AGING WORKERS IN THE POSTINDUSTRIAL ERA

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It is fitting that *Stetson Law Review* has devoted this special symposium issue to the developing field of elder law. The reality is that all of us who are working in the law today need to know more about this field. It is simply a matter of numbers and time. Thanks to the baby boom generation, elder law should be a major growth area for lawyers practicing in the twenty-first century. As members of the "forever young" baby boom generation move into their "adult years" (fifty and beyond), we can expect legal and political issues involving diverse topics such as the social security system, age discrimination, mandatory retirement, pensions and pension law, euthanasia and physician-assisted suicide, elderly criminal offenses, and a host of still to be discovered issues dealing with the law of aging, or what is known as elder law.

This Article will explore how the expanding concerns of elder law might relate to the developing field of employment law.[1] Modern employment law has developed around a cluster of legal rights relevant to non-union employees who work without term contracts, or what employment lawyers call "at-will" employment.[2] At-will employment relations are subject to a general presumption that, absent a term of duration, either party may terminate an employment relationship at will.[3] The employee can rebut this presumption by show-

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1. What is now known as "employment law" involves a relatively modern body of law (judicial and legislative) governing the employer-employee relationship outside the unionized workplaces covered by collective bargaining agreements (unions and collective bargaining agreements are, of course, the subject of labor law). The focus of employment law is varied and diverse, ranging from federal and state anti-discrimination legislation to constitutional adjudication in the United States Supreme Court as well as common-law adjudications in the state courts. *See* MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS (3d ed. 1994).

2. *See, e.g.*, 1 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.1 (3d ed. 1992).

3. *See, e.g.*, Forrer v. Sears, Roebuck & Co., 153 N.W.2d 587, 589–90 (Wis. 1967).

ing that the employer expressly or impliedly intended a specific term of employment or agreed to terminate the relationship only for cause.[4] Federal and state anti-discrimination legislation which forbids the employer to terminate the relationship also governs the at-will relationship, especially legislation with any intent to discriminate on the grounds of race, gender, ethnicity, age, disability, or pension status of the employee.[5]

The specific objective of this Article will be to examine how the regime of at-will employment has responded (or failed to respond) to the plight of older workers (workers over the age of forty) who are struggling to survive the current wave of "restructuring," "outsourcing," "lean production," "reengineering," "reduction-in-force" (RIF), and "downsizing" now occurring in what is called, for lack of a better term, the "postindustrial era."[6] By postindustrial

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4. *See, e.g.*, Foley v. Interactive Data Corp., 765 P.2d 373, 385 (Cal. 1988).

5. Race, ethnicity, and national origin discrimination are the subject of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000a to 2000h-6 (1994). Six states (California, Connecticut, Massachusetts, New Jersey, Vermont, and Wisconsin), the District of Columbia, and more than 50 cities have enacted laws which prohibit discrimination in private employment based on sexual orientation. *See* ROTHSTEIN & LIEBMAN, *supra* note 1, at 346 n.4. Age discrimination in employment is now prohibited by the Age Discrimination and Employment Act (ADEA), which Congress enacted in 1967. *See* 29 U.S.C. §§ 621–634 (1994). Disability discrimination is now prohibited by the Americans with Disabilities Act of 1990. *See* 42 U.S.C. § 12112 (1994). In 1974, Congress also enacted the Employee Retirement and Security Act of 1974 (ERISA) to prohibit pension discrimination. *See* Pub. L. No. 93-406, 88 Stat. 829 (codified as amended primarily at 29 U.S.C. §§ 1001–1461 (1994)). Section 510 of ERISA ostensibly prohibits this form of discrimination to protect employees against loss of their pension rights. *See* 29 U.S.C. § 1140 (1994). The focus of this Article will be on age and pension discrimination prohibited by ADEA and ERISA.

6. The *postindustrial era* signifies the emergence of a new type of social life and a new economic order, which social theorists have called the "postindustrial" or "consumer" society of late capitalism. *See* FREDRIC JAMES, *Postmodernism and Consumer Society*, *in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 111, 112–13 (Hal Foster ed., 1983). *See also* Gary Minda, *Antitrust At Century's End*, 48 SMU L. REV. 1749, 1750 n.4 (1995). Some of the key features of the postindustrial era include:

> the increasing importance of multinational corporations and institutions in the economy; the development of an information economy rather than one based on old notions of "production"; economic power resulting from the ability to manipulate information rather than the fact of "ownership"; and the decreasing relevance of the nation-state as the source of power and influence.

Id. *See also* FRED BLOCK, POSTINDUSTRIAL POSSIBILITIES: A CRITIQUE OF ECONOMIC DISCOURSE 5 (1990); MICHAEL HAMMER, BEYOND REENGINEERING: HOW THE PROCESS-CENTERED ORGANIZATION IS CHANGING OUR WORK AND OUR LIVES 7 (1996); Peter Cappelli, *Rethinking Employment*, 33 BRIT. J. INDUS. REL. 563, 563–64 (1995).

For a discussion of how industrial organizations are responding to changes in the era, this Article refers to the culmination of social, political, and economic forces now transforming world economies into global market places linked by new informational technologies. The new workplaces of the postindustrial era represent what Robert Reich has identified as "new organizational webs of high-value enterprise, which are replacing the old core pyramids of high-volume enterprise . . . reaching across the globe."[7]

The postindustrial era signifies the emergence of a new organizational structure that is changing employers' and employees' understanding of the nature of work. In the past, Adam Smith's notion of specialization of work defined work as a task-centered activity. Employers fragmented the production process into simple tasks, enabling each worker to specialize in a particular function. Today, dramatic developments in information and computer technology have altered and reinvented the nature of work. Work is "process-oriented" functions, linked by computer software systems which integrate tasks into "team systems," managed by "coaches and process managers" and "team specialists."[8] By focusing on "process" instead of "task," and by taking advantage of computer software and information technology, an emerging process-oriented organization has brought about the replacement and elimination of large numbers of workers in hundreds of large companies. This Article explores how these changes in the nature of work will affect the lives

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postindustrial era, including discussion of "restructuring," "outsourcing," "lean production," "reengineering," "reduction-in-force," and "downsizing," see JEREMY RIFKIN, THE END OF WORK: THE DECLINE OF THE GLOBAL WORK FORCE AND THE DAWN OF THE POST-MARKET ERA (1995); MARTIN KENNEY & RICHARD FLORIDA, BEYOND MASS PRODUCTION: THE JAPANESE SYSTEM AND ITS TRANSFER TO THE U.S. (1993). *See also* MCKINSEY GLOBAL INST., MANUFACTURING PRODUCTIVITY (1993); MICHAEL HAMMER & JAMES CHAMPY, REENGINEERING THE CORPORATION (1993); Simon Head, *The New, Ruthless Economy*, XLIII N.Y. REV. BOOKS, Feb. 29, 1996, at 47, 47–52. "Restructuring" refers to corporate reorganizations which have resulted in plant closings, reduction-in-force lay offs, and permanent displacement of workers. "Outsourcing" refers to efforts of large corporations seeking to cut their costs by contracting out (outsourcing) as much production as possible. "Lean production" refers to the effort of mass production industries to cut costs by reducing the need for skilled labor in the production process and by maintaining inventories that arrive "just in time" to save on warehouse and finance costs. "Reduction-in-force" (RIF) and "downsizing" generally refer to the result of a business implementing cost containment strategies designed to reduce the number of workers needed in the production process.

7. ROBERT REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM 110 (1991).

8. *See* HAMMER, *supra* note 6, at 7–9.

of aging workers, and how employment law might respond to those changes.

Part I will survey the problems that aging workers face in the postindustrial firm organized under new theories of business organization. This Article will discuss how new mass-production theories of organization are changing the nature of work and threatening the job security of late-career employees. Part II will examine how downsizing has heightened the job insecurity of many elderly workers throughout the 1990s. Part III will then examine the implications of downsizing for the pending social security crisis. In Part III, the Article will discuss the relevance or non-relevance of age discrimination legislation in responding to the current plight of elderly workers. Part IV will shift to the relevance of employment law to these changes. Part V will consider the relevance or non-relevance of federal pension discrimination law. While the discussion in Parts IV and V focuses on federal legislation, the discussion is applicable to related state anti-discrimination legislation. Part VI will then consider the relevance of the common law rule of at-will employment. The conclusion will speculate on the broader social implications of how the new postindustrial form of organization may further solidify the power of employers under the at-will regime of employment and thereby intensify the anxiety of elderly workers in the future.

