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**\*213 AFFIRMATIVE PROTECTIONS FOR PEOPLE WITH DISABILITIES, ILLNESS AND  
PARENTING RESPONSIBILITIES UNDER UNITED STATES LAW**

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The backlash against the Americans with Disabilities Act [\[FN1\]](#) (ADA) and the Family and Medical Leave Act [\[FN2\]](#) (FMLA) has been immediate and strong. Exaggeration and misstatement have been rampant from the leaders of American capitalism.

Wall Street Journal columnist James Bovard ridiculed the ADA by pretending that claustrophobia and cocaine addiction are covered disabilities that receive reasonable accommodation protection. [\[FN3\]](#) He told a story of a motorist attempting to use claustrophobia as a defense for a seat belt violation but failed to mention that the motorist's case was dismissed and evoked strong negative commentary from the court. [\[FN4\]](#) Similarly, Bovard reported that a high school guidance counselor used the ADA to challenge his cocaine-related discharge, neglecting to mention that the state court action did not [\[FN5\]](#) (and could not) include an ADA claim, because the ADA excludes current users of illegal drugs from statutory coverage. [\[FN6\]](#) Wall Street Journal reporter Stephanie Mehta made the unfounded accusation that "the cost of [ADA] compliance has probably affected many small business profit margins," [\[FN7\]](#) ignoring the fact that most private **\*214** employers were already subject to similar standards under state disability discrimination law long before the ADA was passed. [\[FN8\]](#)

Law and economics scholar Richard Epstein argued that people with disabilities would benefit more from governmental non-interference than from disability discrimination laws, stating, "Like everyone else, the disabled should be allowed to sell their labor at a price, and on whatever terms, they see fit." [\[FN9\]](#) Mandatory affirmative action or reasonable accommodation requirements, he said, are ineffective and unjustifiable tools. He described the supporters of such remedial devices as "antilibertarian, antiutilitarian, and antimarket in their orientation." [\[FN10\]](#)

Reasonable accommodations for family and medical needs under the FMLA have similarly received strong criticism from the Wall Street Journal [\[FN11\]](#) and some theorists in law and economics. [\[FN12\]](#) The Wall Street Journal has published editorials ridiculing the FMLA with headlines such as "Family-Leave Law Can Be Excuse for a Day Off." [\[FN13\]](#) These articles complain that the \$674 million price tag for the statute, as predicted by the General Accounting Office, will be much higher in practice. [\[FN14\]](#)

Commenting on the general issue of legally-imposed "special treatment" for pregnant women under antidiscrimination law, Professor Richard Epstein said:

Because pregnancy is desired, and because women largely control whether and when to become pregnant, the evident moral hazard makes pregnancy a poor candidate for any form of insurance . . . . The legislative and judicial insistence on their [pregnancy's] special status, however, cannot obscure the social losses incurred by their implementation, with pregnancy as elsewhere. [\[FN15\]](#) **\*215** Epstein wrote those words in response to the use of antidiscrimination law for the benefit of pregnant women; one can only imagine what he might say about a blatantly preferential policy like the FMLA.

Professor Richard Posner has also argued against Aid for Families with Dependent Children (AFDC), stating that such pro-

grams inappropriately encourage women to stay home and leave the paid workforce. [FN16] Many modern economists disagree with his assertions, concluding that there is evidence from other countries that society can both support women financially during the first few years of their children's lives and encourage them to return to the paid workforce when their children are somewhat older. [FN17] The recently enacted Personal Responsibility and Work Opportunity Act, [FN18] however, reflected Posner's perspective by instituting time-limited welfare payments without significantly strengthening the social mechanisms that make it possible to combine child care and work.

Why this onslaught against the ADA by some proponents of law and economics? [FN19] Why this opposition to benefits for family and medical leave in comparison to those offered in Canada and Western Europe? Vigorous enforcement of laws which provide assistance to any subgroup in society stands in tension with laissez-faire economics. [FN20] According to free market principles, the state should not require that the private sector use affirmative programs to improve the employability of members of disadvantaged groups because there is no objective way to determine who is historically disadvantaged and because state intervention into private markets is an inefficient remedy for any social problem. [FN21] Hence, the Wall Street Journal enlists any possible tactic to undermine the public's confidence in the ADA and FMLA. Employing more rational arguments, some supporters of a law and economics perspective attempt to demonstrate that antidiscrimination law is inefficient and unprincipled. [FN22]

America's version of capitalism needlessly relies on an individualistic philosophy without sufficiently considering the basic family and medical needs of workers in our society. Although it is far from pure laissez-faire capitalism because it tolerates state intervention in the marketplace, it is generally less protective of the worker and the family than are the versions used in other parts \*216 of the Western world. Not all kinds of capitalism assume that utility and efficiency for the entrepreneurial class must be the dominant principles. Some favor the welfare of the worker out of the conviction that such policies benefit both workers and the economy as a whole. But the appropriateness of the American version of capitalism is rarely questioned in jurisprudence, particularly law and economics, perhaps because so little work on American law makes reference to other legal regimes. [FN23] A comparative examination of disability discrimination law and family and medical leave law in the United States, Canada, Australia, Great Britain, and some European countries can demonstrate the needless resistance to affirmative protections found in United States law.

This inquiry also gives us added insight into the connection between law and politics. In the United States, the imposition of affirmative protections under disability discrimination law or family and medical leave law has had little effect on the scope of protection for people with disabilities, illness and family responsibilities. Legal decisions have badly warped the underlying structure of laws granting protections to employees at the workplace. Moreover, the language of disability discrimination law is markedly similar in the United States, Australia and Canada, yet court decisions in Australia and Canada are much more protective of people with disabilities than those in the United States. [FN24] The same language in a different political context yields remarkably divergent results. \*217 Of course, language is not entirely meaningless. United States courts have had to impose some reasonable accommodation requirements and have not been able to permit reverse discrimination suits since able-bodied individuals have no standing to bring suit. Nonetheless, interpretation of these statutes is more a reflection of the judge's underlying economic philosophy than of statutory language.

In Part I, I will describe various formulations of capitalism. In Part II, I will turn to an investigation of the disability discrimination law in each of the four countries under investigation. In Part III, I will discuss the Family and Medical Leave Act that has recently been passed in the United States. This legislation is the United States' newest "special accommodation" legislation in that it guarantees affirmative protections to individuals who work for covered employers. As we will see, in the few years in which this statute has been in effect, the courts have found numerous ways to limit its provisions. Genuine affirmative protections in the workplace seem virtually impossible to achieve in the United States under our version of hypercapital-

ism.

### I. Capitalism

A Republican Congress swept into office in 1992 proclaiming "laissez-faire" capitalism, even though their version of capitalism has little similarity with a pure laissez-faire model. They proposed rolling back federal regulatory power and reducing federal outlays from one-third to one-half in order to advance "the simple idea that people should be trusted to spend their own earnings and decide their own futures." [FN25] At the same time, Congress recommended increasing the federal military budget with its inefficient subsidy of industries. These proposals would supposedly help create a "just and compassionate society" [FN26] but can easily be unmasked as corporate welfare at the expense of the working class. Although the Republican revolution was not entirely successful, it did push President Clinton to endorse a welfare reform package that radically departs from our previous understanding of the relationship between the state and the family.

Adam Smith's laissez-faire model, however, has little in common with the current support for laissez-faire economics within American law and politics. Smith's objection to government interference in the economy rested on the assumption that merchants would control government and thereby impose restraints that would serve their self-interest. He worried that government interference in the marketplace "unchains the selfishness of humanity and permits it to do harm to the community rather than working for the public benefit." [FN27] As one commentator has noted, Smith "feared monopoly power far \*218 more than he feared unwarranted government intervention in the market mechanism." [FN28] Smith lived in the days of robber barons and worried about their monopoly influence on government and society. If government had not been a government of merchants but instead represented the working people, Smith might not have been as opposed to government intervention in the workplace. It is wrong, therefore, to use Smith's philosophy as an excuse to undermine the limited protections legislated on behalf of workers and families. Yet, while purporting to draw on the work of Adam Smith, modern American capitalism has not been willing to use the state as a weapon against the selfishness of the merchant class.

American capitalism mirrors the evils that concerned Adam Smith. We say we prefer a laissez-faire system of economics, yet when the government does intervene in the marketplace, its intervention often does the greatest disservice to the most underprivileged members of our society. For example, if we look closely at government intervention in the workplace, we see that the most disadvantaged workers--domestic and agricultural workers--are usually excluded from coverage. [FN29] When President Clinton had trouble finding a nominee for Attorney General who had complied with the minimal protections provided by Social Security law for domestic employees, Congress reacted by broadening the exclusion for the benefit of the upper class without even considering its impact on domestic workers. [FN30] The much heralded Family and Medical Leave Act applies only to those workers who can afford to take unpaid leave and also happen to work for the five percent of American corporations that employ more than fifty employees. [FN31]

Meanwhile, by reducing cash payments and imposing time limitations on benefits, the new welfare law makes it even more difficult for poor women to choose to stay home and care for their young children. This treatment is blatantly preferential to the upper class in contrast to the poor. (I say "upper class" rather than "middle class" because it is generally only the upper class that can afford to pay for the services of domestic workers or take extended unpaid leaves from work.) The needs of the middle class for universal health insurance, government-subsidized child care and paid parenting leave have not been addressed by Congress or the President. If such policies that disproportionately benefit the upper class are the inevitable result of laissez-faire economics, then one must \*219 question the morality of laissez-faire economics. If such policies are not inevitable, then they should be noted and changed to create a more equitable society. No other Western industrialized nation tips the balance so far against the interests of the poor and middle class as does the United States.

Some economists whose work is ignored by conservative law and economics scholars have a more realistic assessment of the

way in which the economy works. The British economist John Maynard Keynes, for example, did not accept the premise that unemployment for qualified workers was antithetical to capitalism. Nor did he accept the premise that wages were determined entirely rationally under a capitalist system. [FN32] He argued that there was involuntary unemployment which could not be overlooked in developing economic models. Nonetheless, American law is based primarily on assumptions contrary to how the "economy in which we live actually works," [FN33] in that it often assumes that employment is available to all able-bodied adults.

Some American academics have carefully explored the validity of those assumptions on which proponents of laissez-faire economics rely. They have concluded that there is no evidence that social protection programs negatively affect the labor market's flexibility or the speed of the labor market's adjustment. In addition, they have concluded that the absence of social protection policies--like mandatory health insurance--does have a negative impact on people's well-being. [FN34]

Similarly, academic economists have disputed the Republicans' claim that "welfare spending and other forms of social protection inevitably lead to inefficient allocation of resources and undermine economic growth." [FN35] The social market economies of northern Europe have consistently produced higher gross domestic products (GDP) than has the United States' or Great Britain's economy. Although one might argue that these economies would have operated even better had they used more laissez-faire principles, the evidence does not support this claim. Social market arrangements have actually facilitated wage restraint as well as contributed to economic efficiency and growth through worker training and other investments in human capital. [FN36] The United States has not facilitated long-term investment in human capital through social market protection. If our choices were based on a careful study of the experience of other countries rather than unexamined rhetoric, we might make different and more humane choices. We might make choices that benefit both workers and the long-term interests of society.

**\*220** The premise of this article is not that the United States needs to abandon capitalism in order to provide appropriate protections for employees at the workplace. The premise, instead, is that people in the United States often are unaware of the choices available within capitalism. Capitalism need not be based on assumptions that are contrary to the world in which we live. As in Canada and much of Western Europe, capitalism can be based on the understanding that workers will face arbitrary discrimination, experience disability and illness, and shoulder child care and family responsibilities. The law of employment can make capitalism operate more efficiently by enabling employees to shoulder these responsibilities effectively rather than to deny that these responsibilities are commonplace for most American workers.

## II. Disability Discrimination Law

### A. Introduction

Disability discrimination law is one of the newest areas of civil rights protection in the United States. The movement for disability rights in the United States has been influenced by the movements for civil rights on the basis of race and sex, but its model of protection is quite different: it tolerates affirmative treatment [FN37] exclusively for members of a historically disadvantaged class.

Affirmative action for historically disadvantaged groups is legally disfavored under race and sex antidiscrimination law in the United States, but "reverse discrimination" claims have virtually overtaken race and gender antidiscrimination law. Nearly all the cases on discrimination issues decided by the U.S. Supreme Court in the last several terms have been reverse discrimination cases. In case after case, the Supreme Court found for the white plaintiff. [FN38] Comparable claims by women or racial minorities have also been unsuccessful. [FN39] Race and sex antidiscrimination law is therefore embedded in what I call an "antidifferentiation" approach rather than an "antisubordination" approach. [FN40] As an antidifferentiation approach, it

seeks to eliminate all \*221 distinctions on the basis of race and sex rather than respond to the needs of historically disadvantaged groups.

