating measures must be taken into account in an ADA disability determination.\(^{31}\) The Sutton sisters, despite severe myopia, each applied for positions as commercial airline pilots.\(^{32}\) United Airline's hiring policy mandated a minimum uncorrected visual acuity of 20/100 for their new pilot hires.\(^{33}\) Although both Suttons met the other basic qualifications, when it was discovered that neither sister's uncorrected vision met this requirement, their interviews were cancelled and neither Sutton was offered a position.\(^{34}\) The district court, as affirmed by the Tenth Circuit, held that because the Suttons' vision was correctable and no disability existed, their uncorrected vision did not substantially limit any major life activity.\(^{35}\)

In affirming the lower courts, the Supreme Court examined the language of the ADA and EEOC regulations to determine "whether disability is to be determined with or without reference to corrective measures."\(^{36}\) The Court relied on three provisions of the ADA to support its holding that corrective

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\(^{32}\) *Id.*

\(^{33}\) *Id.* at 476.

\(^{34}\) *Id.* at 475-76. The airline's basic qualifications included age, education, experience, and FAA certification requirements.

\(^{35}\) *Id.* at 476-77.

\(^{36}\) *Id.* at 478-81.
measures should be considered in the disability determination. It determined that the phrase “substantially limits” must refer to a present limitation; that a disability determination is an individualized inquiry, which requires an examination of each individual’s level of correction; and that the Congress’ reference in the ADA to “43,000,000 Americans” with disabilities is incongruent with including in the definition of disability all those Americans with corrected impairments. Following this logic, the Court affirmed the dismissal of the Sutton sisters’ claim.

In 2002, the Court in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams continued its restrictive reading of the ADA in its interpretation of the “substantial limitation” test. Williams was an automobile assembly line worker who had developed carpal tunnel syndrome from her work activities and was placed on work restrictions. Williams was transferred to a work team that allowed her to work without aggravating her condition. However, the defendant then required her to rotate through jobs requiring heavy use of her hands and arms, thus inflaming her carpal tunnel syndrome. After disagreements over her request to be placed back on her former duty schedule, she was terminated for a poor attendance record.

The Supreme Court considered Williams’ argument that she was substantially limited in her major life activities, including performing manual tasks, housework, gardening, playing with

37. Id. at 482.
38. Id.
39. Id. at 483.
40. Id. at 484-86 (On this point, the court was not able to determine the exact source of the 43,000,000 figure, but maintained that it could not possibly include all Americans “whose impairments are largely corrected by medication or other devices.”).
41. Id. at 494.
43. Id. at 187-88.
44. Id. at 188-89.
45. Id. at 189.
46. Id. at 189-90.
her children, lifting, and working. After examining the potential meanings of "substantial" and "major life activities," the Court concluded "[t]hat these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled." The Court again referenced the 43,000,000 disabled Americans figure and reasoned that such a number cannot be congruent with an expansive definition of disability. From that, the Court held that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to people's daily lives." In again concluding that the ADA required a strict, individualized assessment for a disability determination, the Court constricted the definition of a substantial limitation in the ADA.

**CONGRESSIONAL RESPONSE – THE ADAAA**

The ADAAA was specifically intended to annul the Supreme Court's restrictive reading of the definition of disability in the ADA and to remove the language in the Act that might lead to such a reading.

**REVERSAL OF THE SUPREME COURT'S REQUIREMENT OF A DEMANDING STANDARD**

Drawing from the Court's reasoning in *Sutton* and *Williams*,

47. *Id.* at 190.
48. *Id.* at 196-97.
49. *Id.* at 197.
50. *Id.* at 198.
52. Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, § 3406, 122 Stat 3553 §§ 2(a)(4)-(6), 2(b)(2)-(5); Statement of Sen. Harkin, *supra* note 20 (The ADA Amendments Act "amends the definition of disability by providing clarification and instruction about the terminology used in the definition, by expanding the definition, and by rejecting several opinions of the United States Supreme Court that have had the effect of restricting the meaning and application of the definition of disability." *Id.*).
the ADAAA removes the references to 43,000,000 disabled Americans and language referring to individualized ADA disability determinations. In response to the Supreme Court's use of a "demanding standard" for disability determinations in Williams, the language of the amendment makes clear the broad perspective from which Congress intends the ADA be interpreted.

MITIGATING MEASURES

In a specific rebuke to Sutton, the ADAAA amends the ADA to prevent mitigating measures from being taken into consideration in the substantial limitation of a major life activity determination. The only circumstance where such mitigating measures may be considered is in regards to common eyeglasses and contact lenses. However, with a nod to the particulars of Sutton, this exception does not apply in the event an employer imposes employment qualifications based upon an employee's (or prospective employee's) uncorrected vision.

"SUBSTANTIALLY LIMITS"

In addition, the Supreme Court's definition of "substantially
limits” in Williams is directly overruled.\textsuperscript{59} Specifically, in the “Findings and Purposes” section, the ADAAA states that the current definition of “substantially limits” is “inconsistent with congressional intent, by expressing too high a standard.”\textsuperscript{60} Rather, Congress stated that the “primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and . . . the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”\textsuperscript{61} While the specific definition is left to the EEOC’s discretion to modify through regulation, Congress has clearly directed that the definition must be broad, inclusive, and “consistent with [the ADAAA].”\textsuperscript{62}

**MAJOR LIFE ACTIVITIES**

The ADAAA places – within the text of the ADA – the list of major life activities originally found in EEOC regulations. Congress also expanded the list to include as major life activities sleeping, eating, standing, lifting, bending, reading, concentrating, thinking, and communicating.\textsuperscript{63} In addition, the ADAAA adds a section on “Major Bodily Functions,” stating that “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”\textsuperscript{64} This new, expanded list of major life activities represents a repudiation of courts that had viewed this category narrowly.\textsuperscript{65}

\textsuperscript{59} Id. at § 2(a)(7).
\textsuperscript{60} Id. at § 2(a)(8).
\textsuperscript{61} Id. at § 2(b)(5).
\textsuperscript{62} Id. at § 2(b)(6).
\textsuperscript{63} Id. at § 2(b)(4) (amending 42 U.S.C. § 12101.3(2)(A)).
\textsuperscript{64} Id. at § 32(2)(B)(b)(4) (amending 42 U.S.C. § 12101.3(2)(B)).
In contrast to the restrictive treatment currently espoused by the courts, the ADAAA represents a new, broad, inclusive standard for ADA disability determinations.

SECTION II

Consider again the illustrations of older, disabled plaintiffs in the introduction. Will their disability be a factor in an Age Discrimination Employment Act of 1967 (ADEA) claim? While the ADEA has provided a viable theory of recovery, there are limitations to the scope of protection provided to older disabled individuals by the ADEA. The ADEA prohibits discrimination in hiring practices, specifically limiting employers from taking action that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." However, the ADEA does not prohibit discrimination of workers who have been discriminated against because of the impact of disability. The two theories a plaintiff can use in ADEA litigation are disparate treatment—which is intentional discrimination—and disparate impact—which targets content neutral rules or actions that would adversely affect older individuals.