I. REORGANIZING WORK IN THE NEW, POSTINDUSTRIAL FIRM

In the interconnected web of new global marketplaces, new forms of industrial competition are emerging precisely at the time the population is aging. This new form of competition is bringing about fundamental changes in the mass-production and information economies, changes rivaling those that occurred during the Industrial Revolution at the turn of the last century. These changes have initially manifested themselves in the large-scale displacement of older, mainly white, male long-term service employees.[9]

Since the late 1980s, large industrial corporations have begun experimenting with new management techniques to produce more

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9. *See* Cappelli, *supra* note 6, at 579 (reporting on studies establishing that older white men have seen the greatest decline in job security since the 1980s).

output with fewer resources and less labor.[10] They have cut production costs by restructuring their operations, eliminating unnecessary warehousing, and reducing labor costs. These corporations have achieved this result by outsourcing[11] as much production as possible to smaller independent manufacturers whose wage costs are lower, and by reorganizing the production process so that stocks of inventory arrive "just in time" when they are needed in the assembly process. In service industries, a similar reorganization has resulted from the introduction of new mass-production techniques implemented through computer technology by symbolic analysts or knowledge workers to streamline and reduce the service function.

In manufacturing, the advent of "lean production" has been responsible for the elimination of the jobs of late-career workers, many of whom are over the age of forty.[12] "Lean production" is a term used to describe the mass-production techniques of organiza-

10. *See* RIFKIN, *supra* note 6, at 96–106. For analysis of the effects of these changes on employment, see CONGRESSIONAL BUDGET OFFICE STUDY, CONGRESS OF THE UNITED STATES, DISPLACED WORKERS: TRENDS IN THE 1980S AND IMPLICATIONS FOR THE FUTURE (Feb. 1993) [hereinafter TRENDS]. *See generally The Downsizing of America* series published by N.Y. TIMES from Mar. 3–9, 1996 (describing the emotional impact of downsizing in a seven-day series); *see, e.g.*, Louis Uchitelle & N.R. Kleinfield, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, § 1, at 1; N.R. Kleinfield, *The Downsizing of America: In the Workplace Musical Chairs; The Company as Family, No More*, N.Y. TIMES, Mar. 4, 1996, at A1; Rick Bragg, *The Downsizing of America: Big Holes Where the Dignity Used to Be*, N.Y. TIMES, Mar. 5, 1996, at A1; Rick Bragg, *The Downsizing of America: More than Money, They Miss the Pride a Good Job Brought*, N.Y. TIMES, Mar. 5, 1996, at A17; Sara Rimer, *A Hometown Feels Less Like Home*, N.Y. TIMES, Mar. 6, 1996, at A1; Kirk Johnson, *In the Class of '70, Wounded Winners*, N.Y. TIMES, Mar. 7, 1996, at A1; Kirk Johnson, *The Downsizing of America: For Bucknell's Class of '96, Pressure to Focus, and Fast*, N.Y. TIMES, Mar. 7, 1996, at A22; Elizabeth Kolbert & Adam Clymer, *The Politics of Layoffs: In Search of a Message*, N.Y. TIMES, Mar. 8, 1996, at A1; Floyd Norris, *The Downsizing of America: On Wall Street: For Richer, for Poorer?*, N.Y. TIMES, Mar. 9, 1996, at A13; *see also* HEAD, *supra* note 6.

11. *See* HEAD, *supra* note 6, at 48. As Simon Head noted, "[t]he large industrial corporation can cut its costs even further by contracting out (or `outsourcing') as much production as possible to smaller, independent producers, whose wage costs will be lower than its own . . . . In the US [sic], the workers who are hired as a result of outsourcing are usually non-union and among the lower paid." *Id*.

12. *See* RIFKIN, *supra* note 6, at 32–33, 166–67. *See also* A REPORT BY THE COUNCIL OF ECONOMIC ADVISERS, U.S. DEPARTMENT OF LABOR, JOB CREATION AND EMPLOYMENT OPPORTUNITIES: THE UNITED STATES LABOR MARKET 1993–1996 (Apr. 1996) [hereinafter JOB CREATION] (reporting a fundamental change in the *incidence* of job displacement of older workers). *See generally* Gary Minda, *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment* 2 HASTINGS L.J. ___ (forthcoming 1997) (editor's note: at time of this publication, *Hastings Law Journal* had not yet assigned a page number to Gary Minda's forthcoming article).

tion first introduced in Japan by Toyota, and now followed throughout the world. The essence of lean production depends upon the integration of three main requirements. As Simon Head has explained:

> In industries such as automobiles, electronics, and machine tools, lean production has three main requirements: products must be easy to assemble ("manufacturability"); workers must be less specialized in their skills ("flexibility of labor"); and stocks of inventory must be less costly to maintain (components arrive at the assembly plant "just in time," and so save on both warehousing and financing costs).[13]

Manufacturability has meant that many of the unskilled, entry-level jobs in production are eliminated as they are incorporated into other job functions of workers grouped together as teams, quality control units, and process-centered systems. In these new systems of organization, work and production remain flexible, and almost everyone is made responsible for the process. Products must be easy to assemble and produce so that specialization of task is no longer crucial in the production process. Within team groups, workers perform "broader, more complicated and higher-skilled tasks," thus making it easier to assemble products.[14] Flexibility of labor, however, has meant that "employers now make less of an investment in the skills" training of their employees, so workers can easily be replaced without employers incurring a "sunk cost" in workers' training.[15]

One of the most significant changes brought about by lean production strategies has been the new emphasis on "outsourcing" in manufacturing: the practice of contracting out previously performed jobs to other employers who can perform the job at a lower cost. Outsourcing is more than subcontracting, which involves the reassignment of tasks to a third-party vendor.[16] In the new corporate organization, outsourcing attempts to bring together various specialties of different firms at various points in the production process. As technology advances and competitive pressures grow, outsourcing

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13. HEAD, *supra* note 6, at 47.
14. *See* Cappelli, *supra* note 6, at 575; RIFKIN, *supra* note 6, at 97–98.
15. See Cappelli, *supra* note 6, at 576.
16. *See* HAMMER, *supra* note 6, at 177.

permits the firm to remain both flexible and cost-efficient by bringing together a production process based on a "corporate consortium." The corporate consortium consists of many different firms, each contributing its special expertise to the production process.[17]

In some manufacturing industries such as automobiles and electronics, outsourcing has resulted in jobs moving out of the United States to Asia, Mexico, and other third-world economies where labor costs are substantially lower. Within the United States, outsourcing has contributed to the shift from permanent workers to contingent, temporary workers who are usually non-union and lower paid than those they have replaced. Many long-term service employees, particularly those over the age of forty, have lost their jobs. Outsourcing has meant that employer-employee relations have become less important in determining a worker's long-term success.[18]

In service industries (for example banking, insurance, S&Ls, hotels and restaurants, where most Americans now work), a "reengineering revolution" has caused firms to be reorganized with process-centered principles that streamline job tasks. This alteration has meant that large numbers of workers are eliminated from many companies.[19] According to business consultant Michael Hammer: "[t]he key word in the definition of reengineering is `process': a complete end-to-end set of activities that together create value for a customer."[20] In reality, reengineering is not really new; what is new is the application of computer software in the information and service industries to streamline and integrate the service process.[21]

In service industries, reengineering has brought about a transformation in the way we understand the nature of work.[22] Reengineering represents a shift away from Adam Smith's idea of specialization of labor, which emphasized the notion that work should be organized into simple tasks.[23] Reengineers call for a rejection of Smith's idea of specialization, and in its place they call for the adoption of a "process-oriented" notion of work. In the process-oriented view of reengineering, the worker uses information tech-

17. *See id*.
18. *See* Cappelli, *supra* note 6, at 583.
19. *See* MICHAEL HAMMER, THE REENGINEERING REVOLUTION (1995).
20. HAMMER, *supra* note 6.
21. *See* HEAD, *supra* note 6, at 49.
22. *See* HAMMER & CHAMPY, *supra* note 6.
23. *See* HAMMER, *supra* note 6, at 7.

nology to streamline many routine activities of the organization, thereby eliminating the need for specialized tasks.[24] Reengineering has resulted in massive lay offs of supervisors, managers, and other highly-paid career employees of the corporation.[25]

As a result of reengineering, unnecessary tasks are eliminated, and information is shared among all individuals involved in a "process" controlled by a relatively small number of "process specialists." The process specialists use computer software to perform functions once divided among a number of workers. In some cases, substantial productivity increases have been brought about as a result of reengineering. Michael Hammer and James Champy report that reengineering at IBM increased the productivity of its credit department "not by 100 percent, but *one hundred times*, or 10,000 percent."[26] In IBM's case, hundreds of tasks were replaced in different specialized departments by a new computerized web of credit processes controlled by frontline software operators, who had the authority to structure the credit-granting process. As Simon Head has described what happened at IBM:

> With its headquarters at Stamford, Connecticut, the IBM Credit Corporation, a subsidiary of IBM, provides credit for clients who want to purchase IBM products. Five years ago specialists were responsible for each stage of the business. The low-level managers and skilled clerical workers in one department logged in credit applications. The employees in another department inserted special conditions for particular clients. Another department fixed the appropriate rate of interest. Yet another gathered all the relevant information into a "quote letter" to be sent to the IBM salesman and his customer. The entire system depended on vast quantities of paper creeping slowly from one specialist department to another.
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> Reengineering teams descended on these clerical assembly lines and swept them away. They installed employees using software that could accomplish the tasks hitherto carried out by the specialists. Except for a few exceptional cases, which are still handled by a team of specialists, the functions once divided among the various departments have now become the responsibility of a single

24. *See* HEAD, *supra* note 6, at 49.