Disability discrimination law, by contrast, requires affirmative treatment through reasonable accommodation. [FN41] The ADA defines a "qualified individual with a disability" who is entitled to nondiscrimination protection to include "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." It does not require only neutral nondiscrimination, and it uses an antisubordination rather than an antidifferentiation approach. It seeks to improve the employability of an historically disadvantaged group--people with disabilities--rather than to eliminate all disability distinctions from society.

The class of people protected under race and sex antidiscrimination law and disability discrimination law is also quite different. Title VII does not limit coverage to members of a historically disadvantaged group. Any individual can bring a lawsuit under race and sex antidiscrimination law. In an early case, the Supreme Court decided that such an individual could be a white man claiming "reverse" discrimination. [FN42] Thus, nearly any individual who has an employment relationship with a covered employer can bring suit under race and sex antidiscrimination law.

Disability discrimination law, however, allows only those who are "qualified individuals with disabilities" to file a claim of discrimination. [FN43] A qualified individual with a disability is an "individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position." [FN44] To be considered disabled, a person typically must demonstrate that he or she has an impairment that substantially limits a major life activity. The term disability means (1) a physical or mental impairment that substantially limits one or more of an individual's major life activities or (2) a record of such an impairment or (3) being regarded as having such an impairment. [FN45] Claims of discrimination are therefore available only to members of an historically disadvantaged group; there is no such thing as a "reverse" discrimination disability claim.

Although disability discrimination law explicitly incorporates an antisubordination approach, and race and sex discrimination law formally favor \*222 an antidifferentiation approach, both areas of American law favor the antidifferentiation approach in practice. Courts in the United States have undermined the affirmative treatment principles underlying disability discrimination law, despite the clear statutory language to the contrary. They also have narrowed the category of potential claimants entitled to statutory protection. Because the statute does not permit a symmetrical approach in which all individuals can claim disability discrimination, the courts have had to undermine the exclusive focus on people with disabilities by drastically limiting the scope of that class. Only a small subset of people with disabilities are eligible for the statute's antisubordination protection. One can therefore find a common anti-affirmative action thread running through disability, race, and sex antidiscrimination law in the United States, despite differing statutory language. [FN46]

## B. Reasonable Accommodation Case Law

### 1. United States

Title I of the ADA protects "qualified individuals with a disability" against discrimination by employers. A "qualified individual with a disability" is an individual with a disability who "with or without reasonable accommodation can perform the essential functions of the employment position such individual holds or desires." [FN47] The term "reasonable accommodation" includes "reassignment to a vacant position." [FN48] The controversy surrounding whether or not the ADA is an "affirmative action" statute has largely centered on that requirement. What priority, for example, might an individual with a disability be entitled to over individuals possibly seeking the same position? What obligation does an employer have to facilitate

that reassignment? To the extent that the ADA is interpreted to require affirmative action such as priority consideration for a reassignment, it conflicts with American hypercapitalism. [\[FN49\]](#)

To understand the possible scope of this requirement, one first must understand it in the context of the ADA. The reasonable accommodation concept \*223 is part of the definition of a qualified individual with a disability. For example, if an individual has insulin-dependent diabetes, that individual usually is considered a person with a disability. [\[FN50\]](#) If the person were seeking a job as a secretary, he or she might have to request periodic breaks during the day to take insulin injections. Those periodic breaks would be a "reasonable accommodation." Since the individual could perform the job with that reasonable accommodation, he or she becomes a qualified individual with a disability. Having met the criteria for a qualified individual with a disability, the person is also entitled to the statute's nondiscrimination protections. The employer could not, for example, fire all insulin-dependent diabetics (despite their ability to perform the job with a reasonable accommodation) and retain everyone else.

But now let us assume that the employer's needs change after the insulin-dependent diabetic is hired as a secretary. These changes mean that the diabetic will no longer be able to take the breaks that are essential to his safe functioning at the workplace. No reasonable accommodations at that particular work site are possible to allow the person to be a qualified individual with a disability at his or her current job classification. According to Title I of the ADA, the employer nonetheless has an obligation to make the reasonable accommodation of "reassignment to a vacant position." This obligation is not defined as a nondiscrimination requirement but as a reasonable accommodation requirement.

The difference between a nondiscrimination requirement and a reasonable accommodation requirement is relevant to the concept of affirmative action. If the duty to reassign an employee to a vacant position were a nondiscrimination requirement, the employer could not discriminate against the secretary seeking to be reassigned after he or she becomes unqualified for his or her present position. The secretary would be given equal priority with other incumbent employees who sought reassignment. But if reassignment is a reasonable accommodation, then the employer's obligation must be more than nondiscrimination; it must be an affirmative attempt to reassign the employee to a vacant position.

The cases construing the reassignment requirement have often restated the requirement as if it were a nondiscrimination requirement rather than a reasonable accommodation requirement. For example, in *Daugherty v. City of El Paso*, [\[FN51\]](#) the Fifth Circuit found that the city's failure to reassign an insulin-dependent diabetic to another position on the city payroll did not violate its reasonable accommodation obligation under the ADA, absent evidence that the city treated the employee "differently from any other part-time employee whose job was eliminated." [\[FN52\]](#) This holding, in fact, relied on a misstatement of the actual facts in *Daugherty*. *Daugherty's* job was not "eliminated"; rather *Daugherty* was \*224 discharged from his job when his diabetes rendered him unqualified to comply with Department of Transportation rules for bus drivers. Because he had not been discharged for cause, he sought to take advantage of the reasonable accommodation/reassignment rule just described. The court characterized his situation as a job "elimination" in order to hide the disability aspects of his case.

In ruling against *Daugherty* on the reassignment issue, the court distinguished between nondiscrimination and affirmative action:

Stated another way, we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled. It prohibits employment discrimination against qualified individuals with disabilities, no more and no less. [\[FN53\]](#) It ignored the fact that the reassignment/reasonable accommodation rule is a rule regarding priority consideration.

Similarly, in *Fussell v. Georgia Ports Authority*, [\[FN54\]](#) the district court concluded that the defendants did not violate the

ADA when they failed to tell the plaintiff about an opening in another department, for which he may have been qualified, within ninety days of his disability-related discharge. [\[FN55\]](#) The court granted the defendant's motion for summary judgment, concluding that no further factual inquiry was needed to assess liability because it construed the reassignment/reasonable accommodation rule to require no priority consideration.

In both cases, the courts glossed over the fact that the reassignment rule is contained in the reasonable accommodation section of the statute. The courts, however, contended that it was the plaintiffs' lawyers, not the courts, who were misreading the ADA. As the Fussell court declared:

[It is doubtful] whether Congress, in its wildest dreams or wildest nightmares, intended to turn every garden variety worker's compensation claim into a federal case . . . [O]ne of the primary beneficiaries of [the ADA] will be trial lawyers who will ingeniously manipulate [the ADA's] ambiguities to consistently broaden its coverage so that federal courts may become mired in employment injury cases, becoming little more than glorified worker's compensation referees. [\[FN56\]](#)

But the Fussell court, like the Daugherty court, made misleading statements in order to arrive at its conclusion. The paragraph from its opinion just quoted \*225 was taken from another case, *Pedigo v. P.A.M. Transport, Inc.*, [\[FN57\]](#) and was taken completely out of context. In *Pedigo*, the plaintiff was a truck driver until he suffered a heart attack and underwent an angioplasty procedure. He was terminated while on medical leave. The jury found for the plaintiff because it concluded that the defendant had not sufficiently attempted to accommodate him by reassigning him to a vacant position. (Everyone agreed that he was no longer qualified to drive an over-the-road truck.) After the jury ruled in the plaintiff's favor, the defendant asked the court to overturn the verdict because the evidence was insufficient as a matter of law. As recited by the Fussell court, the district court in *Pedigo* did suggest that the ADA was not serving the public interest through its reassignment requirement. Nonetheless, after carefully examining the legislative history under the ADA, the *Pedigo* court concluded: "[I]t appears that legislative history indicates that Congress intended to come down on the side of the administrative agencies which generally required the employer to consider reassignment, rather than on the side of the federal courts which had generally denied that the employer was obligated to do so." [\[FN58\]](#) The Fussell court relied on a deceptive citation to conclude otherwise.

Many courts are, therefore, construing the ADA to erase the reassignment/reasonable accommodation rule. Rather than debate the proper scope of the reassignment requirement, they pretend that the requirement does not exist at all. This is being done in the name of not making the ADA into an affirmative action statute. As we will see, Canada and Australia are more generous in interpreting analogous requirements in their statutes.

## 2. Other Countries

The Canadian constitution explicitly recognizes and protects affirmative action. [\[FN59\]](#) The Canadian Human Rights Act explicitly mentions that affirmative action is permitted. [\[FN60\]](#) Provincial legislation also contains similar protection. This language protects affirmative action programs from reverse-discrimination \*226 challenges. [\[FN61\]](#) The Ontario Court of Appeal interpreted these provisions to mean that a reverse-discrimination claim cannot be made under Canadian law, although one could challenge a disability-based affirmative action program for discriminating against another disadvantaged group. [\[FN62\]](#)

Ironically, however, the Canadian disability discrimination statute (which is part of its general Human Rights statute) does not explicitly require reasonable accommodation. That duty was impliedly found to exist in the 1980's in cases involving religious, age, and pregnancy discrimination. [\[FN63\]](#) Despite the absence of an explicit statutory requirement to reasonably accommodate, Canadian courts have been more generous than United States courts in interpreting the reasonable accommodation, reassignment rule in cases involving disability discrimination. [\[FN64\]](#)

An illuminating example of the liberal Canadian approach to reasonable accommodation is *Re Province of Manitoba and Manitoba Government Employees' Union*. [\[FN65\]](#) A union filed a grievance regarding an employee's right to be reassigned after he no longer was able to perform the duties of his position. [\[FN66\]](#) The grievant, Mr. Ulasz, became disabled and was informed that he would be given priority consideration for other vacant positions in the civil service. Both the plaintiff and the defendant agreed that reassignment as a form of affirmative action was appropriate, so the dispute centered on the scope of that affirmative treatment. Although the defendant, the government, had interviewed the grievant for several positions, the arbitrator concluded that further steps to accommodate him were required:

\*227 The net result of the lay-off had been to put the griever into a position of being inadvertently adversely affected through discrimination due to his disability. While that in itself might be allowable, the employer had failed to accommodate Mr. Ulasz to the point of undue hardship. The discrimination had not occurred deliberately but the net result was the same. [\[FN67\]](#)

The approach of the arbitrator in the Manitoba case is dramatically different than what one would expect in the United States. [\[FN68\]](#) In the United States, when faced with a statutory requirement to consider reassignment as a reasonable accommodation, the courts have applied this requirement in a nondiscriminatory way. By contrast, in Canada, where reassignment is not listed in the statute as a required reasonable accommodation, an arbitrator has gone quite far in dictating the scope of the duty, so long as it is not an undue hardship. [\[FN69\]](#) Although the United States statute also mentions undue hardship as a defense, it is never mentioned by the courts in this context, because they consider reassignment to be a requirement of nondiscrimination, rather than one of reasonable accommodation.

In Great Britain, affirmative action (usually called "positive action") is not currently a well-favored principle in the areas of race and gender discrimination. Thus, the concept of reasonable accommodation is narrowly defined under Great Britain's new disability discrimination legislation. By contrast, when Great Britain was governed more heavily by the Labour Party, tolerance of affirmative action for people with disabilities was far greater. Great Britain's fifty-year statutory quota system, in which employers were obliged by law to maintain a three per cent quota of people with disabilities in their workforces, was repealed \*228 when the antidiscrimination provisions of Part II of the new disability discrimination statutes took effect in 1996. [\[FN70\]](#)

It is too early to know how the courts will interpret the recently enacted disability rules in Great Britain, but it does appear that the statute presumes a narrow interpretation of reasonable accommodation. The British statute calls reasonable accommodation an "adjustment" and states that when arrangements or physical features "place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect." [\[FN71\]](#) The statute offers the following examples of arrangements that relate to reassignment: "transferring him to fill an existing vacancy" and "assigning him to a different place of work." [\[FN72\]](#) By limiting the transfer to an existing vacancy, the British model certainly seems to be less generous than the Canadian model, which entails extensive consideration for reassignment over a lengthy time period. The British model is also more attentive to cost considerations, although the details of the regulations have yet to be worked out. By being attentive to costs and offering a narrow scope of reasonable accommodation, it appears that the British model is deferential to the needs of employers in a capitalistic society, reflecting its conservative political regime. Additionally, the British statute explicitly states that it is not intended to require preferential or favorable treatment for a person with a disability. [\[FN73\]](#)

The case law from Australia with respect to reasonable accommodation is still at an early stage, and so is somewhat difficult to evaluate. In an early case interpreting the disability discrimination law of New South Wales, the Supreme Court was very deferential to an employer's assertion of what constitutes a "reasonable" accommodation in an employment application case.