THE ADEA AND THE MCDONNELL DOUGLAS FRAMEWORK

Given the textual similarities between Title VII of the Civil Rights Act of 1995 and the ADEA, as well as the similar goals of each statute, ADEA litigation follows the same standard of proof used in Title VII cases and outlined in McDonnell Douglas. Thus, in order to establish a prima facie case of discrimination,

66. Fentonmiller & Semmel, supra note 13, at 234.
68. Barnes, supra note 10, at 280.
70. See generally Smith, 544 U.S. 228.
71. Fentonmiller & Semmel, supra note 13, at 266.
the plaintiff must offer evidence that (1) he or she belongs to a statutorily protected age group (in the case of the ADEA, an individual over forty);\(^72\) (2) he or she was qualified for the position and performing his or her job in an adequate manner, (3) he or she was subject to a negative employment action or policy despite his or her qualifications and performance; and (4) he or she was disadvantaged in favor of a similarly situated younger employee.\(^73\)

Following the plaintiff's showing of a prima facie case, the burden shifts to the defendants to produce evidence that the employment decision was based on a legitimate, non-discriminatory reason.\(^74\) If the defendant can produce this evidence, the burden then shifts back to the plaintiff to prove the proffered reason is a pretext for discrimination.\(^75\)

**Affirmative Defenses Available to ADEA Defendants**

The effectiveness of the affirmative defenses an employer can utilize has a negative impact on ADEA plaintiffs. The first defense available in cases of disparate treatment is the bona fide occupational qualification (BFOQ) defense.\(^76\) The ADEA provides that an employer can consider age alone when "age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business."\(^77\) While the BFOQ defense is to be narrowly construed,\(^78\) in order for an employer to utilize the BFOQ defense, the employer must prove that categorization of age is reasonably necessary to the essence of its business.\(^79\) An employer must prove reasonable cause exists to

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\(^72\) A difficulty in pleading a prima facie ADEA case is showing that the plaintiff was replaced by a younger worker. See generally Hoffman v. Primedia Special Interest Publ'ns, 217 F.3d 522 (7th Cir. 2000), reh'g en banc denied.

\(^73\) See McDonnell Douglass Corp. 411 U.S. at 792, 802.

\(^74\) Id. at 801-02.

\(^75\) Id. at 807.


\(^77\) Id.

\(^78\) 29 C.F.R. § 1625.6(a) (2008).

\(^79\) See Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 413-14, 418 (1985) (holding that age is not accepted as a proxy for health due to inconsistencies in the
believe that all, or substantially all, of individuals disqualified by the age requirement would be unable to perform the duties of the job, or that it is "impossible, or highly impractical, to deal with the older employees on an individualized basis." While the ADEA prohibits mandatory retirement for most workers, as a result of the BFOQ defense, employers may be able to enforce mandatory retirement age for physically demanding positions, or for "bona fide executives or high policy makers" due to receive a substantial financial package upon retirement.

The second defense available in claims based on disparate impact and disparate treatment is the reasonable factors other than age (RFOA) defense, which allows employers to make "differentiation[s] [] based on reasonable factors other than age."

**IMPACT OF THE RFOA DEFENSE ON DISPARATE IMPACT CLAIMS**

Following the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, commentators noted the increasing hostility of courts toward disparate impact claims and questioned the continued viability of such claims. However, with its decision in *Smith v. City of Jackson*, the Supreme Court resolved a circuit split by holding that the ADEA allowed recovery in disparate impact cases. In *Smith*, the City of Jackson, Mississippi, adopted a plan to attract more competitive police officers and police dispatchers by raising salaries; workers with fewer than five years of service received proportionately higher raises than more senior employees (who were, in large part, over the age of 40). While holding that the ADEA authorized recovery on a

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86. *Id.* at 230-31.
disparate impact theory, the Supreme Court cautioned that the scope of liability was narrower than in Title VII cases.\textsuperscript{87} The Court noted that a purpose of the amendment to Title VII of the 1991 Civil Rights Act was to expand the Court's narrow holding in \textit{Ward's Cove Packing v. Atonio}\textsuperscript{88} that limited an employer's potential liability in disparate treatment cases. The Court observed that the \textit{Ward's Cove} test should still be applied to ADEA cases because Congress did not choose to amend the ADEA at the time it revised Title VII.\textsuperscript{89}

After \textit{Smith}, there was confusion as to whether the RFOA exemption was an affirmative defense for which the defendant bore the burden of persuasion or whether the burden was placed on a plaintiff to show that the non-age factor was unreasonable. The Supreme Court's decision in \textit{Meacham v. Knolls Atomic Power Laboratory}, clarified that the RFOA defense is an affirmative defense for which the employer bears both the burden of production and persuasion.\textsuperscript{90} \textit{Smith} and \textit{Meacham} resolve concerns about the continued viability of disparate impact ADEA claims. However, \textit{Smith} illustrates that older workers will not be afforded the same level of protection enjoyed by Title VII plaintiffs.\textsuperscript{91}

\textbf{USE OF THE ADEA BY OLDER DISABLED PLAINTIFFS}

\textbf{DISPARATE TREATMENT}

In disparate treatment cases, the ADEA remains a viable cause of action for an older, disabled plaintiff where an ADA claim may not survive summary judgment. For instance, in \textit{Shaw v. Greenwich Anesthesiology Associates}, the court considered

\begin{itemize}
\item \textsuperscript{87} \textit{Id.} at 240.
\item \textsuperscript{88} \textit{Id.} (citing \textit{Ward's Cove Packing Co. v. Atino}, 490 U.S. 642 (1989)).
\item \textsuperscript{89} \textit{Smith}, 544 U.S. at 240.
\item \textsuperscript{90} \textit{See generally Meacham}, No. 06-1505, slip op. at 2398.
\item \textsuperscript{91} \textit{Smith}, 544 U.S. at 240-41.
\end{itemize}
Shaw's ADA and ADEA claims following her termination. Shaw was an anesthesiologist who was diagnosed at age forty-eight with arthritis and at age fifty-five with thyroid deficiency. Upon taking disability leave, Shaw entered into an agreement with her employer to go to part-time work status. Three months into Shaw's leave, her treating physician notified her employer that Shaw was totally disabled and unable to return to work, and Shaw was terminated. Prior to this termination, the defendant had hired two anesthesiologists - ages thirty-two and thirty-four - to assume Shaw's workload.

The trial court rejected Shaw's ADA claim, finding Shaw's impairments did not substantially limit her activities of daily living because Shaw had full use of her body and could still do aerobics, swim, walk, and lift weights. The court reasoned that Shaw had merely shown evidence that her impairments would limit her from working full-time as an anesthesiologist, not that the impairments would prevent Shaw from working at all.