25. *See* HAMMER, *supra* note 6, at 130–31 (describing the downsizing following the adoption of reengineering at a number of large corporations including UPS, Progressive Insurance, Federal-Mogul, and AT&T).

26. HAMMER & CHAMPY, *supra* note 6.

> employee called the "deal structurer." Sitting at his computer terminal, the deal structurer handles the entire credit-granting process up to the moment that the company's "quote letter" is sent off by Federal Express. A software program is able to handle all but a few of the questions that arise at each stage.[27]

Reengineering has meant that conventional managers, and the roles they performed in the old organizations, had to be eliminated. Again, as Michael Hammer has explained:

> Process centering starts a chain reaction that affects everyone from the frontline performer to the CEO. Not only are old roles either eliminated or transformed beyond recognition, but entirely new ones, like process owner, come into being. If there were a section in the Smithsonian for antiquated artifacts of the American economy, the conventional manager would be the subject of a large display case.[28]

Reduction-in-force (RIF) and "downsizing" thus refer to what happens when businesses implement reengineering and lean production strategies to reduce the number of workers needed in the production process. Reengineers and lean managers seek to cut as many costs as possible to stay ahead of competitors, increase profits, and push up the earnings ratios and share prices of the corporation. Because the compensation of the CEO and top reengineers is linked to the "corporate share price," the new breed of reengineers and lean managers is motivated to compete on the basis of streamlining and cost-cutting in order to increase their own net worth as well as that of the shareholders.[29] The motivating force pushing these changes is thus the same force which has motivated business decisionmakers in the past; it is the desire to make money for shareholders and top managers by limiting the income share of employees.

What is different today is that downsizing and reduction-in-force are "strategic," as opposed to being a "defensive" cost-cutting response to short-run economic conditions.[30] Employers in the 1990s

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27. HEAD, *supra* note 6, at 49 (reviewing HAMMER & CHAMPY, *supra* note 6, at 36–39).
28. HAMMER, *supra* note 6, at 92.
29. *See* HEAD, *supra* note 6, at 50. *See also* Minda, *supra* note 12.
30. *See* Cappelli, *supra* note 6, at 577.

have used downsizing strategically as an offensive response in the midst of an economic recovery when employment was generally expanding.[31] Unlike traditional lay offs, which are normally short-term responses that precede reductions in output of the firm, downsizing and RIFing have not been accompanied by output reductions, and unlike temporary lay offs, they are regarded as being permanent.[32] Hence, while the typical lay offs of the past were temporary and took place during downturns in the business cycle, downsizing during the late 1980s and early 1990s are long-term permanent changes that have been implemented for offensive purposes.

Firms that downsize to save costs are acting rationally when downsizing is necessary to render the firm more productive, more competitive in global markets, and more valuable to shareholders. The most compelling reason that companies offer for downsizing is that it will enable the firm to either eliminate unnecessary jobs or replace highly paid, less efficient workers with less expensive, more efficient workers. In doing so, firms can reduce its overall costs and thereby be more competitive in the market. Downsizing is justified when it promotes efficiency by reducing costs and enhancing productivity.

By eliminating high-paying jobs or by replacing high-paid workers with a less expensive workers, the firm can realize a substantial savings on its wage bill, and be more competitive in the global economy. But, in order to reduce the average cost of production after downsizing, the firm would have to maintain (or increase) its production with fewer workers or increase production with newly hired workers who are more productive than the former workers. If downsizing saves some money on labor costs, but total production falls, or if the quality of the output declines, then downsizing will not be cost-efficient. Reducing the wage bill of the firm will not be efficient if its productivity is negatively affected or if a poorer-quality product is produced by less skilled replacement workers. The downsizing of workers may not be justified from a purely economic perspective if it results in inefficient production or if the resulting product is of substandard quality.

31. *See* TRENDS, *supra* note 10.
32. *See* Cappelli, *supra* note 6, at 578.

II. DOWNSIZING OF AGING WORKERS IN THE POSTINDUSTRIAL FIRM

No one disputes that the current economy has been difficult for many workers, skilled and unskilled alike.[33] Real wages have failed to increase appreciably during the mild economic recovery experienced between 1990 and 1995. Productivity and stock market indices have shown healthy growth, while median family incomes have remained stagnant as average weekly earnings of most rank-and-file workers fell. Increases in real wages have failed to keep pace with reported increases in productivity, indicating a decline in the standard of living for many American workers. Growing income inequality has given rise to a growing segment of working poor. The inability of the industrial sector to generate new high-paying jobs, coupled with the increasing competitive demands for cutting costs to meet

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33. People do disagree, however, about the magnitude of corporate downsizing in the economy and the policy consequences of the downsizing numbers. For example, the NEW YORK TIMES Special Report, *The Downsizing of America* series, *supra* note 10, was criticized by Joseph E. Stiglitz, the White House's chief economist, for exaggerating the effects of downsizing on job loss. *See* John Cassidy, *All Worked Up: Is Downsizing Really News or Is It Just Business as Usual?*, THE NEW YORKER 51 (Apr. 22, 1996). *But see* Louis Uchitelle, *Despite Drop, Rate of Layoffs Remains High*, N.Y. TIMES, Aug. 23, 1996, at A1 (reporting how the most recent job loss statistics from the U.S. Department of Labor confirm the job loss projections reported in the Times Special Report). Others continue to disagree. *Compare* HEAD, *supra* note 6, at 47, *with* Paul Krugman, *Downsizing Downsizing*, *The Dismal Scientist*, <http://www.slate.com/Dismal/960624/dismal.asp>. Krugman, an economist at Stanford, relies on the April report of the Council of Economic Advisers that suggests, "[w]orkers are not doing as badly as recent headlines might suggest." Krugman, *supra*. Paul Simon, a correspondent for the *Financial Times*, on the other hand, writes that despite the optimistic and upbeat news of productivity and job growth, a steady downward trend has occurred in the living standard for most families since the early 1970s. *See* HEAD, *supra* note 6, at 47. Anyone who denies the potential nightmare of downsizing should examine the current happenings in Western Europe. *See* John Tagliabue, *In Europe, A Wave of Layoffs Stuns White-Collar Workers*, N.Y. TIMES, June 20, 1996, at A1. Unemployment figures in Western Europe average 11%, twice those in the United States. As Ethan Kapstein has recently noted:

> The Europeans have created a lost generation of workers and are now suffering for it in terms of increased crime, drug abuse, violence against immigrants, and the increasing popularity of extremist political groups. In this context, it is sobering to realize that Germany's current level of four million unemployed is the highest it has been since the early 1930s.

Ethan B. Kapstein, *Workers and the World Economy*, FOREIGN AFFAIRS, May/June 1996, at 15, 22. Whether one agrees with optimists such as Krugman or pessimists such as Head, no serious disagreement exists that downsizing has affected older workers more than any other group.

the "leaner" competitors in the global marketplace, has squeezed American workers where it hurts most: jobs and salary.

The profile of the typical unemployed worker during the early 1980s included primarily younger, unskilled, blue-collar workers. By the 1990s, however, the profile of the unemployed included many more older, skilled, white-collar workers.[34] The most recent statistics from the Bureau of Labor Statistics show that the risk of job loss is rising for workers in the forty-five to fifty-five-year-old category, and it is this age category that has suffered most as a result of corporate downsizing.[35] Older workers are prime candidates for downsizing because management perceives them to be more expensive than younger workers, who usually have lower salaries and benefits.