[FN74] Nonetheless, more recent decisions appear to defer much less to employer's assertions concerning the economics of its workforce. [FN75]

#### \*229 C. Scope of Coverage

##### 1. United States

Because disability discrimination law explicitly requires reasonable accommodation, it is not possible for courts to dismantle its affirmative action elements entirely. But one technique courts may use to limit the scope of the disability discrimination law's affirmative action potential is to limit the range of claimants permitted to bring suit. Thus, as we will see, the United States and Great Britain employ a much narrower understanding of who can bring suit for disability discrimination than do Canada and Australia. These differences are consistent with their differing commitments to capitalism.

Two interpretations of the ADA have helped achieve a narrow understanding of who has standing to bring a disability discrimination claim. First, some courts have used an exceedingly stringent test to determine whether a person has a substantial impairment of a major life activity. [FN76] In particular, they have used a stringent test when the major life activity that is limited is the ability to work. Second, some courts have adopted a very restrictive test to determine whether the impairment is sufficiently substantial. They have evaluated the substantiality of the limitation after--rather than before--an individual has used mitigating measures (e.g., medication, eyeglasses, hearing aid, wheelchair). The first narrow interpretation is arguably supported by the regulatory language under the ADA, but the second interpretation flatly contradicts the regulations.

The ADA typically provides coverage for an individual who can demonstrate that he or she is substantially limited in a major life activity. Few would disagree that working is a major life activity, but the requirement of proof of a substantial limitation for this major life activity is more rigorous than for the other life activities that are specified in the regulations: "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, [and] learning." [FN77]

The general regulation for substantial limitation is that the individual is \*230 unable to perform a major life activity that the average person in the general population can perform; or 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. [FN78]

With respect to the life activity of working, the regulations contain an additional requirement:

The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. [FN79]

As an example of the application of this regulation, the interpretive guidance explains that a professional baseball pitcher who has developed a bad elbow would be precluded from bringing a lawsuit under the ADA when he is no longer able to perform this highly specialized job. [FN80] Common sense might suggest that when a person with extraordinary physical aptitude becomes disabled so that he can no longer perform at an extraordinarily high level of competence, he should not be able to use the ADA to be characterized as "disabled." The EEOC therefore promulgated this regulation and interpretive guidance with respect to the life activity of working issue to achieve that result although the statute does not specify that "working" should be treated differently than other covered major life activities. [FN81]

The EEOC, however, did not have to promulgate this regulation and interpretive guidance to reach that result. The ADA does not extend protection to all individuals with disabilities; rather, it extends protection only to qualified individuals with disabilities. If two people are applying for a job as a professional baseball pitcher and one person has an injured elbow that precludes \*231 him from pitching, the ADA would conclude that he was not a qualified individual with a disability (under the

assumption that no reasonable accommodation would make him otherwise qualified). [\[FN82\]](#)

Like the reassignment/reasonable accommodation rule, the major life activity of working test is particularly detrimental to the job security of incumbent employees. The courts have also interpreted this regulation harshly to preclude many incumbent employees from obtaining the benefits of disability discrimination law. For example, in *Bolton v. Scrivner, Inc.*, [\[FN83\]](#) the court awarded summary judgment to defendants because plaintiff failed to produce evidence that he could not perform a class of jobs. Bolton was not a baseball pitcher; he was an order selector in a grocery warehouse before he suffered a work-related injury to his feet. Although it is possible that a reasonable accommodation might have permitted Bolton to perform his job, the court of appeals ruled that the district court was correct in holding that "Bolton's inability to return to his particular job without some accommodation does not demonstrate a substantial limitation in the major life activity of working." [\[FN84\]](#) He was excluded from the definition of an individual with a disability and therefore was not entitled to reasonable accommodation protection. Other individuals who sought or held low status jobs have been denied statutory coverage under such reasoning. [\[FN85\]](#) By relying on a narrow regulation construing the major life activity of working test, courts have been able to avoid the more probing question of whether a reasonable accommodation might have permitted these people to maintain their jobs.

The second narrowing device is the question of whether the use of a mitigating measure can preclude someone from qualifying as a person with a disability. "Mitigating measures" are assistive devices (e.g., hearing aid, medication, wheelchair) that people use to lessen the effects of their disabilities on their daily functioning. An interpretive question under disability discrimination law is whether one should determine whether an individual has a "substantial impairment of a major life activity," thereby meeting the definition of an "individual with a disability," before or after the use of mitigating measures. A broad definition of an "individual with a disability" would assess the degree of impairment before mitigating measures are used, whereas a narrow **\*232** definition would assess the degree of impairment after mitigating measures are used.

The ADA is silent on this question. Nonetheless, the EEOC has promulgated a broad interpretation: "The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." [\[FN86\]](#) The EEOC offers no further guidance or examples regarding this rule. As we will see, some courts have rejected this broad interpretation.

Whether the substantiality of the impairment is measured before mitigating measures are used has important implications for the breadth of statutory coverage. Let us assume, for example, that an individual works at a company that has a strict rule governing employee breaks. An employee has one fifteen minute break in the morning, one half-hour at lunch time, and one fifteen minute break in the afternoon. Let us further assume that an insulin-dependent diabetic employee cannot complete during these breaks all the monitoring and intake of food and insulin required for him or her to avoid diabetic symptoms. If we measured the substantiality of the impairment before the use of mitigating measures, this person would obviously be disabled. He or she would then be able to request a reasonable accommodation to facilitate the injection of insulin. But if we viewed the employee after the use of mitigating measures (although it isn't even possible to utilize mitigating measures on that job), he or she might not have an opportunity to seek a modest reasonable accommodation.

The appropriateness of the EEOC's regulation has repeatedly arisen in cases involving people with insulin-dependent diabetes. [\[FN87\]](#) In several recent cases, the courts have rejected the EEOC's mitigating measures regulation and found that plaintiffs had to place facts into evidence regarding the substantiality of their impairment after the use of mitigating measures. [\[FN88\]](#) In one of these cases, the court did not even permit further introduction of evidence after plaintiff relied on the EEOC regulations for support that insulin-dependent diabetics are per se disabled because of their dependency on insulin to function. The court held that the plaintiff had failed to demonstrate that he was disabled. [\[FN89\]](#) In future cases, when

plaintiffs are on notice that such evidence is necessary, they should know that the courts have raised their litigation costs by making them put medical facts into evidence.

The rejection of the EEOC's regulation concerning the use of assistive devices is just one more attempt to limit the category of people who can bring \*233 claims under the ADA. Rather than decide whether they genuinely have claims of discrimination--and many of them appeared to have very strong claims of discrimination [FN90]--the courts have closed the door of litigation in their faces. No other country has adopted such a narrow mitigating measures rule.

Finally, the ADA also narrows its statutory scope through more direct methods--statutory exclusions. Title V of the ADA lists those conditions which are specifically excluded from coverage: homosexuality; bisexuality; transvestitism; transsexualism; pedophilia; exhibitionism; voyeurism; gender identity disorders not resulting from physical impairments; other sexual behavior disorders; compulsive gambling; kleptomania; pyromania; psychoactive substance use disorders resulting from current illegal use of drugs; and any individual currently engaging in the illegal use of drugs. [FN91] In addition, alcoholics can obtain only limited statutory coverage. [FN92] Impairments are covered only if they are "substantial" and have a long-term effect on a person's life. "[A]dvanced age, physical or personality characteristics, and environmental, cultural, and economic disadvantages are not impairments." [FN93] As we will see below, both Canada and Australia are much less restrictive in the list of disabilities covered by their statutes.

## 2. Other Countries

The coverage of people with disabilities is much broader in Canada than in the United States. For example, the Ontario Human Rights Code, which includes protection against handicap discrimination, does not contain the "substantial impairment" language found in American law. The Code defines "because of handicap" to include a person who has, has had, or is believed to have had:

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness . . . ,
- (b) a condition of mental retardation or impairment,
- (c) a learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the Workers' Compensation Act. [FN94] \*234 The "any degree" language in the Ontario Code is much broader than the "substantial impairment of a major life activity" language found in American law. Similarly, the Canadian Human Rights Act quite broadly defines people with a disability, and specifically lists "previous or existing dependence on alcohol or a drug." [FN95]

In addition, the Ontario Code specifically lists disabilities that are per se included under that definition, including "diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device." [FN96] Obviously, insulin-dependent diabetics can obtain coverage under the Ontario statute. There is also little question that the issue of whether one is handicapped is measured before the use of mitigating measures because a dependence on mitigating measures makes oneself, per se, disabled.

Not surprisingly, the case law in Ontario reflects this broad definition. One arbitrator presumed that a person who suffers

from kleptomania would be covered by the law; [\[FN97\]](#) another arbitrator concluded that an alcoholic was covered by the Ontario statute referring to the more specific language from the Canadian Human Rights Act concerning the coverage of alcoholics. [\[FN98\]](#)

The recently enacted British statute is even narrower than the United States statute in providing coverage to people with disabilities. The effect of a disability must be both "substantial" and "long-term" and must affect "normal day-to-day activities." There is no "record of" expansion of this definition as there is in the United States. [\[FN99\]](#) In addition, Schedule 1 of the Act further limits which impairments may qualify as disabilities. For example, a mental impairment "includes an impairment resulting from or consisting of a mental illness only if the illness is a clinically well-recognized illness." [\[FN100\]](#) Nonetheless, the British statute clearly states that a court should consider whether one is disabled before the effect of mitigating measures is taken into consideration, unless the corrective measures are spectacles or contact lenses. [\[FN101\]](#) Thus, even the conservative British Parliament has rejected the mitigating measures rule adopted by some courts in the United States.

**\*235** The Australian Disability Discrimination Act of 1992 defines disability broadly. [\[FN102\]](#) Unlike the ADA's requirement, the disability need not substantially limit a major life activity. Proving the existence of an impairment that fits into one of seven categories is sufficient for coverage. In addition, people are protected for whom the disability currently exists, previously existed but no longer exists, may exist in the future, or is imputed. [\[FN103\]](#) Australian courts appear to be applying these definitions broadly. [\[FN104\]](#)

#### D. Conclusion

The breadth of statutory coverage in these four countries therefore corresponds to the strength of their reasonable accommodation protection. Great Britain has the narrowest definition of disability and the most limited reasonable accommodation protection. Canada and Australia offer broad reasonable accommodation protection and accordingly offer a broad definition of disability. The United States offers a broader definition than Great Britain through its coverage of "record of" disability, as well as broader reasonable accommodation protection, but is narrower on both grounds than Canada or Australia.

One might say that it is ironic that countries with broad definitions of disability offer broad reasonable accommodation protection because this combination could be quite expensive for employers. This trend, however, fits my thesis with regard to a willingness to apply principles that are somewhat inconsistent with capitalism. Countries that are willing to act inconsistently with capitalism offer broad protection at every turn and offer less accommodation to the employer's cost considerations.

One might argue that the American courts are correct to offer such a narrow definition of a person with a disability because such a narrow definition is consistent with American law and economics. But the fact that even Great Britain offers a considerably broader definition of a person with a disability who uses mitigating measures should make a conservative jurist pause for further reflection. Through the adoption of the ADA, even the Republican-dominated Congress probably intended to provide meaningful protection to people with **\*236** disabilities. However, excluding insulin-dependent diabetics from statutory coverage is not consistent with such intentions.

### III. Family and Medical Leave Act

#### A. Introduction

The Americans with Disabilities Act was one of the first statutes to explicitly provide for accommodations for some employees in private workplaces. Employees who wanted to miss work to receive medical treatment or recover from illness, however, have generally found the courts unreceptive to their accommodation requests. If a person is repeatedly absent from work, he or she is not considered to be a "qualified" individual with a disability. [\[FN105\]](#) By contrast, Canadian courts often

find that employees with significant absentee records can still receive the protection of disability discrimination law. [\[FN106\]](#) Workers who cannot fit the definition of a "person with a disability," such as pregnant women or workers with temporary medical conditions, also cannot make a claim for accommodation under the ADA. [\[FN107\]](#) Similarly, the Pregnancy Discrimination Amendment to Title VII protects against pregnancy-based discrimination but does not use an affirmative action or reasonable accommodation model for pregnant women. It is generally modeled on a "formal equality" perspective on discrimination, [\[FN108\]](#) thereby requiring pregnant women to be treated the same as similarly situated men [\[FN109\]](#) (whom I have elsewhere called "pregnant men" [\[FN110\]](#) to emphasize their nonexistence).

For example, whereas United States courts have concluded that employers can lawfully require an employee to choose between maternity leave and sick leave, Canadian courts have concluded that such a coerced choice violates **\*237** anti-discrimination law. [\[FN111\]](#) This differing reasoning is premised on different understandings of the status of the pregnant employee in society. American plaintiff Maganuco was a pregnant school teacher who wanted to use her accumulated paid sick leave before taking an unpaid maternity leave. School policy forbade an individual who took maternity leave to combine it with sick leave. The Seventh Circuit Court of Appeals held that this "choice" did not violate the Pregnancy Discrimination Act because "the impact of the leave policy . . . is dependent not on the biological fact that pregnancy and childbirth cause some period of disability, but on a Leyden schoolteacher's choice to forego returning to work in favor of spending time at home with her newborn child." [\[FN112\]](#) The Seventh Circuit considered the plaintiff to have made a private choice for which she bore sole financial responsibility; an employer could not be expected to accommodate her choice in any way.