The trial court's discussion of Shaw's ADEA claim illustrates how facts that may undermine an ADA claim may prove useful in an ADEA claim. The court rejected Shaw's argument in her ADA claim that her demotion to a part-time position was sufficient to show that the defendant regarded Shaw as disabled. However, with regard to the ADEA claim, the court reasoned the failure to offer someone part-time employment might be an adverse employment action. The court noted the defendant's hiring of two younger anesthesiologists to take over the workload of Shaw and two other older doctors, who both went to part-time status, created

93. Id. at 52.
94. Id. at 52.
95. Id. at 52-53.
96. Id. at 52.
97. Id. at 55.
98. Id. at 57.
99. Id.
100. Id. at 61.
an inference of age discrimination.\textsuperscript{101}

Shaw illustrates that despite its flaws, the ADEA may, in certain instances, be more effective than the ADA. The severity of Shaw's impairments was significant enough to interfere with her capacity to work. Her ability to engage in certain activities of daily living arguably undermined her ADA claim but may not have had the same detrimental effect on an ADEA claim.

\section*{Disparate Impact}

The somewhat tortured history of the \textit{Meacham} litigation illustrates the potential impact of the decision on disparate impact litigation. In \textit{Meacham}, the employer instructed managers to identify candidates for an "involuntary reduction in force" by ranking candidates by three metrics: "performance," "flexibility," and "critical skills."\textsuperscript{102} The raw scores, plus points added for years of service, determined the employees who would be terminated.\textsuperscript{103} Of the thirty-one employees eventually laid off, thirty were over the age of forty.\textsuperscript{104}

In its first consideration of \textit{Meacham}, the Second Circuit had applied the "business necessity" test to Meacham's ADEA claims and had used the burden shifting analysis outlined in \textit{Ward's Cove}.\textsuperscript{105} The Second Circuit affirmed a jury verdict in favor of the plaintiffs on their disparate impact claim.\textsuperscript{106} However, following \textit{Smith}, the Supreme Court remanded the \textit{Meacham} case. On remand, the Second Circuit instead applied the "reasonableness" test set forth in \textit{Smith}, which does not require an employer to show there were alternative means of achieving its goal that did not result in a disparate impact on a protected class.\textsuperscript{107} Although the Second Circuit incorrectly

\begin{thebibliography}{99}
\bibitem{101} Id. at 61-62.
\bibitem{102} Meacham, No. 06-1505, 128 S. Ct. slip op at 2398.
\bibitem{103} Id.
\bibitem{104} Id.
\bibitem{105} Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 141 (2d Cir. 2006), \textit{vacated}, 128 S. Ct. 2395 (2008) [hereinafter "Meacham II"].
\bibitem{106} Id. at 141.
\bibitem{107} Id. at 141-43.
\end{thebibliography}
placed the burden of persuasion on Meacham, the court's analysis of whether Knoll's subjective assessments of its employees satisfied the "reasonableness test" is instructive. Knoll provided expert witness testimony that skilled managers, familiar with the matrix criteria and established definitions and guidelines, conducted the evaluations. Additionally, manager decisions were subject to review by general counsel, in conjunction with human resources, as to any questions about employee scoring. The court found that the criteria used was reasonable, and appeared reluctant to second guess decisions that were made through a "settled" process that relied on "plainly relevant criteria." Thus, while Smith represents a victory for plaintiffs in that it preserves the disparate impact theory in ADEA litigation, it also allows employers to use the less restrictive "reasonableness" test.

**CONCLUSION**

The ADEA may provide a plausible alternative for the ADA practitioner in cases of intentional discrimination against the older disabled plaintiff. Assuming that the client can satisfy the elements of a prima facie case, the ADEA may provide a better option, as the client will not have to make a showing of a substantial limitation to a major life activity.

In light of recent litigation concerning disparate impact and the ADEA, the ADA may become a viable option, at least in the context of the usage of medical examinations in the pre-employment or job application process. Fentonmiller and Semmel argue that the ADA may provide greater protection as to medical inquiries and examinations in light of the ADA's greater limitations on the proper usage of a medical examination. If a medical examination has the effect of

108. *Id.* at 144.
109. *Id.* at 145.
110. *Id.* at 144-45 (quoting Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2nd Cir. 1984)).
screening out disabled individuals, an employer will have to show the examination was related to the job and in line with a business necessity.\textsuperscript{112} Recent case law supports the continued viability of the argument that practitioners should consider utilizing the ADA as opposed to the ADEA when challenging medical examinations.\textsuperscript{113}

\textbf{SECTION III}

Several challenges have faced practitioners in pursuing an ADA claim on behalf of an older disabled plaintiff. While numerous courts have considered claims involving impairments related to the aging process, such as menopause,\textsuperscript{114} arthritis,\textsuperscript{115} vision problems,\textsuperscript{116} and heart disease,\textsuperscript{117} courts have restricted the definition of a "qualified individual with a disability" under the ADA.\textsuperscript{118} An examination of relevant case law in these areas in light of the ADAAA may provide a glimpse of how the ADAAA will be treated by courts. The Seventh Circuit, for instance, in

\textsuperscript{112} Id. at 286.
\textsuperscript{113} See, e.g., Conroy v. New York State Dep't of Correctional Servs., 333 F.3d 88 (2d Cir. 2003) (holding that employer's directive requiring employee to bring medical certification upon returning to work following an absence violated the ADA.).
\textsuperscript{114} See generally Klein v. State of Fla., 34 F.Supp. 2d. 1367 (S.D. Fla. 1998) (holding that menopause is generally not a disability because it does not cause substantial limitations on a major life activity. Klein argued that she experienced lethargy/chronobiology, which the court rejected as constituting a major life activity); Manzi v. DiCarlo, 62 F. Supp. 2d 780 (E.D. N.Y. 1999) (holding that menopause is not a disability).
\textsuperscript{115} See generally Moore v. J.B. Hunt Transport, Inc., 221 F.3d 944 (7th Cir. 2000) (holding that claimant's rheumatoid arthritis was an impairment); Dvorak v. Mostardi Platt Assocs., 289 F.3d 479 (7th Cir. 2002) (upholding summary judgment in favor of employer but noting that rheumatoid arthritis constituted impairment); Kaplan v. City of N. Las Vegas, 323 F.3d 1226 (9th Cir. 2003); Ward v. Massachusetts Health Research Inst., 209 F.3d 29 (1st Cir. 2000); Shaw, 137 F.Supp. 2d. 48.
\textsuperscript{116} See generally Albertson's Inc., 527 U.S. 555; Wade v. General Motors Corp., No. 97-3378, slip op. at *2 (6th Cir. Sept. 10, 1998) (noting, in dicta, that "[t]he inability to drive in darkness is a common phenomenon that, if classified as disabling, would make most of the American population over the age of 45 'disabled' under the Act.").
\textsuperscript{117} See generally Weber v. Strippit, 186 F.3d 907 (8th Cir. 1999).
\textsuperscript{118} See Barnes, supra note 10, at 285-86.
distinguishing ADA and ADEA claims, has cautioned, "[o]ld age . . . does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." Thus, in all three of the hypothetical situations posed in the introduction, a court would theoretically treat each claim the same regardless of the age of the plaintiff. This illustrates a problem for an elder law practitioner because the ADA was not drafted to include cases at the intersection of age and disability.