It should be no surprise that downsizing, the 1990's version of permanent career displacement, has become a cause of great anxiety for older workers who have devoted an entire lifetime of employment to a single employer.[36] Aging workers are prime candidates for downsizing because most corporate decisionmakers, looking at the bottom line, and attempting to look as young as possible themselves,[37] tend to correlate high wages with age and length of service. Older workers are thus targeted for downsizing even though their wages may be justified on efficiency grounds (higher wage justified by greater productivity or higher skill). Of course, age and salary level do not always correlate, but in most cases the correlation is reliable.

34. *See* TRENDS, *supra* note 10.

35. The Labor Department's latest and most comprehensive survey (conducted every two years) on job displacement in the American economy revealed in its report of August 22, 1996, that from 1993 through 1995, 8.4 million workers were displaced, and that workers in their "prime" (ages 25 to 54), represented the overwhelming majority of those displaced. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WORKER DISPLACEMENT DURING THE MID-1990S (1996). *See also* Uchitelle, *supra* note 33. *See generally* JOB CREATION, *supra* note 12.

36. Indeed, while worker loyalty to the corporation was once rewarded with a sense of job security, today loyal workers cannot expect to hold their jobs for more than a brief period. Most workers can expect (if they are lucky) to work for a number of different corporations during their working careers. However, once older workers lose their jobs, they are unlikely to find substantial equivalent employment. Downsizing frequently results in permanent unemployment or, at best, under-employment.

37. *See* Amy M. Spindler, *It's A Face-Lift, Tummy-Tucked Jungle Out There*, N.Y. TIMES, June 9, 1996, § 3, at 1 (reporting a new fad among corporate executives who get face-lifts and tummy-tucks to appear younger and to avoid being targeted for downsizing).

The dynamics of downsizing during the early 1990s have meant that aging, middle to upper-income, late-career workers have had to suffer greater economic hardships as a consequence of losing career jobs. A consequence of downsizing is the creation of a contingent unemployed work force made up of relatively high-paid, skilled older workers who have been displaced by what Felix Rohatyn, senior partner of the Wall Street investment bankers Lazard Freres, has called the "harsh and cruel climate" of "advanced capitalism."[38] While it is true that far more jobs have been created, "many of the new jobs are in small companies that offer scant benefits and less pay, and many are part-time positions with no benefits at all."[39]

Downsizing of middle-income workers has contributed to the growing income inequality in the United States and has brought about the first visible changes of what the new postindustrial economic order may be like. As Rohatyn has put it: "What is occurring is a huge transfer of wealth from lower skilled, middle-class American workers to the owners of capital assets and to a new technological aristocracy with a large element of compensation tied to stock values."[40]

In the current climate of downsizing and restructuring, employers are telling at-will employees to change what they do or face the consequences of permanent displacement or downsizing. For those who are elderly and at the end of their working careers (what Professor Stewart J. Schwab has called the "late-career" employee),[41] there is little choice to being permanently downsized. After years of obtaining firm-specific training, aging late-career workers are unlikely to incur the sunken costs of starting over again and retooling as new "process" managers or "lean" managers. The increasing competitive pressure of cost containment in global economies has encouraged large corporations to invoke their near absolute authori-

38. HEAD, *supra* note 6, at 47 (citing a speech Rohatyn delivered at Wake Forest University on March 17, 1995). The average worker can expect to be fired several times during his or her working career. Many recently laid off workers do find jobs, but at lower pay levels. Most of these workers continue to earn less even five years after being fired. *See also* Kapstein, *supra* note 33, at 26.

39. Uchitelle & Kleinfield, *supra* note 10, § 1, at 18.

40. HEAD, *supra* note 6, at 47 (citing a speech Rohatyn delivered at Wake Forest University on March 17, 1995). *See also* Cappelli, *supra* note 6, at 570–71 (describing how compensation for executives has become linked to shareholder value).

41. *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At-Will*, 92 MICH. L. REV. 8, 43–47 (1993). *See also infra* note 60.

ty under the at-will rule and downsize the jobs of these late-career workers.[42] It is evident in the emerging postindustrial era that a huge displacement of relatively high-paid, skilled, at-will employees has taken place.

For many American workers, a good job with promise of long-term job security is a thing of the past. Today, most workers can expect to be fired several times during their working careers. A worker who does lose his or her job can no longer expect to find a replacement job at the same pay. As reported in a Special Report, *The Downsizing of America*, published by the *New York Times* in 1996, more than 43 million jobs have been eliminated in the United States since 1979.[43] Many recently laid off workers do find jobs, but many are forced to accept jobs at lower levels of pay, and most of these workers continue to earn less five years after being laid off.[44] "In this game of musical jobs, people making $150,000 resurrect themselves making $50,000, sometimes as self-employed consultants or contractors. Those making $50,000 reappear earning $25,000. And these jobs are discovered often after much time, misery and personal humiliation."[45]

Today, at-will employees are "downsized," as distinguished from just being "laid off," because unlike a temporary lay off, downsizing normally involves the permanent interruption of the employee's job. Hence, for many late-career employees, to be "downsized" means a permanent, irrevocable loss of a career. The word "downsize" first appeared during the oil crisis of the early 1970s when it was used by

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42. A time existed when many jobs were organized by collective bargaining contracts negotiated by industrial trade unions organized along industry lines. These unionized labor markets provided workers with the protection of "just cause" employment, basic pension, and retirement security. In the emerging postindustrial labor markets, collective bargaining and union representation are no longer a central organizing feature of the employer-employee relationship. Instead, employees are subject to "at-will" employment contracts that presume the employment relation to be terminable at the will of the employer. *See* PERRITT, *supra* note 2, at § 1.1. The at-will rule, initially conceived as a presumption but later transformed into a substantive rule of law, grants employers the power to downsize the jobs of workers without fear of legal intervention. *See* J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal To De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 349–50 (1995).

43. *See* Uchitelle & Kleinfield, *supra* note 10, § 1, at 1. *See generally The Downsizing of America* series, *supra* note 10.

44. *See* Kapstein, *supra* note 33, at 26 (attributing statement to Morris Kleiner of the University of Minnesota).

45. Uchitelle & Kleinfield, *supra* note 10, § 1, at 1. *See also* Bragg, *supra* note 10, at A1.

automobile executives to describe the move toward the design of smaller, gas-efficient automobiles.[46] By the 1990s, the word had come to describe the shrinkage of vast categories of well-paid, high-skilled jobs in the economy as large corporations "downsize" to cut their costs and improve efficiency. In the labor relations offices of corporate America, downsizing has become a euphemism to soften the hard edge of words like "fired," "dismissed," and "laid off." In the corporate-speak of the 1990s, "[e]mployees are `downsized,' `separated,' `severed,' [and] `unassigned.' They are told that their jobs `are not going forward.'"[47] The word "downsize" thus signifies the diminished expectations of workers who find themselves moving from relatively high-paid, skilled jobs in the economy to relatively low-paid, unskilled jobs.[48]

In today's cost-efficient working environments, downsizing also conjures up the notion of speed and acceleration of permanent lay offs in America. "Like a clicking odometer on a speeding car, the [downsizing] number twirls higher nearly each day."[49] It is true that recent economic reports suggest that the welfare of the American worker is not as bad as some have suggested, and that many more new jobs have been created than lost as a result of downsizing. Many of the new jobs created from downsizing, however, are in the service industries where skills and pay are low. Moreover, the recent announcement of new jobs is hardly good news for the fifty-something unemployed executive who has been out of work for a number of years.

"[E]xecutives at big corporations like General Motors are looking at their less-efficient operations with dismay," and trying to find ways to eliminate as much internal labor cost as possible.[50] Whether in the United States or abroad, restructuring, lean manufacturing,

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46. *See* Uchitelle & Kleinfield, *supra* note 10, § 1, at 1.

47. *Id*.

48. Department of Labor statistics show that since 1979, 43 million jobs have been eliminated in the American economy, and that 65% of those workers who have lost their jobs have been forced to accept lower skill level jobs with lower pay. The statistics from the Department of Labor are analyzed in the *Downsizing of America* series published in 1996 by the *New York Times*, *supra* note 10. A *Newsweek* cover story, *The Hit Men*, estimated that in the last five years, major corporations have eliminated 370,000 jobs. *See* Allan Sloan et al., *The Hit Men*, NEWSWEEK, Feb. 26, 1996, at 44.