Canadian plaintiff Carlinda D'Alimonte was also a pregnant school teacher who sought to combine sick leave and maternity leave following the birth of her child in violation of her company's personnel policies. [\[FN113\]](#) A board of arbitration upheld the employer's position. On appeal, the Ontario Divisional Court concluded that such a coerced choice violates the law against sex discrimination. Citing an earlier decision by the Canadian Supreme Court, the Ontario court emphasized that a finding of discrimination was necessary in order to redress a basic disadvantage women face at the workplace and in society at large. "It [the rule] would sanction imposing a disproportionate amount of the costs of pregnancy upon women. Removal of such unfair impositions upon women and other groups in society is a key purpose of anti-discrimination legislation." [\[FN114\]](#) The Ontario court viewed pregnancy as benefiting society and expected employers, as well as society as a whole, to bear some of those costs. Rather than view plaintiff's pregnancy as a private choice, the court viewed her pregnancy in the context of mutual social responsibility.

Thus, until the passage of the Family and Medical Leave Act, federal law in the United States provided no protection for workers who needed to miss work due to illness or to take care of family responsibilities such as child care. Canadian law, by contrast, provides workers with protection under both its antidiscrimination law (both disability and sex-based law) and under its generous parenting leave law. Further, workers are often protected under collective bargaining agreements which do not permit them to be discharged for illness-related leave unless the employer can demonstrate that the employee is **\*238** incapable of regular attendance in the future. [\[FN115\]](#) Canada and the United States are operating under different premises regarding the role of the state in workers' lives. Canada is accustomed to intervening, under its version of capitalism, to provide minimum levels of protections for workers whereas the United States does so quite begrudgingly. [\[FN116\]](#)

## B. Statutory Coverage

Because of the absence of statutory protection for workers who need to miss work due to illness or family-related responsibilities, Congress began to consider proposals for a federal leave statute in the late 1980's. The outcome of this discussion was the Family and Medical Leave Act of 1993 (FMLA), [\[FN117\]](#) which provides eligible employees [\[FN118\]](#) of a covered employer [\[FN119\]](#) the right to take unpaid leave for a period of up to twelve workweeks in any twelve month period for one or

more of the following reasons:

(A) Because of the birth of a son or daughter of the employee and in order to take care of such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

The statute defines a "serious health condition" as an "illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." Part (A) of the definition is relatively easy to interpret because it seems to require an overnight stay at a medical institution. Part (B), however, is more ambiguous and has been interpreted through regulations \*239 promulgated by the Department of Labor. These regulations specify that a medical condition constitutes "continuing treatment by a health care provider" if it involves:

(i) a period of incapacity . . . of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) treatment two or more times by a health care provider . . . or

(B) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) any period of incapacity due to pregnancy, or for prenatal care.

(iii) any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) requires periodic visits for treatment by a health care provider . . .

(B) continues over an extended period of time . . . and

(C) may cause episodic rather than a continuing period of incapacity . . .

(iv) a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider . . .

(v) any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider . . . either for restorative surgery after an accident or injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment . . . [FN120] As we will see, this definition of "continuing treatment" is hard to meet if one does not have a close on-going relationship with a physician.

Although the FMLA was passed over strong opposition by the business community, it has, in fact, provided little job security

for many employees in the workplace with family or medical leave requests for accommodation. The terms of the statute, coupled with narrow judicial interpretations, have caused this result.

The terms of the statute, themselves, expressly provide limited coverage. Only individuals who have worked for their employer for at least one year are covered, and only employers with more than fifty employees are covered. Individuals are also excluded if they are among the top ten percent in salary and benefits compensation at a particular worksite. The statute therefore only covers \*240 five percent of corporations existing in the United States. [FN121] Of those five percent, only one-third were actually required to make adjustments to be in compliance with the Act. [FN122] And, of course, leave is unpaid, a fact which makes it financially infeasible for many employees. By contrast, European countries, Great Britain, and Canada, offer their leave on a paid basis. For example, the typical European country provides six weeks of paid sick leave, usually at 100% of gross earnings. [FN123] This leave is in addition to paid maternity and parenting leave, as well as unpaid sick leave usually for up to a year.

Family leave to care for children under the FMLA is limited to the first year of the child's life (or placement with the family) unless the child has a "serious health condition," as that term is defined in the statute. Thus, a parent with child care problems after the first year of a child's life can rarely take advantage of the statute's protections. Beyond the child's first year of life, leave would be limited to "serious health conditions," which, as I will discuss below, the courts have interpreted not to cover many of the health conditions that cause many parents to miss work to care for their children.

### C. Case Law

#### 1. Serious Health Condition

The legislative history and regulations concerning the definition of a "serious health condition" suggest that neither Congress nor the Department of Labor have done a good job in constructing a definition that would provide meaningful protection to workers who face job security issues because of their own or their children's health impairments. The Senate Report, for example, states that:

[T]he term 'serious health condition' is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. [FN124] \*241 The Senate Report then offers examples of such conditions. Many of the examples--" heart attacks, heart conditions requiring heart bypass of valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries" [FN125]--will frequently require far more than twelve weeks of leave from work, especially if the employee has already used up some FMLA leave before a course of treatment is selected for the condition.

The coverage of leave during pregnancy is ambiguous under the FMLA. Obviously, the FMLA covers leave for either parent following the birth of a child but the FMLA is not so clear as to how it treats leave during pregnancy. The Senate Report's list of possible "serious health conditions" includes "ongoing pregnancy, miscarriages, complications or illness related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth." [FN126] The regulations promulgated by the Department of Labor, however, do not reference "ongoing pregnancy" as a sufficient basis for medical leave. The regulations state that there must be a "period of incapacity due to pregnancy, or for prenatal care." [FN127] The courts have therefore interpreted the FMLA as requiring a woman to have medical proof that her pregnancy is abnormal and incapacitating in order for her to invoke FMLA leave prior to delivery. Thus, plaintiff Michaela Gudenkauf was found not to be eligible for FMLA protection when she requested part-time work following an episode of contractions in what her physician classified as a normal pregnancy. [FN128] The medical model underlying the FMLA therefore displays

little concern for the normal discomforts of pregnancy despite its purported concern for burdens due to pregnancy and childbirth.

The Department of Labor regulations purportedly cover conditions lasting more than three consecutive calendar days but also state that the regulations ordinarily exclude "unless complications arise, the common cold, the flu, ear aches . . ." [FN129] A flu patient may, of course, be ill for a week and a child with an ear ache may be home from child care for several days yet both conditions are excluded from the regulations. The regulations do not mention common childhood illnesses such as diarrhea, chicken pox and "pink eye" which may require exclusion from child care yet not require continuing treatment by a health care provider. The assumption is that employers would not fire parents who have periodic needs to stay home and care for children with common childhood illnesses. [FN130] The FMLA facilitates parents staying home with their children during the first year of the child's life (when they can take twelve weeks of leave \*242 without demonstrating that the child is ill) but does little for parents when the child is likely to be attending group daycare or preschool and is at significant risk of contracting childhood diseases. And when an employee misses work to care for a terminally ill parent, the FMLA only covers their absence until the death of the parent. No leave is required for time-consuming activities relating to the funeral and the estate. [FN131]

The assumption that employers would not fire parents who miss work to take care of children with common childhood illnesses is not borne out in the case law. For example, OshKosh B'Gosh, a manufacturer of children's clothing, sought to terminate Lilly Crisp after she stayed home with her three-year-old daughter who had had a persistently high fever for several days and been under doctor's care through an emergency room visit. [FN132] Plaintiff was able to prevail in a FMLA challenge since the medical records demonstrated that the daughter had had a persistent fever for several days and was under a doctor's care but plaintiff was not able to get FMLA protection for sick leave from a month earlier when she had flu-like symptoms and missed three days of work. Despite a physician's testimony that it would be reasonable to be absent from work for three and one-half days with such an illness (especially since one of the prescribed medications might have affected her ability to operate a sewing machine safely at work), the court found that the plaintiff had not sustained her burden of proof that she did not work due to a serious health condition. [FN133] In both instances, the plaintiff faced the same problem--an employer with an inflexible leave policy--but one of her requests for leave fell on the side of statutory protection and the other did not.

Numerous other plaintiffs have lost cases, despite being discharged from work due to medical problems of themselves or a family member, because they could not meet the "serious health condition" hurdle. Chronic sinusitis bronchitis, [FN134] a child's ear infection, [FN135] and food poisoning [FN136] have been found not to constitute a "serious health condition" although, in each case, the employee had little choice but to miss work in response to the health condition. It wasn't sufficiently serious to evoke statutory coverage but was sufficiently serious to cause these individuals to lose their employment.

The burden of proof rules imposed on the plaintiff in OshKosh are also insensitive to the realities of the lives of employees who need FMLA protection. The regulations presume that individuals have doctors who they see for continuing supervision when they face health problems. In Oshkosh, for example, the plaintiff's daughter saw a physician through use of the emergency \*243 room at the local hospital for a condition that probably did not require emergency treatment. The plaintiff did see a physician in his office for her earlier illness but it also appears that she had little personal relationship with the physician. He was only able to testify as to what his notes disclosed from the visit; he had no personal memory of the office visit. [FN137] Because of the vagueness in his notes and recollection, the court found that the plaintiff had not sustained her burden of proof of showing that she had had a serious health condition during that absence from work. Irrespective of how sick the plaintiff had been at that time, it is hard to imagine that she could have met her burden of proof unless she visited a hospital emergency room.

Repeated studies have shown that poor people receive inferior medical care, as compared with middle-class people, irrespective of whether they have health insurance. [FN138] The FMLA embodies a middle-class expectation for the doctor-patient relationship. But, ironically, middle-class individuals are likely to have liberal leave policies at work and no need to use the FMLA. It is working class employees like Penny Brandon who need to use the FMLA, and they have trouble complying with the medical model that underlies the FMLA. [FN139] Brandon and other FMLA plaintiffs frequently use hospital emergency rooms for routine medical problems rather than a private physician with whom they have a long-standing relationship. [FN140] In order to comply with the FMLA, they are required to have two doctor's visits for conditions such as chicken pox for which doctor's visits are usually not encouraged. But if they miss work for more than three days and fail to visit a doctor twice they may be denied statutory coverage. Thus, plaintiff William George prevailed under the FMLA for his six days of leave to recover from chicken pox because he visited both the hospital emergency room and a clinic thereafter, but plaintiff Seidle was not able to prevail because her son only visited a doctor one time to be treated for his ear infection. [FN141] In another case, an employee was unable to demonstrate that his rectal bleeding constituted a serious health condition because he missed his second doctor's appointment in order to avoid missing work, in violation of his company's absenteeism policy. [FN142]

Ironically, it is the United States--which relies primarily on private health care for the treatment of employees--that imposes such stringent certification requirements on employees seeking to take illness-related leave. No parallel rules exist in Canada or European countries where a system of national health \*244 insurance also exists. The FMLA primarily covers employers who provide the most minimal benefits at the workplace--most likely not including health insurance--and then asks those employees to provide documentation of illnesses for which they will have to bear the documentation expenses. In other words, the FMLA is premised on a different health delivery model than in fact exists for working class employees.

It is also extremely difficult for employees to meet the causation standards required under the FMLA to show that their use of their rights under the FMLA motivated a discharge. Applying rigid burden of proof rules developed under Title VII, courts are requiring direct evidence of an illegal motive for an employee to prevail under the FMLA. Circumstantial evidence is insufficient. Thus, plaintiff's evidence that he was discharged the day he returned to full-time work following heart surgery was insufficient to prove an illegal discharge under the FMLA. [FN143] The federal court insisted that the plaintiff should be able to produce "admissible evidence, based on personal knowledge" in order to prevail. [FN144] Employees, however, are unlikely to have stronger evidence than that they were fired as soon as the employer learned they had a serious health condition since employees are rarely at meetings at which such decisions get made.

Even where defendants concede that plaintiff's request affected their discharge decision, courts have ruled against plaintiffs under the FMLA. For example, Pat Tuberville was fired two days before her hysterectomy was scheduled for surgery. Pursuant to the FMLA, she had given her employer three weeks notice of her need for surgery. The employer used this notice as an excuse to terminate her from her employment. The employer's rationale was that she was on notice that she would be discharged unless her office improved its work performance. "Since the plaintiff would be on leave the final two weeks of the month and unable to assist in turning the office around," it decided to discharge her when her leave was scheduled to commence. [FN145] Although the court concluded "that the timing of the leave was a major factor used in making the termination decision," it ruled against the plaintiff because it concluded that she would have nonetheless been discharged eventually. [FN146] Onerous proof rules can therefore undermine statutory guidelines.

In Europe and Canada, by contrast, these statutory minimums are usually written into the union-employment contract. [FN147] Thus, the employee can use the \*245 union to grieve about a failure to follow these rules. The union can serve both an education and advocacy function for the employee. Because of the decline of unionization in the United States, this possibility is relatively rare.