Courts use a three part test to establish disability discrimination for employee claims. First, a plaintiff must demonstrate that he is disabled under the ADA. Second, the plaintiff must show that he is qualified to perform the essential functions of the job, either with or without reasonable accommodation. Third, the plaintiff must have suffered from an adverse employment action stemming from the disability. Courts have referred to the first criteria of the aforementioned test, whether the plaintiff is in fact disabled under the ADA, as the "threshold burden" of the analysis. To decide whether this level of disability exists, courts have used a three-part test enunciated by the Supreme Court in *Bragdon v. Abbott*. This test first requires that the plaintiff possess a qualifying physical or mental impairment. Second, the plaintiff must identify one or more affected major life activities. Third, the plaintiff must

120. Fentonmiller & Semmel, supra note 13, at 290.
121. Moore, 221 F.3d at 950; see Byrne v. Bd. of Educ., 979 F.2d 560, 563 (7th Cir. 1992); Gabriel v. City of Chicago, 9 F.Supp. 2d 974, 978 (N.D. Ill. 1998) (finding reasonable issue of fact existed where plaintiff's impairment was a difficult pregnancy); Quick v. Tripp, Scott, Conklin & Smith, P.A., 43 F.Supp. 2d 1357, 1365 (S.D. Fla. 1999).
122. Moore, 221 F.3d at 950.
123. Id.
124. Id.
125. Id. (citing Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir. 1995)).
127. Id.
128. Id.
demonstrate that the impairment substantially limits those major life activities. While courts often have an inclusive view of what constitutes a physical or mental impairment, their "major life activity" and "substantially limits" determinations have often been very restrictive.

Both regulations and case law concerning this issue would seem to benefit older disabled plaintiffs. A court's inquiry should be individualized and fact specific, especially where the symptoms of an impairment vary from person to person. The regulations instruct that an individual has an impairment that "substantially limits" a major life activity if he or she is "[u]nable to perform a major life activity that the average person in the general population can perform" or is "[s]ignificantly restricted as to the condition, manner or duration under which [he or she] can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." The regulations further provide that the court should consider the "nature and severity," "duration or expected duration," and "permanent or long term impact, or the expected permanent or long term impact" of the alleged impairment. If the plaintiff alleges that the impairment has affected the major life activity of working, the court should

129. Id.
130. Id.
131. Fentonmiller & Semmel, supra note 13, at 244.
133. See, e.g., Martinez v. Cole Sewell Corp., 233 F.Supp. 2d 1097, 1129-30 (N.D. Iowa 2002) (quoting Barnes v. Nw. Iowa Health Ctr., 238 F.Supp. 2d, 1053 (N.D. Iowa 2002)) (concluding that plaintiff generated a genuine issue of material fact as to whether her "mild" carpal tunnel syndrome substantially limited the plaintiff in her major life activity of lifting. The court noted that Williams directed the court to engage in an individualized inquiry as to how the impairments affected Martinez because symptoms could vary in degree from person to person. Although the court noted Martinez's carpal tunnel syndrome had been classified as "mild," there were other causes to the impairment to her thumb. The court observed that Martinez had presented evidence that her treating physician had restricted her to no use of her right hand and noted that even this restriction had failed to improve her condition.).
134. 29 C.F.R. § 1630.2(j)(1).
135. Id. at § 1630.2(j)(2).
consider whether the plaintiff is restricted in his or her ability “to perform either a class of jobs or a broad range of jobs . . . as compared to the average person having comparable training, skills, and abilities.”136

Numerous cases illustrate the negative impact Sutton, Williams, and Bragdon have had on older plaintiffs. In Dvorak v. Mostardi Platt Assocs., Inc.,137 Dvorak had arthroscopic surgery on his knee in order to address arthritis problems; the most recently Dvorak’s arthritis had flared up so severely had been fifteen years prior.138 Following surgery, Dvorak refused a field assignment due to the fact he was on crutches and his treating physician had restricted him to deskwork.139 The court ultimately held that Dvorak could not survive summary judgment because he had not shown that he was terminated because of his disability.140

The Seventh Circuit expressed no opinion on the issue of whether Dvorak was substantially limited, but noted that, under the heightened standard of Williams, Dvorak would have to show that his arthritis “‘prevent[ed] or severely restrict[ed]’ him from walking, in a permanent or long-term way.”141 The court suggested that this determination would be difficult to make in light of the record, but noted that the record did suggest Dvorak’s employer regarded him as being physically impaired.142

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136. Id. at § 1630.2(j)(3).
137. Dvorak, 289 F.3d at 481 (affirming trial court’s grant of summary judgment on ADA claim after concluding that plaintiff had been terminated for reasons not related to his arthritis).
138. Id.
139. Id.
140. Id. (quoting Bekker v. Humana Health Plan, Inc., 229 F.3d 662, 669-70 (7th Cir. 2000) (noting to make a prima facie case for disability discrimination, the plaintiff must show that: (1) she is disabled within the definition of the ADA; (2) that she is qualified to perform essential functions of the job with or without reasonable accommodation; (3) she has faced an adverse employment decision because of her disability).
141. Dvorak 289 F.3d at 484.
142. Id.
Likewise, in *Wood v. Crown Redi-Mix*, the court relied on *Williams* in considering whether Wood's impairment substantially limited his ability to walk. Although Wood experienced numbness in his extremities, the court was quick to note that he did not have a handicapped parking sticker and could walk approximately one-quarter of a mile before needing to rest. However, Wood experienced numbness in his toes on the left foot, and his left knee would collapse. As a result of these impairments, Wood had to occasionally use a cane. The court noted in its conclusion—that Wood's difficulties with fatigue after walking long distances and in climbing stairs were moderate but not substantially limiting—was consistent with *Williams*. Next, the court noted the "high bar set by *Williams*" directed a conclusion that Wood's postural and exertional limitations were "inconvenient" but were not substantially limiting.

The decisions in *Wood* and *Dvorak* illustrate the possible significance of the ADAAA. It is possible that the *Wood* court would now reach a different conclusion given the reliance on *Williams*, and a more liberal interpretation of "substantially limits." However, the *Dvorak* court might have reached a similar result in light of the court's examination of the less than permanent nature of Dvorak's impairments. The ADAAA does exclude "transitory and minor impairments" in the "regarded as" prong, but does not address the holding in *Williams* that an impairment must have a permanent or long-term impact.

A significant question remains as to how courts will apply the ADA Amendment's new standard for "substantially limited." Since the Supreme Court's rulings in *Williams*,

144. *Id.* at 685.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 685-86.
149. Long, supra note 65, at 227.
Sutton,\textsuperscript{151} and Bragdon,\textsuperscript{152} numerous cases have considered the ADA claims of elderly for their age related impairments.