49. *See* Uchitelle & Kleinfield, *supra* note 10, § 1, at 1.

50. *See* Keith Bradsher, *Need to Cut Costs? Order Out; Outsourcing Saves Money, But Labor Is Frustrated*, N.Y. TIMES, Apr. 11, 1996, at D1.

and outsourcing have fostered considerable job insecurity and employment anxiety for older workers. Downsizing, the 1990's version of permanent unemployment, has consequently become a cause of great anxiety for older workers who have devoted an entire lifetime of employment to a single employer.[51]

Consider, for example, the plight of Steven Holthausen, a fifty-something bank loan officer turned tourist guide, whose story was reported in the *New York Times* series *The Downsizing of America*.[52] Mr. Holthausen was "severed" from the bank in August 1990 and has since been unable to obtain a job as a loan officer. For nearly a year, he barely scraped by on severance pay, unemployment insurance, and meager commissions earned as a freelance mortgage broker, only recently obtaining a job as a tourist guide on the interstate.[53] Meanwhile, a 22-year-old performs Mr. Holthausen's former duties as a loan officer at a fraction of Mr. Holthausen's former salary.[54] Mr. Holthausen, recently divorced and living alone in his brother's humble apartment, seeks support from a self-help group of forty and over people who have been recently fired and have been unable to find comparable employment. Like other older workers, Mr. Holthausen is having a difficult time accepting his plight.[55] Mr. Holthausen's story is but one of many stories from the trenches of downsized America.[56]

Late-career employees like Holthausen are vulnerable because they have usually invested their substantial time in acquiring job-specific training (what economists call investment in job-specific human capital) that is most valuable for their employer but not necessarily other employers.[57] Moreover, in adopting a particular

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51. *See supra* text accompanying note 36.

52. *See* Uchitelle & Kleinfield, *supra* note 10, § 1, at 1. *See generally The Downsizing of America* series, *supra* note 10. Narratives from those recently downsized, as reported in the news media, may not provide a realistic picture of aggregate trends in the American labor market. On the other hand, narratives from those who have personally experienced what it is like to be downsized are helpful in providing us with personalized accounts of the human consequences of downsizing.

53. *See* Uchitelle & Kleinfield, *supra* note 10, § 1, at 1.

54. *See id*.

55. *See id*. He is reported to have said, "[t]he anger that I feel right now is that I lost both my family and my job. . . . That is not where I wanted to be at this point in my life." *Id*.

56. *See id*.

57. I have called downsizing of such employees "opportunistic downsizing" whenever it is implemented to exploit the vulnerable position of a late-career employee who cannot

career path with a single employer, late-career employees' benefits are tied to length-of-service, making it expensive for them to quit and join another firm.[58] As a consequence of their chosen career path, late-career employees are locked-in with the firm in ways that make it economically unfeasible to change employers.

Employers, on the other hand, have a financial incentive to downsize late-career employees and replace them, if necessary, with younger employees, who represent lower labor costs. This is because a late-career worker,[59] at the end of his or her life cycle on the job, will be earning salary and benefits based on seniority increases which will likely have increased faster than the employee's productivity.[60] Employers have a financial incentive to terminate these employees because they are no longer earning what economists call an "efficient wage."[61] Late-career employees are thus vulnerable because they have acquired years of job-specific training, and have incurred other sunken costs from years of service with the firm. These costs and training cannot be replaced when and if they find another job, even a job at the same salary and benefits levels. What creates the possibility for their vulnerability is a long-term relationship of career employment, and a situation where one party has substantially performed and the other party has not.[62]

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easily leave the employment relationship due to job-specific training and other "sunk cost" investments in the job. I have further argued that opportunistic downsizing of aging workers is, or ought to be, a form of age discrimination prohibited by the ADEA. *See generally* Minda, *supra* note 12.

58. *See* Schwab, *supra* note 41, at 24–25.

59. Stewart J. Schwab provides an insightful analysis of the vulnerability of late-career workers to dismissal. *See id*. Drawing from Schwab's analysis of career employment, the downsizing of late-career employees should be regarded as a form of age and pension discrimination if the employer justifies the dismissal by arguing that aging employees are too expensive relative to other employees. *See generally* Minda, *supra* note 12.

60. As Schwab noted, economic studies suggest that "workers' pay relative to others in their job grade increases with seniority but their relative productivity does not." Schwab, *supra* note 41, at 16 (citing James L. Medoff & Katharine G. Abraham, *Are Those Paid More Really More Productive? The Case of Experience*, 16 J. HUM. RESOURCES 186 (1981), and James L. Medoff & Katharine G. Abraham, *Experience, Performance & Earnings*, 95 Q.J. ECON. 703 (1980)).

61. As Schwab has explained, "[t]he term *efficiency wage* refers to raising the wage above the level workers can earn elsewhere until the marginal benefit from the resulting harder work just equals the extra wage." Schwab, *supra* note 41, at 16 n.30.

62. *See id*. at 32–33. *See also* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 979 (1984). In a subsequent paper, I show how this dynamic can give rise to a form of age and pension discrimination that I call "opportunistic

If, in a long-term contract, one party has performed and the other has not, the party who has not yet performed has received most of the benefit of the contract, and that party will have an incentive to terminate the contract to avoid performing its side of the bargain. Stewart J. Schwab argues that this can happen when late-career employees near the end of their "life cycle" on the job.[63] The reason is simple: the employee has substantially performed by working hard throughout his career, and the employer will have a financial incentive to terminate the employee in order to avoid paying the employee a salary that exceeds the employee's current productivity.

Unquestionably, thirty years ago one would have expected unions to have curtailed somewhat the effort of employers to compete on the basis of labor costs.[64] Downsizing would have been a subject dealt with during direct, voluntary negotiations between the employer and a union that the employees selected as their bargaining representative.[65] To counter competitively justified downsizing and outsourcing, labor unions might accept lower wages in exchange for employment guarantees as the UAW did in its contract negotiations with Ford.[66] But union membership has fallen since the 1970s, so less than eleven percent of the work force is now covered by collec-

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downsizing." *See* Minda, *supra* note 12.

63. *See* Schwab, *supra* note 41, at 32–33.

64. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE 10–11 (1990). In the unionized sector of the work force, for example, management has relied upon the claim that outsourcing to non-union contractors streamlines the cost of production and renders the firm more competitive in the global marketplace. General Motors (G.M.) recently publicized a study by an independent consulting firm showing G.M.'s labor costs for automobile parts are $440 higher than those of Ford Motor Company, and $600 more than the Chrysler Corporation's because G.M. relies on its own internal production of parts rather than outsourcing. *See* Keith Bradsher, *G.M.'s Labor Costs for Parts Exceed Rivals'*, N.Y. TIMES, June 25, 1996, at D2. General Motors used the study to bolster its bargaining position in contract negotiations with the United Automobile Workers Union. *See id*. The U.A.W. criticized the study because the consulting firm that produced the study "had looked only at labor costs and had not included the lower quality and lower productivity at many suppliers." *Id*.

65. *See* WEILER, *supra* note 64, at 7.

66. *See* Keith Bradsher, *New Approach for Union in Ford Accord*, N.Y. TIMES, Sept. 18, 1996, at D1. The new labor contract, negotiated between Ford and U.A.W. on Sept. 16, 1996, requires Ford to guarantee a minimum number of union jobs in exchange for lower union wages. The deal makes it much less attractive for Ford to outsource the manufacture of parts. Whether the remaining "Big Three" automakers will go along with the deal in their own labor negotiations remains unclear. General Motors relies more on outsourcing than Ford, so G.M. may be less likely to accept such a contract.

tive bargaining. Moreover, unions themselves have lost much of their power and are no longer in the position to resist competitively unjustified downsizing and reduction-in-force strategies or to give concessions to soften the effects of competitively justified reduction-in-force decisions. Unions are instead forced to accept downsizing as an inevitable industry practice. Collective bargaining is thus not likely to provide an effective check against the downsizing of aging, late-career workers.

III. DOWNSIZING AND THE PENDING SOCIAL SECURITY CRISIS

To the extent that downsizing of older workers goes unchecked, we can expect to see more of these workers forced to retire prematurely. Ironically, as a result of improved medical care, healthier lifestyles, and safer working environments, older workers today are more capable than ever of remaining at work. Also, thanks to the baby boom generation, the number of Americans over the age of forty will more than double between 1990 and 2030. Accordingly, more people will be entering retirement and greater resources will be consumed in providing for the new generation of retired workers. Workers who have private sources of retirement funds will be able to take care of themselves upon retirement, but for the vast majority of workers, social security will be the only source of retirement security.