A typical example in Canada that was resolved in the employee's favor was a dispute between Anne French and Bell Canada. [\[FN148\]](#) French was fired after taking several weeks of sick leave when she was experiencing emotional strain due to her mother's serious illness. Although her emotional strain was apparently heightened by her heavy drinking during this period, the employer did not dispute that her emotional strain caused her to be eligible for illness disability benefits. The employer's criticism of her employment history was two-fold: (1) that French continued to work at her second job during this period, and (2) that French lied, when asked, if she had a second job. Although Bell Canada policy did not forbid employees from holding second jobs, it did forbid them to claim sick leave on days during which they had worked at another job. French claimed that her emotional distress precluded her from answering telephone calls as an operator for Bell Canada but did not preclude her from working in a solitary position during the day as a mail carrier.

The court's resolution of the case reflects the ways in which Canada's labor law differs from that of the United States. The case is a labor grievance. Thus, French had a union arguing on her behalf (and presumably without compensation). French also had documentation from an apparently sympathetic physician who would have treated her under Canada's national health insurance system. Her family doctor wrote a letter in which he stated that French "has been unable to manage her demanding duties as a Bell operator, although she was still quite capable, in my opinion, of managing her less demanding duties at Canada Post." Rather than offer a vague recollection, he offered specific, useful information that helped support her claim for disability sick leave. Finally, the standard for "illness" allowed a physician to make fairly vague supporting statements in order for an employee to qualify as eligible for sick leave benefits. French's doctor never even gave her condition a name. He just said that "this lady has been under my care" and that "she has been unable to manage her demanding duties." No further documentation of illness was required. Although Bell Canada employed its own physician to monitor sick leave requests, the company physician verified her entitlement to sick leave without examining French and without speaking with her family physician. Ultimately, the plaintiff prevailed in this case because the court did not believe that her conduct had been intentionally fraudulent and thereby could not be a proper basis for discharge. The burden of establishing fraud was placed on the employer, in sharp contrast to the United States case law, which places all of the burdens of proof on the \*246 employee. This decision reflects a very different conceptualization of the employer-employee relationship than is embodied in the United States under the FMLA.

## 2. Twelve weeks

The FMLA uses one leave period--twelve weeks--which is supposed to be sufficient to protect workers from discharge for all their family and medical leave problems. A woman's pregnancy leave must come out of this twelve week period as well as her family and medical needs. Thus, if she finds it too difficult to work in the last month of her pregnancy, she will only have eight weeks of leave for all her family and medical needs following delivery of the child. In addition, she may find that she cannot qualify for any FMLA leave until the baby is born because her pregnancy--with its many discomforts--is considered to be "normal." In comparison with European countries, the twelve weeks is an extremely short period of time. Nearly every European country provides for at least six months of leave for pregnancy alone, with some of that leave being permitted before delivery of the baby. Medical leave and parenting leave is in addition to that time period. [\[FN149\]](#) Although the FMLA is purportedly geared to providing parents with adequate family leave, it is hard to see how twelve weeks can meet that need in the first year of a child's life. After a woman has taken a minimum of six weeks to recover from her pregnancy, she is only left with a maximum of six weeks of parenting and sick leave. The twelve week figure could be seen as a minimum amount of time to care for the child following birth before a parent returns to the workplace, but that allows for no absences due to the sickness of the parent or child for the remainder of the year. No European or British country has such an unrealistic expectation of good health in the first year of a child's life. [\[FN150\]](#) Seventeen of the nineteen European or British countries provide for paid sick leave with most countries not specifying the time period for such leave. [\[FN151\]](#) Of the countries that specify the length of leave, only one country-- Germany--has a limitation which is equivalent to that of the United States.

[FN152] These countries also specify leave for sickness in addition to leave for maternity or parenting. The United States, by contrast, specifies a twelve week period for all forms of leave combined. The United States' model presumes that most women can and do work until the moment they give birth. We have imposed that rule onto our understanding of what is "normal."

The existing twelve week rule emerged as a legislative compromise in the early stages of the drafting of the FMLA. The original bill, introduced by \*247 Representative Patricia Schroeder in 1985, provided for eighteen weeks of unpaid leave over a twenty-four month period for the birth, adoption, or serious illness of a child, and twenty-six weeks of unpaid leave over a twelve month period for an employee's own serious health condition. [FN153] In 1989, when the bill was reintroduced, those time periods were shortened to ten and thirteen weeks, respectively. [FN154] Finally, when the first floor vote occurred in the House in 1990, the leaves were combined into one twelve week leave period per year. [FN155] This bill was twice passed by the Congress and vetoed by President Bush [FN156] before being reintroduced during the Clinton Presidency. [FN157] The bill signed by Clinton maintained this prior legislative compromise with no attempt made to return the bill to its earlier, more generous and separate time periods. The United States legislative debate about family and medical leave was therefore shaped at an early stage by the expectation that there would be one combined leave period for both family and medical leave. This is a uniquely American compromise and can cynically be described as an attempt to pass legislation without providing meaningful protection for many American workers. Twelve weeks might be seen as minimally taking care of the child care obligations that exist immediately following birth but will do little to provide job security to working parents who have other family or medical leave needs in the year that a child is born. The statute might be named the Family or Medical Leave Statute, but it hardly can be characterized as a statute that responds to both a family's dependent care and medical needs.

The testimony offered by child care experts during hearings on the FMLA reflects that twelve weeks is insufficient even for parenting leave, let alone all combined leave. For example, Dr. T. Berry Brazelton, a world-renowned pediatrician, testified that a minimum of four months is preferable for a newborn to receive care from a parent in order for appropriate bonding to take place. [FN158] The Advisory Committee on Infant Care Leave of the Yale Bush Center in Child Development and Social Policy recommended a minimum of six months for parenting leave. [FN159] Others testified that the standard recommended leave for parents wishing to adopt children is six months. [FN160] \*248 Despite this testimony, a twelve week figure for all forms of leave was adopted. Congressman William Ford explained how this figure was chosen in hearings before the Committee on Education and Labor. He explained that the sponsors of the legislation began with a twenty-six week figure because "that was consistent with what all our trading partners in the Free World do. It was still less than Canada, less than Germany, and less than other major trading partners." [FN161] He then explained:

. . . over the years that number was compromised down not because 12 weeks made any more sense to the original sponsors of this legislation than 26, because we could get more people to vote for 12 weeks than we could for 26, including members of this committee who didn't support the bill at the very beginning but began to support the bill after we modified the number of weeks involved. [FN162]

In other words, the number of weeks chosen had to do with politics not the needs of the individuals who would qualify for leave under the FMLA. And the number that was selected was admittedly much less than the number chosen by our trading partners as well as the number of weeks minimally needed by new parents for the benefit of their children.

The argument that is sometimes offered against lengthy periods of paid parenting leave is that such leave will harm the employment opportunities of women in the workplace by acting as a hidden tax on their employment status. [FN163] Even when such leave is available on a gender-neutral basis, the argument is that women will disproportionately be the individuals who take such leave, and employers are aware of that demographic pattern when they hire women. This backlash argument is

similar to the "stigma" argument that is offered in the affirmative action area--if one offers any special benefits to minorities or women in the form of affirmative action then there will be a backlash in the form of stigmatization of minority and female workers.

The problem with these arguments is proving cause and effect. Women in the United States receive virtually no government-guaranteed paid parenting leave after giving birth to a child and face economic inequality in the workplace. In Canada, by contrast, women receive paid parenting leave after giving birth to a child and also face economic inequality in the workplace. In other words, economic inequality in the workplace exists irrespective of the existence of paid parenting leave. Given the existence of substantive inequality in the workplace, I believe it makes more sense to also try to improve the quality of women's lives by offering paid parenting leave. Mothers need not be martyrs in the \*249 workplace--returning to work too early for the well-being of themselves or the child--in order to try to attain economic equality. [\[FN164\]](#)

### 3. Notice

Where the leave is foreseeable, the FMLA requires that the employee shall provide the employer with not less than thirty days' notice, before the date the leave is to begin. If the date of the treatment requires leave to begin in less than thirty days, the employee shall provide such notice as is practicable. [\[FN165\]](#)

Some courts have applied this rule stringently, requiring an employee to invoke the words "FMLA" when requesting leave in order to evoke statutory coverage. Even the conservative Fifth Circuit Court of Appeals, however, has recognized that such a rule departs from Congress' intent. "Congress in enacting the FMLA did not intend employees . . . to become conversant with the legal intricacies of the Act." [\[FN166\]](#) Plaintiff June Manual missed about a month of work following treatment for a health condition and was fired from her job. She challenged her discharge under the FMLA and lost in the trial court. She ultimately prevailed by pursuing her case to the Fifth Circuit Court of Appeals. It took enormous sophistication for her to win back the right to work at her blue-collar job where she probably received no compensation for her medically-related leave of absence. And had she not learned of the existence of the FMLA after her discharge, the employer would have gotten away with ignoring its requirements in its blue-collar workforce. [\[FN167\]](#)

Other employees have been even less fortunate. Plaintiff Wayne Johnson requested a month's leave without pay because he was "forced by circumstances to [attend to] a matter . . . of significant financial importance to [his] immediate and extended family." [\[FN168\]](#) After his leave request was denied, Johnson was repeatedly absent from work and ultimately terminated. At trial, Johnson explained that he needed the time off to monitor his son who had asthma. The son's grandmother had previously provided care for the child when he was ill but the grandmother had recently died. The son had a record of hospitalization for his asthma. Because Johnson had previously received a two week leave when his \*250 son was ill with asthma, the court concluded that "he cannot shield himself behind inexperience or naiveté to excuse the alleged drafting error [i.e., not mentioning medical condition] for his case differs from that of an inarticulate individual who is disinclined to reveal personal matters such as family illness." [\[FN169\]](#) Although the FMLA does not require employees to invoke it by name and does not require notice when leave is unforeseeable, the plaintiff's attempt to foresee his need for leave with a general request for leave was used against him under the statute. Had he made no advance request but found himself requiring emergency days to deal with his son's illness, the court would have had to rule in his favor. His inartful attempt to provide notice, however, precluded him from qualifying for FMLA leave.

Notice also works in the other direction. Employers have obligations to inform employees of their rights under the FMLA. These notice rules are important because many employees will not be familiar with the specifics of the FMLA. For example, Lisa Fry, who worked as a head teller for a bank, took sixteen weeks of family leave after the birth of her child. [\[FN170\]](#) The employee handbook specified that such leave was permitted without loss of one's employment. Prior to the passage of the

FMLA, however, the employer's policy was not to guarantee that an employee be reinstated to their prior position. The FMLA, by contrast, states that employees must be reinstated to a comparable position upon return from covered leave. Thus, the employer would be obligated to comply with the FMLA for those employees who took only twelve weeks of leave but could not be required to comply for those employees who took between twelve and sixteen weeks of leave. Plaintiff Fry, not realizing that FMLA rights were limited to twelve weeks of leave, mistakenly thought she would be guaranteed back her old position even if she took sixteen weeks of leave.

Substantively, Fry had no argument under the FMLA that she was entitled to reinstatement to her former position if she took the full sixteen weeks of leave. But procedurally the court found that the employer had the obligation to explain to her the FMLA consequences of taking more than twelve weeks of leave--that she would not be guaranteed back her old position. In the words of the court:

We conclude that such claim states a valid cause of action under the FMLA since adequate notice to employees concerning their FMLA right to reinstatement in light of any additional leave permitted by the employer is necessary to enable them to exercise their statutory right to reinstatement by electing to request only twelve weeks of family leave, if the employer's policy so provides. [\[FN171\]](#)

Lisa Fry is one of the fortunate few to persuade a court to strictly enforce the notice requirements imposed by the FMLA on employers. More often, \*251 employees are penalized for their lack of sophisticated knowledge with little consideration given to how they are supposed to acquire such knowledge. In the absence of a workplace with a strong union presence, it is unrealistic to expect employees to have much knowledge about their rights. Countries like Canada, with a strong union movement, have lower expectations for employee knowledge than the United States where employees' sole source of educational material will most likely be limited to posters at discrete places in the workplace.

#### IV. Conclusion

Remarkably, the ADA was passed by a bipartisan Congress. Even more remarkably, it is framed by an antisubordination approach that grants rights only to people with disabilities. Despite the hostility of many employers to affirmative action, it goes much further than Title VII in ordering employers to make reasonable accommodations for people with disabilities.

The backlash has been quick and decisive. The scope of the reasonable accommodation obligation has been narrowed far beyond the statutory language, and the categories of people who can bring claims under the statute has been confined beyond the intentions of Congress or the EEOC. Moreover, conservative newspapers have fueled this backlash by exaggerating the scope of success for claimants under the ADA.