As discussed above, courts appear to be willing to accept limiting conditions of the elderly as impairments, but will often stop short of holding that they substantially limit a major life activity. For the purposes of this article, we have looked at how courts have treated three common age related impairments: arthritis, vision loss, and heart disease.

\textit{Illustrative Cases: Arthritis, Vision Loss, and Heart Disease}

\textbf{Arthritis, Osteoarthritis, and Degenerative Joint Disease}

While courts have acknowledged that arthritis is an impairment,\textsuperscript{153} they have been less open to view it generally as a disability under the ADA. Plaintiffs can identify such postural and exertional limitations as sitting, standing, lifting, and reaching as major life activities, which would seem to benefit an older plaintiff, because arthritis can impair an individual's ability to perform these functions.\textsuperscript{154} Arguably, courts have been somewhat hostile to claims based on arthritis, even where a plaintiff can identify the specific limitations in terms of the weight that he or she could lift or the distance that he or she could walk and/or run.\textsuperscript{155}

\begin{itemize}
\item \textsuperscript{152} See Bragdon, 524 U.S. 624, 655 (1998).
\item \textsuperscript{153} Barnes, 238 F.Supp. 2d at 1069.
\item \textsuperscript{154} Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 948 (8th Cir. 1999) (citing Helfter v. United Parcel Serv., Inc., 115 F.3d 613, 616 (8th Cir. 1997)).
\item \textsuperscript{155} See, e.g., Kelly, 94 F.3d at 106, 109 (upholding summary judgment in favor of employer where Kelly indicated that he could not walk more than a mile as a result of his degenerative joint disease); Selandia v. Regents of the Univ. of Cal., No. CIV50315511KMPANPS, slip op at *1, *5 (E.D. Cal Feb. 24, 2006) (holding that restrictions by treating physician that plaintiff was limited by her osteoarthritis to lifting ten pounds and was precluded from lifting twenty to thirty pounds was not established by the evidence); but c.f. Wheaton v. Ogden Newspapers, Inc., 66 F.Supp. 2d 1053, 1062, 1069 (N.D. Iowa 1999) (holding material issue of fact existed where plaintiff's arthritis and back condition limited her to lifting objects of no
In Moore v. J.B. Hunt Transport, Inc., the Seventh Circuit upheld summary judgment against Moore, an employee who claimed that he had been fired as a result of his rheumatoid arthritis. Moore controlled his arthritis with medication and complained of episodic flare-ups once or twice a year that drastically restricted his movements. A physical examination demonstrated that Moore “should not be exposed to ‘excessive cold, wet, damp conditions,’” and a strength evaluation revealed no diminished strength when compared to an average man of his size and weight. After his required annual physical, Moore was terminated when his employer determined that he was not qualified for any open positions within the company.

The Seventh Circuit, using the above standards to determine disability discrimination and disability under the ADA, concluded that rheumatoid arthritis is an impairment under the ADA. However, the court held that even if Moore had raised walking as a major life activity (which he failed to do in his appellate brief), he still would not have a disability, because he could walk, and impairments affecting the rate and pace of walking are not substantial. The court rejected Moore’s argument that he was disabled because Moore did not seek accommodation as a result of the flare-ups, but was rather seeking to establish disability as a result of this periodic condition.

Courts have also considered instances where a plaintiff’s arthritic condition limits their abilities to less than that of an average individual. For example, in Talk v. Delta Airlines, Inc., the Fifth Circuit held that Talk was not substantially limited despite the fact that she walked with a limp and at a slower pace.

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156. Moore, 221 F.3d at 947.
157. Id. at 948.
158. Id. at 949.
159. Id. at 948-49.
160. Id. at 951 n.3.
161. Id. at 951.
162. Id. at 952.
than an average person.\textsuperscript{163} Likewise, in \textit{Kelly v. Drexel University}, the Third Circuit held that a sixty-eight year-old man who was unable to walk a mile due to his degenerative joint disease was not substantially limited in his ability to walk despite the fact that he walked with a limp and his pace was less than that of an average man.\textsuperscript{164} Additionally, in \textit{Penny v. United Parcel Service}, the Sixth Circuit held that moderate difficulty or pain experienced while walking does not fall under the ADA’s definition of disability.\textsuperscript{165}

Courts have even been reluctant to consider situations where the plaintiff is able to identify how their arthritis has limited their ability to perform specific tasks at work.\textsuperscript{166} For instance, in \textit{Phillip v. Ford Motor Co.}, the Eighth Circuit held that Phillip’s degenerative joint disease did not substantially limit his ability to work.\textsuperscript{167} The court observed that while Phillips had focused on the effect of his limitations on his work related activities (suggesting that he in fact could not perform specific tasks), he had failed to identify how his limitations affected activities of daily living.\textsuperscript{168} The court noted that Phillips retained the physical ability to operate a weed whacker, walk up and down stairs, care for his personal hygiene, wash his car, and do basic exercises.\textsuperscript{169}

\textit{Phillip, Talk, Penny, and Kelly} illustrate the potential difficulty that older disabled plaintiffs who have arthritis may face under the ADAAA. For example, both Talk and Kelly demonstrated that their physical abilities were less than an average person. Phillips contended that his arthritis limited his ability to perform specific tasks on his job. In the instance of Talk and Kelly, both individuals retained the ability, albeit somewhat impaired, to perform a specific task. With regard to

\textsuperscript{163} Talk v. Delta Airlines, Inc., 165 F.3d 1021, 1025 (5th Cir. 1999).
\textsuperscript{164} Kelly, 94 F.3d at 104, 106, 108.
\textsuperscript{165} Penny v. United Parcel Serv., 128 F.3d 408, 415 (6th Cir. 1997).
\textsuperscript{166} See, e.g., Philip v. Ford Motor Co., 328 F.3d 1020, 1024 (8th Cir. 2003).
\textsuperscript{167} Id. at 1022, 1024.
\textsuperscript{168} Id. at 1024-25.
\textsuperscript{169} Id. at 1025.
Phillips, he remained able to perform certain tasks around the house, a fact that seemed to have undercut his argument that his degenerative joint disease had an impact on his major life activities. When promulgated, the EEOC’s new definition of “substantially limits” will affect whether any of the above individuals will be considered disabled under the ADA.

A plaintiff similarly situated to Moore in terms of experiencing periodic or intermittent flare-ups of arthritis may find the ADAAA to be substantially helpful. Barnes v. Northwest Iowa Health Center serves to illustrate how plaintiffs experiencing periodic or intermittent flare-ups may fare under the ADAAA. Barnes experienced flare-ups of her rheumatoid arthritis approximately six times per year, which, according to her physicians, left her totally disabled, because she was unable to perform any activities of daily living. The court noted that Barnes’ rheumatoid arthritis was generally “mild,” but applying an individualized inquiry, the court held that Barnes generated an issue of fact as to whether the frequency and severity of her impairment during these flare-ups were substantially limiting.