Unfortunately, social security may not be viable in the next century as the big generation born in the first two decades after World War II enters retirement. It now seems apparent that there will be a substantial drain on the social security system by the end of this century. As widely reported last year, the trustees of the social security system have estimated that revenues will fall short of scheduled outlays by about thirty percent between 2019 and 2043. We are thus facing a serious social security crisis.

Few options are available to resolve this crisis. One solution would be to raise taxes to make up for the shortfall in social security revenues. A tax increase, however, is not a viable option in the current political environment. Cutting benefits or soaking the rich might be a second-best interim solution, but these stop-gap measures are politically unpopular, and probably insufficient to keep the social security fund in the black into the next century. The only real alternative may be to encourage older workers to remain working for additional years to ease the retirement squeeze on social security. Downsizing of late-career employees, however, has had just the opposite policy effect. Employees who are just reaching the prime of their working careers are downsized and become unemployed at a younger-than-expected age (early fifties instead of sixty-five or over).

Of course, even a sixty-five-year-old downsized executive who cannot afford to live on social security alone might well decide that he or she has to remain employed. There is thus reason to suggest that many formerly downsized and subsequently retired workers will find that they have to work because social security and savings are inadequate. In returning to the work force, however, these "second career" employees will likely find that they must accept low paying jobs, typically in the lowest paying and less skilled service industry jobs (the proverbial "hamburger flipping" jobs). There is reason, therefore, for the view that in the future many downsized retired workers may have to accept low paying, unskilled employment in their retirement years. We may see many more older people returning to the job market as a result of economic necessity, and yet there may be few good paying jobs available to them, creating a growing dependency on the Social Security system.

Downsizing will consequently exacerbate the coming retirement crisis. By increasing the number of workers who retire, downsizing will create a greater drain on the social security system and therefore contribute to the coming social security crisis. This, in turn, will force some retired workers to accept low paying jobs in the service industry, but for many aging retirees this will not be an option to governmental assistance. Increasing the retirement age and encouraging voluntary savings are means for avoiding the bankruptcy of the social security fund, but downsizing makes these options less likely: a class of older, downsized workers can no longer find gainful employment nor continue to contribute to their retirement savings. What we see is more workers retiring today and less saving for retirement. We are now approaching the point where it will take two and perhaps three taxpaying workers to financially support each Social Security beneficiary.

Every proposed solution to the retirement-finance crisis is therefore potentially jeopardized by downsizing. One way or another the pension crisis must be addressed or the next generation of retirees will have to do without. Downsizing is an important factor that cannot be ignored in future policy debates about the pending retirement crisis. Lawyers and judges thus have a good policy rationale for doing something about downsizing, especially when it is used to frustrate the purpose of protective employment legislation.

IV. THE AGE DISCRIMINATION ACT IN THE POSTINDUSTRIAL ERA[67]

The Age Discrimination in Employment Act (ADEA),[68] enacted in 1967, prohibits an employer from discriminating against any employee on the ground that the employee is forty or older. Initially, the protected class was forty to sixty-five, such that mandatory retirement at age sixty-five was permitted. In 1978, however, the age ceiling was raised to seventy and then removed altogether in 1986. The act now forbids mandatory retirement at any age, and also forbids any measure by which an employer treats an employee disfavorably because of age. One might think that the law of age discrimination would protect older workers who find themselves the likely targets of downsizing, but experience to date has revealed that the age discrimination law is largely ineffectual in protecting older workers.

Reduction in force (RIF) strategies associated with restructuring and downsizing are largely immune from ADEA regulation. Older workers who are victims of RIFs have had a difficult time establishing prima facie claims of age discrimination because employers can always argue that reduction of the workforce was a legitimate, nondiscriminatory reason or motive for its actions.[69] Employers have thus been able to permanently lay off older workers as they restructure and reduce the size of their workforce without fear of incurring ADEA liability. In such cases, economic justification becomes a legitimate, nondiscriminatory reason for the permanent lay off of the older worker. It is ironic that, because older workers are usually more expensive than younger workers, employers will always be able to argue (and prove) that their decision to discharge was based on the expense of the employee rather than on the employee's age. In such cases, "all the court[s] can see is that the employer had a

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67. *See generally* Minda, *supra* note 12.

68. 29 U.S.C. §§ 621–634 (1994).

69. *See* Jessica Lind, Note, *The Prima Facie Case of Age Discrimination in Reduction-in-Force Cases*, 94 MICH. L. REV. 832 (1995).

reason unrelated to age for firing the older worker — he was more expensive."[70]

One might think that ADEA would be a check against this practice, since lower-paid younger employees would be favored over higher-paid older employees. The courts might, for example, look to discrimination based on wages or length of service as a "proxy" for establishing a prima facie case of age discrimination. Of course, if time spent on the job failed to "correlate" with age, then the employer could rebut the prima facie case in the "rebuttal stage" of the litigation. An employer's decision to cut costs by focusing on salary level or years of service of employees may not be circumstantial evidence of age discrimination in every case,[71] but "strategic" cost cutting should at least raise a rebuttable inference of discriminatory intent for establishing a prima facie violation of the ADEA if late-career workers are mainly targeted for downsizing.

The courts, however, have been reluctant to consider salary or time of service as a "proxy" for age in ADEA cases. First, the courts are prone to accept the firms' cost containment rationale as a justification for cutting the more expensive older employees from their staffs because older employees do tend to be more expensive than younger ones. "The more costly they are, the more difficult it is to ascribe their discharge to their age, as distinct from their expense."[72] In addition, a growing number of federal judges apparently also subscribe to the view that employment discrimination legislation was "not intended to protect workers from the harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings, and relocations."[73]

The difficulty of proving age discrimination claims in downsizing cases is also complicated by the United States Supreme Court's 1993 decision in *Hazen Paper Co. v. Biggins*.[74] In *Biggins*, a sixty-two-year-old employee, who was fired just before the vesting of his pension, attempted to prove that his employer discriminated against him based on his age. Justice O'Connor, for a unanimous Court,

70. RICHARD A. POSNER, AGING AND OLD AGE 336 (1995).

71. *See* Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation*, 30 GA. L. REV. 563, 573 (1996).

72. POSNER, *supra* note 70, at 336.

73. Allen v. Ethicon, Inc., 919 F. Supp. 1093, 1099 (S.D. Ohio 1996).

74. 507 U.S. 604 (1993).

found that the first circuit, in upholding the age discrimination claim, had improperly allowed the plaintiff to establish his prima facie case on the basis of circumstantial evidence of pension-plan interference. Justice O'Connor emphasized that the problem with the plaintiff's proof was that he attempted to infer age discrimination from length of service. As Justice O'Connor explained, the ADEA only "requires the employer to ignore an employee's age . . . it does not specify *further* characteristics that an employer must also ignore."[75] In other words, discrimination based on wage status or length service cannot be used as circumstantial evidence to prove unlawful age discrimination.

Professor Michael J. Zimmer suggests that *Biggins* creates two serious impediments to age discrimination claims.[76] First, *Biggins* makes it easier for employers to defend the claim at the rebuttal stage. Instead of producing evidence that they had "legitimate, nondiscriminatory reasons" for their actions, they can now satisfy their burden by producing evidence of *any* reason so long as the reason is not age. As Justice O'Connor explained, "it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA."[77]

The second impediment *Biggins* established is that it has "restricted the range of circumstantial evidence upon which a factfinder can draw the inference of discrimination."[78] In refusing to allow the *Biggins* plaintiff to prove his age was the basis of the employer's pension interference, the Court ruled out the possibility of proving unlawful motive through circumstantial evidence based upon accumulation of years of service. This means that pension status or length of service cannot be used as a proxy for age, even though there might be a positive correlation between pension status, length of service, and *age*. In restricting the range of circumstantial

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75. *Id*. at 612.

76. *See* Zimmer, *supra* note 71, at 570–74.

77. 507 U.S. at 612. According to Professor Zimmer,

> [T]he rebuttal burden of the employer . . . is no longer to produce evidence that it had a "legitimate, nondiscriminatory reason" for its action. Instead, the employer can satisfy its burden of production with evidence of any reason other than an admission that it discriminated on the grounds plaintiff claims (or could still legally claim).

Zimmer, *supra* note 71, at 571–72.

78. Zimmer, *supra* note 71, at 572.

evidence, *Biggins* has opened the door for employers to escape ADEA liability by using length of service, pension status, and salary level as a non-discriminatory "proxy" for terminating elderly workers.