Why has there been this quick backlash to a congressional bipartisan effort? Capitalism cannot accommodate affirmative action even when race and gender issues are not at stake. In Canada, most disability cases are decided as arbitration decisions involving union grievances on behalf of disabled employees. The labor contracts typically contain their own protection for workers who become disabled and thereby serve to strengthen the applicable disability statute. Since a strong labor movement is indicative of a less capitalistic economy, it is consistent with my thesis that these arbitration decisions protect people with disabilities, often providing them with what I have termed affirmative protection.

The United States has been on the forefront in passing legislation to ban discrimination on the basis of race, sex, national origin, religion, and now disability. Nonetheless, it has lagged behind its trading partners in passing legislation to guarantee family and medical leave. But irrespective of whether the United States leads or follows, it soon dilutes this legislation so as not to provide many affirmative protections for employees in the workplace. American-style capitalism resists the notion that external constraints limit the effectiveness of employees and that only governmental action can restore a proper balance at the

workplace. Our trading partners have long recognized that an effective version of capitalism requires government intervention to safeguard the workplace against such externalities. By being more aware of the type of capitalistic philosophy that dominates American jurisprudence, we can do better for our workers. \*252 American capitalism need not be hypercapitalism. Instead, it could be humane capitalism.

[FNd1]. Ruth Colker, Heck-Faust Memorial Chair in Constitutional Law, Ohio State University. I would like to thank my research assistants from the University of Pittsburgh School of Law--Colleen Zak, Theresa Zimmerman, and Nicole Bower--for their invaluable assistance while I wrote the first draft of this article. Finally, I would like to thank Gregory Baker (Ohio State '98) for his assistance with the final stages of this article. This article is drawn from Ruth Colker, *American Law in the Age of Hypercapitalism: The Worker, the Family, and the State* (forthcoming 1998).

[FN1]. [42 U.S.C. §§ 12101-12117 \(1994\)](#).

[FN2]. [29 U.S.C. §§ 2601-2654 \(1994\)](#).

[FN3]. See James Bovard, *The Disabilities Act's Parade of Absurdities*, *Wall St. J.*, June 22, 1995, at A16. For a definition of reasonable accommodation, see *infra* Part II.B. As I will discuss in Part II, I consider reasonable accommodation to be a type of affirmative action.

[FN4]. See [Weaver v. City of Topeka, No. 93-4213-SAC, 1993 WL 544568, at \\*2 \(D. Kan. Dec.21, 1993\)](#) (granting a motion to dismiss, the court said: "The court finds nothing in the definition or the proscriptive terms of the Act which could support such a broad reading.").

[FN5]. See [Burns v. Stafford Bd. of Educ., No. CV 93 53581 S., 1995 WL 348196 \(Conn. Super. Ct. June 2, 1995\)](#).

[FN6]. See [42 U.S.C. § 12114\(a\) \(1994\)](#).

[FN7]. Stephanie N. Mehta, *Big Conference Will Feature Eye-Catching Proposals: Topics Range from Enshrining English Language to Killing Disabilities Act*, *Wall St. J.*, June 12, 1995, at B2.

[FN8]. See, e.g., [Alaska Stat. § 18.80.210](#) (Michie 1995) (enacted in 1965); [Ariz. Rev. Stat. Ann. § 41-1463](#) (West 1995) (enacted in 1974); [Cal. Gov't Code § 12940](#) (West 1996) (enacted in 1980).

[FN9]. Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 484 (1992).

[FN10]. *Id.* at 8.

[FN11]. The *Wall Street Journal* has not been alone in this campaign of lies and distortions. For example, an editorial in the *San Francisco Chronicle* stated that disability is "a highly questionable definition that fails to differentiate between people in wheelchairs and junkies." Debra J. Saunders, *Free the Berkeley Three*, *S.F. Chron.*, July 27, 1994, at A19 (editorial). In fact, current users of illegal drugs are excluded from ADA coverage. See [42 U.S.C. § 12114\(a\) \(1994\)](#).

[FN12]. Epstein criticizes the Pregnancy Discrimination Act as using "the antidiscrimination norm as a tool for redistributive ends." Epstein, *supra* note 9, at 349. Obviously, the FMLA could also be described in such terms.

[FN13]. Joanne S. Lublin, *Family-Leave Law Can Be Excuse for a Day Off*, *Wall St. J.*, July 7, 1995, at B1. See also *Taking Leave*, *Wall St. J.*, April 17, 1995, at A12 (editorial); Gary Klotz, *Regulatory Chokehold: The High Cost of 'Employees'*

Rights, Wall St. J., August 3, 1993, at A14.

[FN14]. See Klotz, *supra* note 13, at A14.

[FN15]. Epstein, *supra* note 9, at 329.

[FN16]. See Richard Posner, *Economic Analysis of Law* 465 (4th ed. 1992).

[FN17]. See Maria J. Hanratty, *Social Welfare Programs for Women and Children: The United States Versus France*, in *Social Protection Versus Economic Flexibility* 301 (Rebecca M. Blank ed. 1994). For further discussion, see *infra* text accompanying notes 34-36.

[FN18]. [Pub. L. No. 104-193](#), 110 Stat. 2105 (Aug. 22, 1996).

[FN19]. Richard Epstein is not alone in engaging in a broad critique against antidiscrimination law and, in particular, affirmative action. See also Richard Posner, *The Economics of Justice* 351-407 (1981). Writing in 1981, Posner does not discuss disability discrimination law in his critique of affirmative action.

[FN20]. For a definition of capitalism, see *infra* Part I.

[FN21]. See Epstein, *supra* note 9, at 413-20.

[FN22]. See, e.g., Ron A. Vassel, *The Americans with Disabilities Act: The Cost, Uncertainty and Inefficiency*, 13 *J. of L. & Com.* 397 (1994); Christopher J. Willis, [Title I of the Americans with Disabilities Act: Disabling the Disabled](#), 25 *Cumb. L. Rev.* 715 (1994-95); Edward Felsenthal, *Are Antibias Laws Applied Too Broadly?*, Wall St. J., June 10, 1996, at B1.

[FN23]. The origins of law and economics in American law schools can be traced to Richard Posner, currently a judge on the U.S. Court of Appeals for the Seventh Circuit. In 1973, he published the first textbook-treatise on the economic analysis of legal rules and institutions. Now, in its fourth edition, this book aspires to make his brand of law and economics the foundational principle for assessing the entire legal system. See Posner, *supra* note 16. Unbalanced in the extreme, Posner's work presumes that the principles of value, utility, and efficiency should govern the analysis of law from an economic perspective based on the assumption that human behavior is rational. Why we should choose the concepts of value, utility, and efficiency to measure the appropriateness of a particular set of laws is not something that Posner even cares to address. His work is parochial; he never refers to examples outside of the United States. Readers who are interested in alternative perspectives on law and economics currently have few sources of guidance in law. Nearly all the published teaching materials are structured around consideration of efficiency and utility maximization, with no comparisons with other economic systems or jurisprudential perspectives. See, e.g., David Barnes & Lynn Stout, *Cases and Materials on Law and Economics* (1992); A. Mitchell Polinsky, *An Introduction to Law and Economics* (1992); Robert Cooter & Thomas Ulen, *Law and Economics* (1988). The only modest exception to this trend is a slim paperback by Robin Paul Malloy entitled *Law and Economics: A Comparative Approach to Theory and Practice* (1990). This book's notion of "comparative" is to share with the reader a variety of theoretical perspectives that one might use in thinking about the connection between law and economics. But all the cases that are chosen for the readers' examination are from the United States and tend to reflect a laissez-faire view of law and economics. It is doubtful that students could offer a sophisticated critique of law and economics based on these scant materials.

[FN24]. Brian Doyle notes one important drafting difference between some of these statutes. In the United States, reasonable accommodation is required. In Canada, the federal statute permits reasonable accommodation while not requiring it. Brian

Doyle, Disability Discrimination and Equal Opportunities: A Comparative Study of the Employment Rights of Disabled Persons 245-46 (1995). Doyle's assessment, however, is too narrow. In the Canadian cases that I have reviewed, for example, collective bargaining agreements for federal employees have clearly imposed broad application of a reasonable accommodation principle. Moreover, provincial legislation, also combined with collective bargaining agreements, often imposes reasonable accommodation requirements. See *infra* Part IVA. Finally, Canadian courts have implied a duty of reasonable accommodation in their Human Rights statute even though the duty is not explicitly mentioned. See, e.g., *Re Emrick Plastics Div. of Windsor Mold Inc. and Ontario Human Rights Comm'n*, [1992] 90 D.L.R.4th 476 (failure to reassign female spray painter during her pregnancy constitutes discrimination on the basis of sex).

[FN25]. Leonard Silk et al., *Making Capitalism Work* 2 (1996) (quoting House Majority Leader Dick Armey).

[FN26]. *Id.*

[FN27]. William J. Baumol, *Microtheory: Applications and Origins* 245 (1986).

[FN28]. Thomas E. Geu & Martha S. Davis, [Work: A Legal Analysis in the Context of the Changing Transnational Political Economy](#), 63 *U. Cin. L. Rev.* 1679, 1688 (1995).

[FN29]. See, e.g., Fair Labor Standards Act § 213(a)(6), [29 U.S.C. §§ 201-219 \(1988\)](#) (exemption for agricultural workers); Fair Labor Standards Act § 206(f), [29 U.S.C. §§ 201-219 \(1988\)](#) (exemption for domestic workers).

[FN30]. The Social Security Domestic Employment Reform Act of [1994, Pub. L. 103-387, § 2, 108 Stat. 4071 \(creating I.R.C. § 3510\)](#); see also Scott E. Grimes & Marylyn K. Wiggam, [Nanny Tax Act Eases Rules for Employers of Domestics](#), 23 *Tax'n for Law.* 212-16 (1995); Richard Berke, Clinton Seeks Change in Tad Rule that Scuttled Baird Nomination, *N.Y. Times*, April 24, 1993, at A2; Mark Linder, What Hath Zoe Baird Wrought? The New FICA Amendments on Domestic Service Employees, 66 *Tax Notes* 113 (1995).

[FN31]. See [29 U.S.C. § 2611\(4\)\(a\)\(i\) \(1993\)](#) (excluding businesses with less than fifty employees); [H.R. Rep. No. 103-8, pt 1, at 60 \(1993\)](#) (reporting that Act only covers five percent of American corporations).

[FN32]. John M. Keynes, *The General Theory of Employment, Interest, and Money* 13 (Harcourt Brace & Co. 1964) (1936).

[FN33]. *Id.*

[FN34]. See Rebecca M. Blank, *Introduction to Social Protection Versus Economic Stability* 12 (Rebecca M. Blank ed., 1994).

[FN35]. Jonas Pontusson, *Wither Northern Europe*, in *Making Capitalism Work*, *supra* note 25, at 119, 128.

[FN36]. See *id.*

[FN37]. I use the term "affirmative treatment" to encompass both the concepts of affirmative action and reasonable accommodation.

[FN38]. See, e.g., [Adarand Constructors, Inc. v. Pena](#), 515 U.S. 200 (1995); [Shaw v. Reno](#), 509 U.S. 630 (1993); [City of Richmond v. J.A. Croson](#), 488 U.S. 469 (1989).

[FN39]. Such developments have made me snidely inquire whether we should object to a Republican Congress trying to repeal antidiscrimination law since it rarely has served the interests of women or minorities in recent years. See Ruth Colker, [Whores, Fags, Dumb Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine](#), 7 *Yale J.L. & Feminism* 195 (1995). Ironically, Epstein would agree with me that affirmative action might flourish more easily in the absence of antidiscrimination law since reverse discrimination lawsuits would no longer be recognized. See Epstein, *supra* note 9, at 419 ("Were discrimination allowed as a matter of course, the greatest victory for the civil rights movement would be to see its own position prevail in an atmosphere wholly free from any threat of government coercion."). Epstein does not argue that affirmative action is per se a bad idea; he only argues that government should not impose affirmative action on the private sector.

[FN40]. See generally [Ruth Colker, Anti-Subordination Above All: Sex, Race, and Equal Protection](#), 61 *N.Y.U. L. Rev.* 1003 (1986).

[FN41]. [42 U.S.C. § 12111\(8\) \(1994\)](#).

[FN42]. See [McDonald v. Santa Fe Trail Transp. Co.](#), 427 U.S. 273 (1976).

[FN43]. Two exceptions to this general principle, nonetheless, exist. First, Title I of the ADA states that "discrimination" includes "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." [42 U.S.C. §12112\(b\)\(4\) \(1994\)](#). Second, Title V protects all "persons" from retaliation or coercion for participating in cases involving allegations of disability discrimination. [42 U.S.C. § 12203 \(1994\)](#).

[FN44]. [29 C.F.R. §1630.2\(m\) \(1997\)](#).

[FN45]. [42 U.S.C. § 12102\(2\) \(1994\)](#).

[FN46]. A parallel investigation that might further this thesis is the case law under the Age Discrimination in Employment Act (ADEA), [29 U.S.C. §§621-633\(a\)\(1994\)](#). Like the ADA, the ADEA only covers a subset of the population--people over the age of forty. [29 U.S.C. §631\(a\)\(m\)](#). It does not permit reverse discrimination claims. I would therefore predict that courts would narrowly define the scope of what kinds of claims are covered by the ADEA (since it can't arrive at a peculiar definition of our "age") and would not require preferential treatment to accommodate older persons. In Canada, by contrast, the age discrimination case law does require reasonable accommodation for older workers in order to maintain their employability. See *infra* Part II.B(2).