VISION LOSS

Restrictive ADA holdings have encompassed other impairments commonly associated with aging. In Albertson’s, Inc. v. Kirkingburg, the Supreme Court held that the ADA “requires monocular individuals, like others claiming the Act’s protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial.” While the Court also asserted “people with monocular vision ‘ordinarily’ will meet the Act’s definition of disability,” the Fourth Circuit has since observed that vision problems that are

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170. See generally Barnes, 238 F. Supp. 2d 1053.
171. Id. at 1075-76.
172. Id. at 1077-78.
173. Albertson’s, Inc., 527 U.S. at 567.
174. Id.
at all viewed as temporary or likely to improve would not qualify as a disability.\textsuperscript{175}

A serious, lasting vision impairment may survive summary judgment on an evaluation of the substantial impairment of the major life activity of the ability to see.\textsuperscript{176} In Cutrera v. Board of Supervisors of LSU, a plaintiff with Stargardt's disease, an uncorrectable visual impairment with no known cure or treatment, was terminated from her research position at LSU.\textsuperscript{177} Following Albertson's, the court determined that the severe deterioration of the plaintiff's vision presented "a genuine question of material fact with respect to a substantial limitation on her ability to see," and reversed the District Court's grant of summary judgment on this point.\textsuperscript{178} Following the ADAAA, the courts will have to focus their analysis on the alleged disability during the active period of such an impairment.\textsuperscript{179}

Courts have also examined situations where vision limitations exist in conjunction with other impairments. In Puckett v. Park Place Entm't, Corp., a cocktail waitress who was diagnosed with multiple sclerosis (MS) was left without a job when her employer refused to provide her with work after her diagnosis.\textsuperscript{180} The court cited blurred vision as one of the many relevant symptoms accompanying MS\textsuperscript{181} and acknowledged that MS is a physical impairment that impacted the major life events

\textsuperscript{175} Palotai v. Univ. of Md. at Coll. Park, No. 01-1147, slip op at **8 (4th Cir. June 27, 2002) (quoting Pollard v. High's of Balt., Inc., 281 F.3d 462, 468 (4th Cir. 2002) (here, vision problems were a result of an accident).

\textsuperscript{176} Cutrera v. Bd. of Supervisors of LSU, 429 F.3d 108, 111-12 (5th Cir. 2005).

\textsuperscript{177} Id. at 110, 112.

\textsuperscript{178} Id. at 111-12, 114 (This was a severe case. The plaintiff's condition was uncorrectable, untreatable, and likely progressive, and according to presented evidence, she had "virtually no central vision in her left eye, and little in her right.").

\textsuperscript{179} Long, supra note 65, at 221.

\textsuperscript{180} Puckett v. Park Place Entm't Corp., 332 F.Supp. 2d 1349, 1351-52 (D. Nev. 2004).

\textsuperscript{181} Id. at 1353 (To the court, these symptoms include "numbness, pain, fatigue, cramps, blurred vision, fainting spells, forgetfulness, loss of balance, and incontinence." Id.) (quoting Anderson v. Coors Brewing Co., 181 F.3d 1171, 1174 (10th Cir. 1999)).
of working and lifting. However, even including impaired vision (admittedly chronic) with other symptoms, the court found that these major life events were not significantly impaired.

More relevant to the common hardships of the elderly is a case involving a plaintiff suffering from congenital statutory night blindness, which prevented driving, seeing, and general functioning at night and in dim light. In Capobianco v. City of New York, the Second Circuit disagreed with the district court's grant of summary judgment for the defendant, finding that there was substantial evidence in the record that the plaintiff's night blindness, which prevented him from holding many jobs involving night work, substantially limited the major life activity of seeing.

In Wade v. General Motors Corp., an electrician had developed night vision problems that impacted his ability to drive home from his normal shift (2:15 p.m. to 10:45 p.m.). The court found that "[t]he inability to drive in darkness is a common phenomenon that, if classified as disabling, would make most of the American population over the age of forty-five 'disabled' under the Act." The court specifically stated that "Congress could not have intended such a result" and affirmed the grant of summary judgment for the employer.

Such cases of restrictive ADA interpretation for vision loss/impairment situations are likely to be affected by the

183. Id. at 1354; see also Vandeveer v. Fort James Corp., 192 F. Supp. 2d 918 (E.D. Wis. 2002) (plaintiff's MS symptoms explicitly included blurred vision; her ADA claim was also rejected by the court, although the court made it clear that the plaintiff's insistence on pro se representation worked against her).
185. Id. at 58-59.
186. Wade, No. 97-3378, slip op at *1.
187. Id. slip op at *2.
188. Id. (For an examination of a court's treatment of a case that examines the monocular vision issue under a state disability statute that the court sees as very broad (unlike the intent of the ADA, according to the court), see EEOC v. United Parcel Service, Inc., 424 F. 3d 1060, 1064 (9th Cir. 2005) and its treatment of suits by applicants denied for UPS driver positions under California's Fair Employment and Housing Act.)
changes mandated by Congress in the ADAAA. Because of new broad "major life activities," potential changes to "substantial limits" definitions, and the prohibition on the consideration of mitigating measures, plaintiffs are much more likely to have their impairments qualify as disabilities under the new framework.

HEART DISEASE

Numerous courts have considered the ADA claims of individuals with heart disease. Although heart disease does constitute a physical impairment under the ADA, a heart condition is not a per se disability. With the decision in Sutton, the corrective measures a plaintiff has used to mitigate their impairments would be relevant to a court's decision. The Sutton decision has had a profound impact on the ability of plaintiffs to successfully allege an ADA claim. In Jewell v. Reid's Confectionary Company, Jewell, who was a commercial driver, had two heart attacks, after which he had a defibrillator implanted. The court held that because the plaintiff fully recovered from his heart attacks with the assistance of the defibrillator, his heart condition was not substantially limiting. Following Sutton, individuals treated with common therapies following a myocardial infarction, such as a pacemaker, placement of a vascular stent in the coronary arteries, or usage of beta blockers, have found their ADA claims foreclosed.

In light of the individualized inquiry that courts utilize in analyzing ADA claims, it is difficult to identify trend lines in circuit court decisions involving heart disease. Nonetheless,

190. See Jewell v. Reid's Confectionary Co., 172 F.Supp. 2d 212, 216-17 (D. Me. 2001); Weber, 186 F.3d at 913.
192. See id.
194. Id. at 216-17.
195. Id.
cases decided prior to Williams may have predictive value as to how courts will treat heart disease ADA claims under the ADAAA.

The Eleventh Circuit's decision in Hilburn v. Murata Electronics North America illustrates the fundamental importance for a practitioner to identify in specific terms how a plaintiff's coronary artery disease substantially limits a major life activity. Hilburn began working in 1976 as a machine operator, and received favorable employee evaluations. Hilburn argued that her coronary heart disease substantially limited several of her major life activities. In the fall of 1989, Hilburn was diagnosed with coronary artery disease following a heart attack, which allegedly limited her ability to lift, run, and perform essential manual tasks. Hilburn's condition, as well as personal issues, caused Hilburn to miss approximately 184 days of work between June 1988 and the end of 1992; Hilburn was terminated in March of 1993.