For age discrimination plaintiffs, the challenge will be to find a way to interpret the *Biggins* precedent so that evidence of salary and pension status might be used as "proxy" evidence of age. Professor Stewart J. Schwab, for example, has argued that the *Biggins* precedent contains an enigmatic citation to a decision of the seventh circuit, *Metz v. Transit Mix, Inc.*,[79] which contemplates the use of salary and pension status of the plaintiff as evidence of age discrimination. This citation in Justice O'Connor's opinion gave Professor Schwab reason for believing that *Biggins* did not rule out the possibility that wage and length of service might be a "proxy" for proving age discrimination in the proper factual setting. However, even if the court decided for the plaintiffs in *Biggins*, employers could still easily avoid ADEA liability by strategically deciding who gets downsized. As Judge Richard A. Posner has recently observed: "[A] firm that wants to get rid of an older employee can often do so with near impunity by *cashiering* a younger employee at the same time."[80]

The Supreme Court in *O'Connor v. Consolidated Coin Caterers*

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79. 828 F.2d 1202 (7th Cir. 1987). In *Metz*, the Seventh Circuit reversed the trial court judgment for an employer who had fired a 54-year-old manager and replaced him with a younger, less expensive co-worker. The court concluded that the trial court applied an inaccurate interpretation of the law to Metz's claim. *See id*. at 1206. Thus, *Metz* stands for the proposition that salary may be used as "proxy" circumstantial evidence for proving age discrimination. *See id*. Schwab argues that Justice O'Connor's "enigmatic citation" to *Metz* provides support to the interpretation that the "ADEA protects older workers fired because their salary exceeds current productivity." Schwab, *supra* note 41, at 45. In *Biggins*, Justice O'Connor gave a "cf." cite to the *Metz* decision, finding that "[p]ension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly." *Biggins*, 507 U.S. at 612–13 (citation omitted).

80. POSNER, *supra* note 70, at 336. Posner concludes that:

> cashiering may be feasible because there is high turnover among young employees anyway and the firm may not yet have invested much in the young employee's firm-specific human capital (a principal reason *why* turnover of young employees is high) and so [the employer] has little to lose from firing him, though concern with reputation must inhibit this Machiavellian strategy to some and perhaps to a great extent.

Id. But see infra notes 114–17 and accompanying text.

Corp.,[81] for example, recently concluded that the fact an employee was replaced by another older employee does not preclude a prima facie case of age discrimination in a non-reduction-in-force case. The Court, however, reaffirmed the notion that a younger employee hired to replace an older employee continues to be the touchstone for establishing the prima facie case. As Justice Scalia stated for a unanimous Court: "Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class."[82] A potential implication of *Consolidated Coin* may be that *cashiering* younger workers may not be reliable evidence to refute a claim of age discrimination. What Justice Scalia and the Court failed to consider is that employers might use *cashiering* of younger employees to disguise their unlawful discrimination against older workers and fool federal judges in reduction-in-force and downsizing cases. The implications of Scalia's *Consolidated Coin* opinion may insulate the *cashiering* strategy from ADEA regulation.[83]

There is also another employer strategy which can effectively insulate employers from ADEA liability in most RIFing contests — the "two stage" RIFing strategy. Most companies in fact conduct RIFs in two stages. As Zeller and Mooney have noted:

> The first phase is generally a voluntary program in which the company offers incentives to those employees who are not yet eligible for normal retirement to induce their early retirement or other voluntary separation. The second phase is the involuntary termination plan, which focuses on position elimination, job performance, or some mix of the two.[84]

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81. 116 S. Ct. 1307 (1996).

82. *Id*. at 1310.

83. Jessica Lind recently argued that in the RIF context, the courts should develop new doctrinal standards for the prima facie violation of age discrimination. *See* Lind, *supra* note 69. Ms. Lind recommends that the prima facie case should require the RIF plaintiff to "demonstrate that she possesses equivalent objective qualifications to the retained, younger employee(s) and that her employer did not eliminate completely her job responsibilities but only her position." *Id*. at 834. The problem with Lind's recommendation is that employers can easily evade ADEA liability by arguing that the younger worker has superior abilities or by simply asserting a cost-containment rationale for discharging the more expensive older worker.

84. Michael R. Zeller & Michael F. Mooney, *Legally Reducing Work Forces in a*

Judge Posner notes that the result of the "two stage" program of RIFing usually has had the intended consequence of persuading the older employee to voluntarily retire at stage one. As Posner observed:

> [A]nyone who doesn't take the hint and retire early becomes a candidate for phase 2 — involuntary termination. And, should this happen, he cannot count on having a good claim of age discrimination, let alone getting a good job with another employer . . . . the analysis suggests that it might actually pay an employer to engage in outright discrimination from time to time in order to increase the incentive of older employees to elect early retirement.[85]

V. ERISA IN THE POSTINDUSTRIAL ERA

In *Biggins*, the Court found that the firing of a sixty-two-year-old employee just before the vesting of his retirement pension might give rise to a cause of action under § 510 of the Employee Retirement Income Security Act of 1974 (ERISA).[86] ERISA is a complex statute that was created mainly to protect employees' pension benefits and other types of deferred compensation. Section 510 of ERISA makes it unlawful "for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . ."[87] One might argue, as did the *Biggins* plaintiff, that the downsizing of an older employee whose retirement benefits are about to vest constitutes a prima facie violation of § 510 since the permanent lay off of the employee may have been motivated by a desire to interfere with the employee's pension benefits (which are protected under ERISA).

For the same reason ADEA claims do so poorly in the courts, ERISA claims in such cases are also unlikely to prevail. The problem is that ERISA plaintiffs are also "required to prove, by a preponder-

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Recessionary Economy, HUM. RESOURCE PROF. 14, 15 (Spring 1992), *cited in* POSNER, *supra* note 70, at 341 n.40.

85. POSNER, *supra* note 70, at 341–42.

86. *See Biggins*, 507 U.S. at 612. Section 510 of ERISA can be found at 51 Pub. L. No. 93-406, 88 Stat. 895 (1974) (codified as amended in 29 U.S.C. § 1140 (1994)).

87. *Id*. § 1140.

ance of the evidence, that [their] discharge was motivated by an intent to interfere with their [protected] benefits."[88] In trying to establish proof of discriminatory intent, the ERISA plaintiff is very much in the same position as the ADEA plaintiff seeking to prove unlawful age discrimination. Unfortunately for these plaintiffs, employers can always claim that the plaintiff was discharged for cost containment reasons — a nondiscriminatory business justification. Indeed, in the ERISA context, discrimination is even harder to prove since the courts frequently defer to the business judgment of trustees about matters such as cost containment and the financial integrity of pension plans.[89] Consequently, once the employer establishes a legitimate business reason for its action, the ERISA case is over.

Employers can argue that in today's global economy, competition demands that the firm cut costs whenever possible. Outsourcing, restructuring, lean manufacturing, RIFing, and other business strategies (resulting in the downsizing of late-career employees) can be justified on cost containment and competitive market rationales. It is highly unlikely that courts would interfere with a firm's efforts to reduce costs by eliminating the jobs of employees who are earning premium wages as a result of their length of service. Ironically, business cost containment strategies, such as outsourcing and downsizing, may work to undermine corporations' general obligation under ERISA to provide pension plans to all employees.[90]

Downsizing based on cost containment rationales normally provides employers with a meritorious defense to discrimination claims brought under ERISA. Because late-career employees are likely to have higher salary levels and benefit packages than younger employees, they will be perceived to be more "expensive," even if they are in fact more productive than their younger counterparts. This perception gives the downsizing employer a basis for claiming that

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88. *See* Phelps v. Field Real Estate Co., 991 F.2d 645, 649 (10th Cir. 1993) (holding that a dismissal of an HIV-positive employee covered under an ERISA plan was not unlawful discrimination because the employer had non-discriminatory reasons).

89. *See generally* Lorraine Schmall, *Toward Full Participation and Protection of the Worker With Illness: The Failure of Federal Health Law After* McGann v. H&H Music Co., 29 WAKE FOREST L. REV. 781, 806 n.134 (1994). Folz v. Marriot Corp., 594 F. Supp. 1007 (W.D. Mo. 1984), is an exception, but as Professor Schmall notes, "[v]ery few courts have followed *Folz*." *Id.* at 806.