[FN47]. [42 U.S.C. §12111\(8\)\(1994\)](#).

[FN48]. [42 U.S.C. §12111\(9\)\(B\)\(1994\)](#).

[FN49]. Another aspect of the reasonable accommodation inquiry that conflicts with capitalism is its case-by-case orientation, because it does not permit employers to predict efficiently the outcome in discrete cases. According to Epstein, "the utter want of precision is not treated, as it should be, as a reason for jettisoning the system altogether." Epstein, *supra* note 9, at 490.

[FN50]. But see *infra* Part II.C(1) (discussing cases in which courts do not assume that insulin-dependent diabetics are persons with disabilities).

[FN51]. [56 F.3d 695 \(5th Cir. 1995\)](#).

[FN52]. [Id. at 700](#).

[FN53]. [Id. at 700](#).

[FN54]. [906 F. Supp. 1561 \(S.D. Ga. 1995\)](#).

[FN55]. See [id. at 1574](#).

[FN56]. [Id. at 1577](#) (quoting [Pedigo v. P.A.M. Transport, Inc., 891 F. Supp. 482, 485-86 \(W.D. Ark. 1994\)](#) (footnote omitted)).

[FN57]. [891 F. Supp. 482 \(W.D. Ark. 1994\)](#).

[FN58]. [Id. at 486](#).

[FN59]. Part 1 of Section 15 of the Canadian Charter protects individuals from discrimination on the basis of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Can. Const. (Constitution Act, 1982), § 15(1). Subsection (2) of Section 15 then protects affirmative action programs from Section 15(1) attack. It states that subsection (1) "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." [Id. at § 15\(2\)](#).

[FN60]. "It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce advantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the ... disability of members of that group by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group." Canadian Human Rights Act, R.S.C., ch. H-6, [§16 \(1995\)](#).

[FN61]. The Ontario Human Rights Act, for example, in [section 14\(1\)](#) provides that an equality right is "not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of [equality] rights." Human Rights Code, R.S.O. 1990, ch. H.19, [§ 14\(1\)](#).

[FN62]. See generally [Roberts v. Ontario](#), [1994] 117 D.L.R.4th 297.

[FN63]. See generally [Re Embrick Plastics Div. of Windsor Mold Inc. and Ontario Human Rights Comm'n](#), [1994] 90 D.L.R.4th 476 (requiring employer to accommodate pregnant woman who could not safely work in the spray painting area); [Re Ontario Human Rights Comm'n and Simpson-Sears](#), [1985] 23 D.L.R.4th 321, 335 (stating a duty "to take steps to accommodate the complainant, short of undue hardship" in religious discrimination case; placing burden of proof on employer to demonstrate undue hardship); [Ontario \(Human Rights Commission\) v. Etobicoke \(Borough\)](#), [1982] 132 D.L.R.3d 14, 22-23 (requiring multi-factor analysis to determine if mandatory retirement can be imposed upon firefighters below the age of 65).

[FN64]. Reflecting on the federal disability discrimination legislation in Canada, Brian Doyle describes the scope of reasonable accommodation more narrowly than I have. He says "Although employers are permitted to take special action to prevent, eliminate or reduce disadvantage faced by disabled individuals in employment opportunities, this provides blessing only to

voluntarily conceded reasonable accommodation." Doyle, *supra* note 24, at 228. Relying on religious discrimination case law involving the duty of reasonable accommodation, Doyle speculates that Canadian courts will interpret the reasonable accommodation requirement narrowly in the disability context. I do not share his speculation because the religious cases offer the courts very different problems. In the United States, the courts have resisted importing the religious reasonable accommodation rulings into disability discrimination law.

[FN65]. [1994] 42 L.A.C.4th 86.

[FN66]. The applicable Human Rights Code stated that discrimination means "failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any [disability] characteristic." Human Rights Code, S.M. 1987-88, ch 45, §9(1).

[FN67]. 42 L.A.C.4th at 98. Concretely, the arbitrator found that it would make sense to have a more up-to-date medical assessment of plaintiff's abilities to be performed with consideration given to medical rehabilitation or retraining, for the government to consider necessary modifications to job positions prior to plaintiff's interview for a particular position, and for the government to consider a trial period for a new position to assess plaintiff's qualification to perform it. The arbitrator concluded that such proposals might allow plaintiff to compete on a more "level playing field." *Id.* at 106. In other words, affirmative action creates equal opportunity.

[FN68]. The Manitoba decision is not an isolated example of a liberal interpretation of the reassignment rule. See, e.g., *Babcock and Wilcox Indus. Ltd. and U.S.W.A.*, [1994] 42 L.A.C.4th 209 (ruling that grievor, who was an alcoholic, should be "put back into the employer's place of work to resume his duties" once the physician certifies that grievor is "fit to return to work"); *Re Canada Post Corp. and Canadian Union of Postal Workers*, [1993] 38 L.A.C.4th 1 (ruling that employer has obligation to assign grievor to vacancy in another mail unit which would not involve heavy lifting); *Re United Air Lines and Int'l Ass'n of Machinists & Aerospace Workers*, [1993] 33 L.A.C.4th 89 (ordering reinstatement with modified work conditions following head injury to employee).

[FN69]. But see *Re Can. Nat'l Ry and C.A.W.-Canada*, [1994] 43 L.A.C.4th 129 (arbitrator refuses to order reinstatement with reasonable accommodation where grievant was diagnosed as having kleptomania and had received no treatment for his condition in three years subsequent to his discharge; arbitrator concluding "it is, in my view, beyond the standard of undue hardship to ask the employer to return the individual to the workplace who will, in all probability, steal again and whose day-to-day employment will involve changing a largely unsupervised work setting to require continual vigilance on the part of supervisors, fellow employees and security personnel"); *Re Canada Post Corp. and Canadian Union of Postal Workers*, [1993] 32 L.A.C.4th 289 (accommodating employee does not require pushing seniority rated employee from job).

[FN70]. See *Disabled Person (Employment) Act 1994*, ch. 10, §17. "This section is prospectively repealed by the *Disability Discrimination Act 1995*, ss 61(7), 70(5), Sch. 7, as from a day to be appointed." (LEXIS Annotation).

[FN71]. *Disability Discrimination Act, 1995*, ch. 50, §6(1)(b) (emphasis added).

[FN72]. See *id.* at §§ (6)(3)(c), (6)(3)(c)(e).

[FN73]. See *id.* § 2(6)(7) ("Nothing in this part is to be taken to require an employer to treat a disabled person more favourable than he treats or would treat others.") Nonetheless, reassignment for people with disabilities might occur in Great Britain under general principles of employment law. Since 1978, British employees have been statutorily protected from unfair dismissal by the *Employment Protection (Consolidation) Act*, under which the employer must demonstrate that he reasonably

believed that the employee engaged in misconduct. Halisbury's Statutes, Vol. 16, Employment Protection Act, Part V (1990). There is therefore a seeming conflict between Great Britain's recent enactment of disability discrimination protection and its pre-existing protection for all workers. I would explain this discrepancy by suggesting that current disability law is reflective of contemporary conservative economic influences in Great Britain and the common law is reflective of prior support for the labor movement. More extensive investigation of the relationship between common law employment-at-will principles and disability discrimination law is beyond the scope of this article.

[FN74]. See *Jamal v. Secretary, Department of Health*, [1988] 14 N.S.W.L.R. 14.

[FN75]. See, e.g., *Scott & Anor v. Telstra Corp. Ltd.* P92-717 (Human Rights and Equal Opportunity Commission ruling) (requiring employer to provide tele-typewriters to profoundly hearing impaired employees). See generally Bonnie Poitras Tucker, *The Disability Discrimination Act: Ensuring Rights of Australians with Disabilities, Particularly Hearing Impairments*, 21 Monash U. L. Rev. 15, 26 n.74 (1995) (describing several cases under Australian state disability discrimination law in which plaintiffs prevailed by demonstrating a failure to reasonably accommodate their disabilities).

[FN76]. The term "disability" means, with respect to an individual:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;(B) a record of such an impairment; or(C) being regarded as having such an impairment.[42 U.S.C. § 12102\(2\) \(1994\)](#).

[FN77]. [29 C.F.R. § 1630.2\(i\) \(1996\)](#).

[FN78]. [29 C.F.R. § 1630.2\(j\)\(1\) \(1996\)](#).

[FN79]. [29 C.F.R. § 1630.2\(j\)\(3\) \(1996\)](#) (emphasis in original). Additional factors are also mentioned in [§1630.2\(j\)\(3\)\(ii\) \(1996\)](#).

[FN80]. See [29 C.F.R. pt. 1630 app. § 1630.2\(j\) \(1996\)](#) (providing interpretive guidance). The regulations promulgated by the EEOC under the ADA have been promulgated pursuant to Congress' directive. See [42 U.S.C. § 12116](#) (requiring EEOC to promulgate regulations by July 26, 1991). Although the interpretive guidance was promulgated as an appendix to the C.F.R. at the same time as the regulations were promulgated, the EEOC has stated that it does not intend that guidance to have the rule-making authority of regulations. The interpretive guidance "represents the Commission's interpretation of the issues discussed, and the Commission will be guided by it when resolving charges of employment discrimination." 29 C.F.R. pt. 1630 app. § 1630 (1996).

[FN81]. The ADA does not list any activities in the statutory language as inherently a "major life activity." That term was delegated to the EEOC to define.

[FN82]. The only advantage to concluding that the individual is not disabled rather than concluding that the individual is not qualified is that the unqualified, but disabled, individual might be entitled to consideration for reassignment as a reasonable accommodation if he became injured as an incumbent employee. He therefore might become eligible for consideration for reassignment to a non-playing position in the front office. But I do not see why that possibility should concern the EEOC, especially since, as we have seen, the courts have narrowly construed the reassignment requirement.

[FN83]. [36 F.3d 939 \(10th Cir. 1994\)](#).

[FN84]. *Id.* at 943.

[FN85]. See, e.g., [Chandler v. City of Dallas, 2 F.3d 1385 \(5th Cir. 1993\)](#) (city employee); [Jasany v. United States Postal Serv., 755 F.2d 1244 \(6th Cir. 1985\)](#) (postal worker); [Elstner v. Southwestern Bell Tel. Co., 659 F. Supp. 1328 \(S.D. Tex. 1987\)](#), aff'd, [863 F.2d 881 \(5th Cir. 1988\)](#) (service technician).

[FN86]. [29 C.F.R. pt. 1630 app. § 1630.2\(j\) \(1996\)](#) (providing interpretive guidance).

[FN87]. See, e.g., [Bombrys v. City of Toledo, 849 F. Supp. 1210 \(N.D. Ohio. 1993\)](#) (ruling concerning a police officer requesting permission to carry food or glucose gel or tablets on his person, as well as a pen-like device containing an insulin injection kit).

[FN88]. See, e.g., [Deckert v. City of Ulysses, No. 93-1295-PFK, 1995 WL 580074 \(D. Kan. Sept. 6, 1995\)](#); [Coghlan v. H. J. Heinz Co., 851 F. Supp. 808 \(N.D. Tex. 1994\)](#).

[FN89]. See [Deckert, 1995 WL 580074](#).

[FN90]. See id.; [Coghlan, 851 F. Supp. 808](#).

[FN91]. See [42 U.S.C. §§ 12210-11 \(1995\)](#).

[FN92]. See [42 U.S.C. § 12114 \(1995\)](#).

[FN93]. [29 C.F.R. pt.1630 app. §1630.2\(j\) \(1996\)](#).

[FN94]. Human Rights Code, R.S.O., 1990, ch. H.19, [§ 10\(1\)](#). This language is in direct contrast to the American courts that have resisted making the ADA into an expanded worker's compensation statute. See supra text accompanying note 58.

[FN95]. Canadian Human Rights Act, R.S.C., 1985, ch. H.6, § 25.

[FN96]. Human Rights Code, R.S.O. 1990, ch. H.19, [§ 10\(1\)\(a\)](#).

[FN97]. See *Re Canadian Nat'l Ry Co. and C.A.W.-Canada* [1994] 43 L.A.C.4th 129.

[FN98]. See *Re Babcock and Wilcox Indus. Ltd. and U.S.W.A., Loc. 2859*, [[[1994] 42 L.A.C.4th 209.

[FN99]. The British Disability Discrimination Act of 1995 defines disability as "a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities." Disability Discrimination Act, 1995, ch. 50, § 1(1).

[FN100]. Id. §1(1), sched. 1.

[FN101]. "An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect." Id. [§ 6\(1\)](#), sched. 1. See also id. [§ 6\(3\)\(a\)](#), sched. 1 (exempting impairments which are correctable by spectacles or contact lenses).