The court did not find a conclusory statement by the treating physician to be persuasive, given the lack of any specific facts that would corroborate the conclusion. In concluding that Hilburn had not shown that her coronary artery disease had limited her ability to run, the Eleventh Circuit pointed to Hilburn's acknowledgment that she could walk and run as inadequate to support of finding that she was substantially limited in this activity. The court further rejected a statement made by Hilburn's treating physician that she had "diminished activity tolerance for . . . running." With regard to Hilburn's alleged diminished capacity to perform manual tasks, Hilburn was unable to identify any specific tasks that she would be

197. Id. at 1222.
198. Id. at 1227.
199. Id. at 1222-23.
200. Id. at 1223-24.
201. Id. at 1227-28.
202. Id.
203. Id. at 1227.
unable to do.\textsuperscript{204} In her deposition, Hilburn indicated she was able to do a number of activities including walking, running, standing, sitting, eating, bathing, writing, cooking, and working around her house.\textsuperscript{205}

In \textit{Weber v. Strippit, Inc.}, the Eight Circuit considered the ADA claim of Weber, who had a major heart attack at age fifty-four and was subsequently diagnosed with heart disease.\textsuperscript{206} Following his return to work, Weber was informed that he could be required to relocate and retrain.\textsuperscript{207} After a subsequent angioplasty, Weber was ordered to either relocate from Minneapolis to Akron, Ohio or take a position at a much lower salary.\textsuperscript{208} Weber conceded that his impairment did not limit his major life activity of working, but argued that he was limited in his ability in eating, walking, shoveling snow, gardening, mowing the lawn, playing tennis, fishing, and hiking.\textsuperscript{209} The court held that Weber's heart disease did not automatically qualify as a disability under the ADA.\textsuperscript{210} The court found that Weber's dietary restrictions and difficulty walking and climbing stairs were moderate (but not substantial) limitations on his major life activities, and thus no disability existed under the ADA.\textsuperscript{211}

However, in \textit{Weissman v. Dawn Joy Fashions, Inc.}, the Second Circuit held that the heart attack of a thirty-one year-old man satisfied the definition of disability\textsuperscript{212} under the New York Human Rights Law (NYHRL)\textsuperscript{213} and New York City

\textsuperscript{204} \textit{Id.} at 1228.

\textsuperscript{205} \textit{Id.}

\textsuperscript{206} \textit{Weber}, 186 F.3d at 910.

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{Id.}

\textsuperscript{209} \textit{Id.} at 913-14.

\textsuperscript{210} \textit{Id.} at 913.

\textsuperscript{211} \textit{Id.} at 914.

\textsuperscript{212} Weissman v. Dawn Joy Fashions, Inc., 214 F.3d 224, 227, 233 (2nd Cir. 2000) (holding that although Weissman had pleaded an ADA claim, the Court did not need to evaluate whether he was disabled under the ADA because Weissman merely had to satisfy the broader standard under the State and City statutes).

\textsuperscript{213} The NYHRL defines disability as "(a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological
After Weissman's heart attack, he informed his employer that his doctors had indicated he would need four to five weeks to recover. After being placed on disability leave, Weissman was terminated less than a week later. While the court found ample evidence to support the jury's finding that Weissman was disabled under the broad standard enunciated in the NYHRL and Code, today it is probable that courts would draw a similar conclusion under the ADAAA.

It is likely that the ADAAA would not have affected the court's decision in Hillburn. The impact of the ADAAA on a case similar to the fact pattern in Weber is more difficult to anticipate. Weber was limited in his life activities, but it is not clear he would have prevailed even if he had been able to specify his ability to walk given courts' reluctance to draw "a bright line delineating the point at which a condition affecting an employee's ability to walk can be regarded as a disability within the ADA."

The decision in Weissman, however, might shed light on how heart disease will be treated under the ADAAA. As noted earlier, the ADAAA now defines a major life activity to include the operation of major bodily functions. While the Code specifically mentions cardiovascular disease, heart disease

conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques . . . or (c) a condition regarded by others as such an impairment . . . ." N.Y. Exec. Law § 292(21) (Consol. 2008).

214. The Code provides that a disability is "any physical, medical, mental or psychological impairment, or a history or record of such impairment." NYC Administrative Code § 8-102(16)(a) (2007). The Code further defines a "physical . . . impairment" as "an impairment of any system of the body; including, but not limited to . . . the cardiovascular system." Id. (b)(1).

215. Weissman, 214 F.3d at 227.
216. Id. at 227-28.
217. Id. at 233.
218. Weber, 186 F.3d at 914.
219. Kelly, 94 F.3d at 108.


would impact a number of the bodily functions identified in ADAAA, including the respiratory and circulatory systems.\textsuperscript{222} Thus, practitioners may find the ADAAA useful in pleading ADA cases involving heart disease.

**CONCLUSION**

The ADAAA is a positive development for advocates of older, disabled individuals. In light of the ADAAA's clear rejection of Williams and Sutton, older, disabled individuals may have greater success in asserting an ADA claim. More certain is that older individuals who have impairments that are controlled by medication or other assistive devices, are likely to find that they are able to establish that their impairments substantially limit a major life activity.\textsuperscript{223} This change should impact those older individuals, for instance, whose cardiovascular impairment is controlled by a pacemaker.

Additionally, for plaintiffs whose impairments are by nature episodic or currently in remission, the ADAAA may provide relief as courts will now be able to engage in a hypothetical inquiry as to whether the dormant impairment would substantially limit a major life activity.\textsuperscript{224} This change will affect, for instance, older individuals whose arthritis is intermittent or whose acute myelogenous leukemia is in remission.

Less certain is the impact for individuals such as the plaintiffs in Talk, Penny, or Kelly, or others who have ADA claims based on factors of disability plus age.\textsuperscript{225} In support of its

\begin{footnotes}
\footnotetext[223]{Long, supra note 65, at 220-21.}
\footnotetext[224]{Id. at 221.}
\footnotetext[225]{Fentonmiller \& Semmel, supra note 13, at 288 (Fentonmiller suggests that a "plus" factor analysis might work in either ADA or ADEA litigation); see Good v. U.S. West Commc'ns, Inc., Civ. No. 93-302-FR, slip op at *1 (D. Or. Feb. 16, 1995) (The court appeared to recognize a hybrid age and sex discrimination claim, without stating whether the claim was cognizable under Title VII or the ADEA. However, we found no instance where a district court explicitly adopted an age plus disability theory of liability under the ADEA or disability plus age theory}
\end{footnotes}
conclusion, the court in Kelly reasoned that EEOC regulations instructing that "[t]o rise to the level of a disability, an impairment must significantly restrict an individual’s major life activities," undermined Kelly’s contention that his less than average physical abilities rendered him disabled. Congress did not offer a new definition of “substantially limits” and left this task to the EEOC to adopt a standard consistent with the ADAAA. Arguably, the new definition will be less restrictive in light of the spirit of the ADAAA and the expected impact of the Obama administration on EEOC.

SECTION IV

The ADAAA represents, in the view of one commentator, a “long overdue” change that may help some plaintiffs prove their disability substantially impairs a major life activity. As noted above, one of the advantages of filing an ADA claim instead of an ADEA claim is that an ADA plaintiff can seek reasonable accommodation. If a plaintiff can satisfy the first two prongs, the next issue that will become important is whether the plaintiff’s requested reasonable accommodation was, in fact, reasonable. One difficulty facing courts is that Congress has not provided guidance as to what constitutes a reasonable accommodation. Unfortunately, the ADAAA does not offer a better definition of reasonable accommodation than the original ADA, which could be detrimental the older disabled individuals.

The Seventh Circuit’s decision in Filar v. Board of Education of

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228. Long, supra note 65, at 229.
230. Long, supra note 65, at 225.
231. Id.
the City of Chicago\textsuperscript{232} illustrates how a seemingly valid ADA claim can easily fail\textsuperscript{233} because of the reasonable accommodation requirement. In \textit{Filar}, the Seventh Circuit reversed the trial court's grant of summary judgment on a sixty-nine year-old plaintiff's ADEA claim, and upheld the trial court's grant of summary judgment in favor of the Chicago Public Schools (CPS) on Filar's ADA claim.\textsuperscript{234} In 1999, Filar – then sixty-nine years old – was moved by CPS from full-time status to substitute teaching.\textsuperscript{235} Filar argued that the change in her employment status was due to her age because younger teachers in her department had been retained, and her osteoarthritis (combined with her reliance on public transportation) made her commute to various locations around the city difficult.\textsuperscript{236} Filar requested that she be assigned to one school with minimum distance from public transportation.\textsuperscript{237}

The Seventh Circuit determined that Filar's request to work at one school was unreasonable because (1) it amounted to preferential treatment;\textsuperscript{238} (2) under the collective bargaining agreement, the school board was not responsible for assigning

\textsuperscript{232} See generally Filar v. Bd. of Educ. of the City of Chicago, 526 F.3d 1054 (7th Cir. 2008).

\textsuperscript{233} Despite the restrictive legal environment for ADA claim success, courts have on occasion found qualifying disabilities requiring accommodation. In \textit{Ward v. Massachusetts Health Research Inst., Inc.}, a lab assistant/data entry assistant on flex time schedule sued under the ADA, alleging that he was terminated as a result of his arthritis and that his employer failed to accommodate his schedule. \textit{Ward}, 209 F.3d. at 31-32. Ward had been warned about his tardiness and stated that he informed his supervisor that he was late because of stiffness and pain caused by his arthritis in the mornings. \textit{Id.} The court found that "for purposes of reviewing summary judgment, there is sufficient evidence that his condition 'substantially limits' major life activities." \textit{Id.} at 33 n.3. The court held that as a result of the nature of his job (data entry), "there is little evidence in the record that a regular and predictable schedule is an essential function of Ward's data entry position, or alternatively, that his requested accommodation – an open-ended schedule – would be an undue burden on his employer." \textit{Id.} at 33 The court reversed the summary judgment by the district court, finding issues of fact relating to the reasonableness of the requested accommodation and whether Ward's tardiness was caused by his disability. \textit{Id.} at 38.

\textsuperscript{234} \textit{Filar}, 526 F.3d at 1056.

\textsuperscript{235} \textit{Id.}

\textsuperscript{236} \textit{Id.} at 1056.

\textsuperscript{237} \textit{Id.} at 1059.

\textsuperscript{238} \textit{Id.} at 1067-68.
teachers to specific schools, and a principal could not be required by the board to take a particular substitute teacher; and (3) that Filar’s request was “simply too barebones to show the request was reasonable.” The court reasoned that CPS could either assign Filar to one of her requested schools—in violation of the teacher’s collective bargaining agreement—or undertake the costly task of researching schools that would fit the parameters of Filar’s request.

The court’s acceptance of the argument that it would be too costly to make a reasonable accommodation to Filar illustrates a difficulty that older, disabled plaintiffs will have in seeking a reasonable accommodation. Putting aside the other factors the court considered, the argument that a study of what schools would satisfy the parameters of Filar’s request is somewhat questionable. Obviously, if Filar worked for a small business whose space required $10,000 in modifications, the burden of this cost to the business should be considered. However, in Chicago, the Chicago Transit Authority’s web site allows users to enter their address and destination. Users will receive a result that includes what public transportation to use, including buses or trains, and the distance that an individual must walk to get to their destination. Thus, in Filar’s case, the only cost associated with studying which schools she could access, would be labor costs, which would appear to have been minimal to CPS.

Nonetheless, this approach of focusing on the economic cost is somewhat shortsighted because it does not consider the potential economic loss of a valued, older employee, whose wealth of experiences can make positive contributions to an employer, not only in terms of production, but also in terms of development of younger employees. In considering a requested reasonable accommodation, courts should try to balance the “reasonableness” of the request with the positive gains that will

239. Id, at 1068.
240. Id.
be achieved in the accommodation of an experienced employee.\textsuperscript{242}

CONCLUSION

Courts have expressed some concern about the relationship of the ADA and age related impairments.\textsuperscript{243} This concern, or perhaps skepticism, seems consistent with the Supreme Court's observation that "intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII."\textsuperscript{244} While this assertion may be true, with a population that is aging, it is likely that there will be a rise in the number of cases where individuals are discriminated against on the basis of age and disability.\textsuperscript{245} The question then remains whether the ADAAA and the ADA will provide the remedy for the older, disabled individual. Shaw and Filar illustrate that a seemingly good ADA claim may fail, and if Shaw and Filar had not been replaced by younger workers, their ADEA claims would have failed as well. The ADA and ADEA ignore the reality of claims that sit at the crossroads of age and disability, as neither statute was written to address age plus disability (or disability plus age). A practical solution would be to adopt a flexible age plus disability standard, but the courts have been reluctant to utilize the plus factor standard as used in Title VII cases. The question should thus be asked whether new legislation should be drafted to better provide protection for intersectional claims of age and disability.

\begin{itemize}
\item \textsuperscript{242} Barnes, \textit{supra} note 10, at 300.
\item \textsuperscript{243} Wade, No. 97-3378, slip op at *1, *2 (noting, in dicta, that "[t]he inability to drive in darkness is a common phenomenon that, if classified as disabling, would make most of the American population over the age of 45 'disabled' under the Act").
\item \textsuperscript{244} Smith, 544 U.S. at 241.
\item \textsuperscript{245} Barnes, \textit{supra} note 10, at 296 (noting that by 2030 those over age sixty-five will be twenty percent of the U.S. population).
\end{itemize}