[FN102]. Disability is defined as:

(a)total or partial loss of the person's bodily or mental functions; or (b)total or partial loss of a part of the body; or (c)the presence in the body of organisms causing disease or illness; or (d)the presence in the body of organisms capable of causing dis-

ease or illness; or (e)the malfunction, malformation or disfigurement of a part of the person's body; or (f)a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or (g)a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behavior; and includes a disability that: (h)presently exists; or (i)previously existed but no longer exists; or (j)may exist in the future; or (k)is imputed to a person.

Disability Discrimination Act, 1992, §135(4).

[\[FN103\]](#). *Id.*

[\[FN104\]](#). See, e.g., *Archibald v. Commissioner, NSW Fire Brigades P92-736* (ruling by Equal Opportunity Tribunal in New South Wales) (ruling that complainant who had reconstructive surgery on both his knees was a person with a disability).

[\[FN105\]](#). See, e.g., *Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir. 1994) (holding that regular attendance is an essential job function and that employee with disability who is excessively absent is therefore not a "qualified" individual under federal law).

[\[FN106\]](#). See, e.g., *Re Hamilton Street Ry. Co. and Amalgamated Transit Union, Local 107* [1994] 41 L.A.C.4th 1 (classifying grievor who missed work nearly half of the year for a several year period as a qualified individual with a disability under Ontario law); *Re Toronto Hosp. and Ontario Nurses' Ass'n*, [[1992] 31 L.A.C.4th 44 (grievor prevailed in a case involving excessive absenteeism due to a disability). See also *Re Canadian Nat'l Ry. Co. and Niles et al.* [1992] 94 D.L.R.4th 33 (Fed. Ct. of Appeal) (finding that employee's absenteeism is a lawful basis of discharge only because that employee did not offer sufficient evidence of rehabilitation from his condition of alcoholism).

[\[FN107\]](#). See ADA Title I Interpretive Guidance, [29 C.F.R. § 1630.2\(I\)](#) ("Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.") Courts have generally followed these ADA guidelines. See, e.g., *Gudenkauf v. Stauffer Communications, Inc.*, 922 F. Supp. 465, at 475-76 (D. Kan. 1996) (ruling that a woman experiencing a normal pregnancy cannot use the FMLA to request leave during her pregnancy). But see *Deborah A. Calloway, Accommodating Pregnancy in the Workplace*, 25 *Stetson L. Rev.* 1 (1995) (arguing that ADA should be applied to pregnant women seeking accommodations at the workplace).

[\[FN108\]](#). But see *California Fed. Sav. and Loan Assoc. v. Guerra*, 479 U.S. 272 (1987) (permitting California to provide pregnant women with preferential treatment).

[\[FN109\]](#). See, e.g., *Troupe v. The May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (holding that an employer is not required to accommodate an employee's nausea during pregnancy).

[\[FN110\]](#). See Ruth Colker, *Pregnant Men: Practice, Theory and the Law* (1994).

[\[FN111\]](#). But see *Re Ontario Human Rights Commission and Board of Commissioners of Police of the Town of Fort Frances* [1988] 55 D.L.R.4th 218 (Ontario High Court of Justice, Divisional Court) (finding that police department did not discriminate against pregnant female officer by imposing uniform and gun belt requirements on her during her pregnancy, but finding that department discriminated in refusing to reassign duties when she became temporarily disabled due to pregnancy).

[\[FN112\]](#). *Maganuco v. Leyden Community High Sch. Dist.* 212, 939 F.2d 440, 444 (7th Cir. 1991).

[\[FN113\]](#). See *Re Ontario Secondary School Teachers' Federation, District 34 and Barton*, [1996] 136 D.L.R.4th 34.

[FN114]. *Id.* at 50.

[FN115]. See, e.g., *Re Belleville Gen. Hosp. and Serv. Employees Union, Local 183* [1993] 37 L.A.C.4th 375 (deferring to judgment of employee's physician despite extensive history of absenteeism in violation of company policy).

[FN116]. For example, in a typical case involving a union grievance, the arbitrator deferred to the judgment of the employee's physician while recognizing that the "evidence places the grievor on the borderline and it may turn out to have been too optimistic." *Re Belleville Gen. Hosp. and Serv. Employees Union, Local 183* [1993] 37 L.A.C.4th 375. A United States court is unlikely to interpret a close case in favor of the employee.

[FN117]. [29 U.S.C. §§ 2601-2654 \(1994\)](#).

[FN118]. An eligible employee "means an employee who has been employed (1) for at least 12 months by the employer with respect to whom leave is requested ... and (2) for at least 1,250 hours of service with such employer during the previous 12-month period." [29 U.S.C. § 2611\(2\)\(1994\)](#).

[FN119]. The term employer "means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar years." [29 U.S.C. § 2611\(4\)\(a\)\(1994\)](#).

[FN120]. [29 C.F.R. § 825.114\(a\) \(1997\)](#) (emphasis in original).

[FN121]. Marcus D. Ward, [The Family and Medical Leave Act of 1993: "A Sound Investment, or an Expensive Lesson in Employee Benefits?"](#), 20 *T. Marshall L. Rev.* 413, 422 (1995).

[FN122]. Mona L. Schuchmann, [The Family and Medical Leave Act of 1993: A Comparative Analysis with Germany](#), 20 *J. Corp. L.* 331 (1995).

[FN123]. See Edmund L. Andrews, *New Hard Line by Big Companies Threatens German Work Benefits*, *N.Y. Times*, October 1, 1996, at A1. The paid leave situation, however, is also coming under attack in Europe. The German Parliament, for example, has approved a bill that reduces the minimum required sick pay from 100 % of pay for six weeks to 80 %. Although labor unions have criticized this modification, it has gone into effect over their opposition. *Id.* at C3. Nonetheless, I would argue that even a reduced level of benefits in European countries are far, far more generous to workers than the existing benefits in the United States.

[FN124]. [S. Rep. No. 103-3, at 6 \(1993\)](#), reprinted in 1993 U.S.C.C.A.N. 3, 30-31.

[FN125]. *Id.*

[FN126]. *Id.*

[FN127]. [29 C.F.R. §§ 825.114\(a\)\(2\)\(ii\) \(1997\)](#); see also [29 C.F.R. § 825.800\(2\) \(1997\)](#).

[FN128]. See [Gudenkauf v. Stauffer Communications, Inc.](#), 922 F. Supp. 465 (D. Kan. 1996).

[FN129]. [29 C.F.R. § 825.114 \(1997\)](#).

[FN130]. See [H.R. Rep. No. 103-8](#), at 103 ("The term 'serious health condition' is not intended to cover short-term conditions

for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies.")

[FN131]. See, e.g., [Brown v. J.C. Penney Corp.](#), 924 F. Supp. 1158 (S.D. Fla. 1996) (plaintiff not covered by FMLA for absence from work following the death of her father).

[FN132]. See [Brannon v. OshKosh B'Gosh](#), 897 F. Supp. 1028 (M.D. Tenn. 1995).

[FN133]. See id.

[FN134]. See [Hott v. VDO Yazaki Corp.](#), 922 F. Supp. 1114 (W.D. Va. 1996).

[FN135]. See [Seidle v. Provident Mutual Life Ins. Co.](#), 871 F. Supp. 238 (E.D. Pa. 1994).

[FN136]. See [Oswalt v. Sara Lee Corp.](#), 889 F. Supp. 253 (N.D. Miss. 1995).

[FN137]. See [Brannon](#) 897 F. Supp. 1028, 1031 (Physician "did not personally recall anything about the examination, and his testimony was based exclusively on what was reflected in plaintiff's clinical records.").

[FN138]. See Warren Leary, Health Care Lagging Among Blacks and Poor, N.Y. Times, Sept. 12, 1996, at A1.

[FN139]. See also [Freemon v. Foley](#), 911 F. Supp. 326 (N.D. Illinois 1995) (plaintiff discharged after she failed to provide sufficient documentation concerning her children's chicken pox).

[FN140]. See also [George v. Associated Stationers, No. 1:95CV1345, 1996 WL 406169 \(N.D. Ohio June 3, 1996\)](#) (plaintiff used hospital emergency room to diagnose and treat his chicken pox several days after becoming ill).

[FN141]. Compare id. with [Seidle v. Provident Mutual Life Ins. Co.](#), 871 F. Supp. 238 (E.D. Pa. 1994).

[FN142]. See [Bauer v. Dayton-Walther Corp.](#), 910 F. Supp. 306 (E.D. Ky. 1996).

[FN143]. See [Day v. Excel Corp., No. 94-1439-JTM, 1996 WL 294341 \(D. Kan. May 17, 1996\)](#).

[FN144]. Id. at \*13.

[FN145]. [Tuberville v. Personal Finance Corp., No. 3:95CV150-B-A, 1996 WL 407571 \(N.D. Miss. June 5, 1996\)](#).

[FN146]. Id. at \*3.

[FN147]. Thus, when Germany tried to cut back its compensation for sick leave, unions challenged what they perceived to be modifications of the employment contract. See Andrews, *supra* note 123. Similarly, unions have responded with widespread strikes when France has tried to cut back on employment rights. See Thomas Kamm, *Strikes Start to Fizzle Out in France; Effect on Reforms, Economy Will Linger*, Wall St. J., Dec. 18, 1995, at A11; Craig Whitney, *Public-Employee Strike in France Fosters A Day of Discontent*, N.Y. Times, Oct. 11, 1995, at A1. The highly capitalistic structure of the United States means that few workers have guaranteed job rights and that a union response to cutbacks cannot be anticipated.

[FN148]. See *Re Bell Canada and Communications, Energy & Paperworkers Union of Canada*, [1996] 53 L.A.C.4th 228.

[FN149]. See generally Carol Daugherty Rasnic, [The United States' 1993 Family and Medical Leave Act: How Does it Compare with Work Leave Laws in European Countries?](#), 10 *Conn. J. Int'l L.* 105 (1994).

[FN150]. See [id. at 113-32](#) (country comparison chart).

[FN151]. See *id.*

[FN152]. See [Jane Rigler, Analysis and Understanding of the Family and Medical Leave Act of 1993](#), 45 *Case W. Res. L. Rev.* 457 (1995).

[FN153]. See Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. § 102(2) (26 workweeks in one calendar year for general disability leave); § 103(a) (18 work weeks in any two year period upon advance notice to employer for parental leave).

[FN154]. See Family and Medical Leave Act of 1989, S. 345, 101st Cong. §§ 103(a)(1), 104(a)(2).

[FN155]. See H.R. 770, 101st Cong. § 102(a) (1990).

[FN156]. President Bush vetoed the bill on June 29, 1990 and again on September 22, 1992. See generally Donna Lenhoff & Claudia Withers, [Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace](#), 3 *Am. U. J. Gender & L.* 39, 64 (1994).

[FN157]. See Family and Medical Leave Act of 1993, S. 5, 103d Cong.

[FN158]. See H.R. No. 103-8, pt. 2 (1993). See also Hearing on [S. 5](#) Before the Subcommittee on Children, Family, Drugs and Alcoholism of the Committee on Labor and Human Resources, 102d Cong. (1991) (includes testimony of Dr. Berry Brazelton).

[FN159]. See *id.*

[FN160]. See generally *id.*

[FN161]. The Family and Medical Leave Act: Hearing on H.R.1, Hearing Before the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, 103d Cong. 27 (1993).

[FN162]. *Id.*

[FN163]. See generally Epstein, *supra* note 9.

[FN164]. Of course, paid parenting leave could be created explicitly for the purpose of harming women's participation in the labor force and, if so, should be opposed on those grounds. For example, Professor Frances Olsen reported at Challenging Boundaries, a feminist legal conference, that Slovenia provides three years of paid parenting leave to mothers after the birth of a child and speculates that the purpose of such leave is to keep women out of the public, paid workforce. Comments of Frances Olsen at Yale Law School, Nov. 9, 1996. That example, however, appears to be isolated and extreme, and not reflective of the policies of other countries in Western Europe, Canada, Australia, or Great Britain.

[FN165]. See [29 U.S.C. § 2612\(e\)\(2\)\(B\) \(1994\)](#).

[\[FN166\]. Manual v. Westlake Polymers Corp., 66 F.3d 758, 764 \(5th Cir. 1995\).](#)

[\[FN167\]. See also Hendry v. GTE North, Inc., 896 F. Supp. 816 \(N.D. Ind. 1995\)](#) (employee found not to have to strictly comply with notice requirements under FMLA because employer did not properly post information about FMLA at the workplace).

[\[FN168\]. Johnson v. Primerica, No. 94 Civ.4869\(MBM\)\(RLE\), 1996 WL 34148 at \\*1 \(S.D.N.Y. Jan. 30, 1996\).](#)

[\[FN169\]. Id.](#) at \*7.

[\[FN170\]. See Fry v. First Fidelity Bancorporation, No. CIV. A. 95-6019, 1996 WL 36910 \(E.D. Pa. Jan. 30, 1996\).](#)

[\[FN171\]. Id.](#) at \*4.

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