90. *See* Cappelli, *supra* note 6, at 573.

downsizing of those employees was the result of a legitimate business justification: late-career employees cannot be retained because their salaries are too expensive (regardless of pension costs) for the competitive corporation.

In such cases the courts will find that the employer had a reason unrelated to pension benefits for dismissing the late-career employee. ERISA, like ADEA, is therefore unlikely to deter opportunistic downsizing of elderly workers. In the eyes of the law, the fact that many late-career employees will be over the age of forty becomes merely an unavoidable consequence of downsizing. Age and pension status are likely to be viewed as the ancillary consequences of an otherwise legitimate business decision. What is not seen is how pension and age discrimination can be perpetuated by the cost containment rationales justifying downsizing.

VI. AGING WORKERS, DOWNSIZING, AND AT-WILL EMPLOYMENT

As previously noted, modern employment law has developed on the basis of the common law rule of at-will employment. Historically, as part of their inherent power to manage and operate the business, the common law has allowed firms to hire and fire whomever they pleased. The employer's inherent common law prerogatives were stated in an early case as follows:

> [M]ay I not refuse to trade with any one? May I not dismiss my domestic servant for dealing or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them?[91]

The mindset exhibited by such thinking is still applicable to employment law analysis more than a century later.[92]

The challenge posed by the at-will rule is to develop a theory justifying an exception to the rule that would protect against arbitrary and discriminatory dismissals based on the age of the employee. Since federal age discrimination law would preempt the creation

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91. Payne v. Western & Atl. Ry., 81 Tenn. 507, 518 (1884). *See generally* ROTHSTEIN & LIEBMAN, *supra* note 1.

92. *See* ROTHSTEIN & LIEBMAN, *supra* note 1, at 882–84.

of a special "age discrimination" exception to the at-will rule, an indirect approach would be required. One idea has been to focus on length of service as a basis for granting greater protection to older career employees.[93] Professor Schwab, for instance, has recently predicted that "[g]reater protection may come from common law courts, which in recent years have begun policing opportunistic firings of late-career employees."[94]

Schwab points to the California appellate decision in *Pugh v. See's Candies, Inc.*,[95] as a "leading case" for his position. In *Pugh*, a thirty-two year employee was fired after working his way up the corporate ladder from dishwasher to vice-president in charge of production and a member of the board of directors. The employee was working without a written employment contract. However, when he was hired, a former president of the firm stated that his job would be "secure" so long as he remained "loyal" to the firm.[96] Pugh argued that the production employees' union at See's Candies had a "sweetheart" contract with the employer and that this "contract" required See's to discharge him. Pugh sued in both tort and contract to challenge his discharge.

A California Court of Appeal dismissed the tort claim on the ground that the employer's action, though morally reprehensible, failed to fall within the narrow exception created to protect employees from tortious employer conduct. The court, however, found that the plaintiff's contract claim was actionable based on an implied-in-fact promise against arbitrary dismissal. In upholding the contract claim, the court emphasized that the facts that plaintiff had worked for the employer for twenty-nine years, had received encouraging job

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93. *See generally* Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986).

94. Schwab, *supra* note 41, at 45.

95. 171 Cal. Rptr. 917 (Ct. App. 1981).

96. *Id*. at 918–19. The Blue Chip Stamps Corporation purchased See's Candies in 1972, and replaced the president of the company, Charles See, with its own employee, Charles Huggins. *See id*. Huggins fired Pugh. *See id*. In concluding that Pugh's employment contract was not terminable at will, the court relied on a statement made by an even earlier president, Ed Peck, that "[i]f you are loyal to [See's] and do a good job, your future is secure." *Id*. Peter Linzer argues that these statements were sufficient to establish proof of a just cause employment relation. *See* Linzer, *supra* note 93, at 354–68, 383–86. Stewart Schwab disagrees, finding that the statements are "so general that almost any long-term employee could supply proof of similar assurances. The critical feature of *Pugh* is not these assurances, but the longevity of his tenure." Schwab, *supra* note 41, at 45 n.151.

evaluations over those years, and had been given assurances of job security, established an implied-in-fact agreement that he would not be discharged "wrongfully." In reversing the trial court's dismissal of the case and remanding for a second trial, the court noted that the plaintiff had established a prima facie case of wrongful dismissal and that the burden shifted to the employer to come forward with evidence as to the reason for termination.[97]

Schwab finds *Pugh* to be a "leading case" rendering length of service as a legal basis for extending greater common law protection to late-career employees. As Schwab argued: "Pugh committed himself to a single firm, worked hard to gain promotions to the promised easy life, but then was terminated . . . . Length of service is the key element that motivates courts to scrutinize a late-career firing."[98] As Schwab acknowledged, however, the *Pugh* decision, like similar decisions, is complicated by the fact that the court also relied upon oral statements and company procedures in finding an implied-in-fact promise.[99] Schwab, also points to a decision of the Montana Supreme Court to illustrate the "centrality of longevity" in at-will cases involving career service employees.[100]

In the Montana case, *Flanigan v. Prudential Federal Savings & Loan Ass'n*,[101] a bank dismissed a twenty-eight-year career employee without notice or a hearing. The Montana Supreme Court affirmed a $1.5 million judgment for the plaintiff, finding that the employee's "28 years of employment . . . gave her a secure and objective basis for believing that, if her work was satisfactorily performed, her employment would continue."[102] Schwab notes that the *Flanigan* court quoted extensively from another California appellate case, *Cleary v. American Airlines, Inc.*,[103] which also emphasized the importance of length of service in determining that the discharge of the employee was in bad faith.[104] Schwab reads these cases as establishing greater job protection for employees who are dismissed late in their ca-

97. Schwab notes the irony that on remand, after a second trial, "the jury found for the employer. Thus, the employee whose case symbolizes court protection of late-career workers himself ultimately was fired without legal protection." *Id*. at 45 n.152.

98. *Id*. at 46.

99. *See id*.

100. *See* Flanigan v. Prudential Fed. Sav. & Loan Ass'n, 720 P.2d 257 (Mont. 1986).

101. *Id*.

102. *Id*. at 262.

103. 168 Cal. Rptr. 722, 729 (Ct. App. 1980).

104. *See* Schwab, *supra* note 41, at 46.

reers.[105]

Schwab's interpretation of these cases is provocative given that the weight of current caselaw is decidedly running contrary to his position. Most common law courts refuse to find that length of service is a justifiable basis for creating an exception to the employment at-will rule. The use of the implied covenants of good faith, relied upon in *Cleary*, has been found to be highly problematic because it would create a general duty to treat all long-term service employees in "good faith," and thus transform the at-will employment relationship into "just cause" employment. The implied covenant of good faith has been recognized as the "most nebulous judicial exception to the employment-at-will doctrine,"[106] and is in fact recognized by only a minority of the jurisdictions.[107]

The implied-in-fact contract theory used by the *Pugh* court to protect a long-term service employee requires more than length of service to justify judicial interference in the employment relation. Normally there must be a promise of job security and language in an employee handbook or personnel manual creating a binding obligation on the part of the employer.[108] As for the Montana Supreme Court, it is highly doubtful that the court has accepted the "centrality of length of service" in justifying exceptions to at-will employment relations.

For example, in *Flanigan*, the Montana Supreme Court recognized that the expectation of continued employment was conditioned upon satisfactory employee service and the company's economic health.[109] The court went on to state: "[o]f course, this does not foreclose an employer from engaging in legitimate reductions in force necessary to maintain the economic vitality of the company."[110]

Flanigan was decided one year prior to the enactment of Montana's Wrongful Discharge From Employment Act,[111] which created a comprehensive law protecting at-will employees from arbi-

105. *See id.*

106. J. Wilson Parker, *At-Will Employment and the Common Law: A Modest Proposal to De-Marginalize Employment Law*, 81 IOWA L. REV. 347, 360 (1995).

107. *See* PERRITT, *supra* note 2, § 4.11.

108. *See* Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 884–85 (Mich. 1980); Pine River State Bank v. Mettille, 333 N.W.2d 622, 626–27 (Minn. 1983); Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257, 1258 (N.J.), *modified*, 499 A.2d 515 (1985).

109. *Flanigan*, 720 P.2d at 261.

110. *Id.*

111. MONT. CODE ANN. § 39-2-901 (1995).

trary and wrongful discharge. When faced with its first opportunity to interpret this Act, the Montana Supreme Court, in *Cecil v. Cardinal Drilling Co.*,[112] defined the legislative "good cause" standard of the Act as requiring subjective good faith and found that economic conditions constituted a good faith justification for the termination of a fifty-seven-year-old long-term service employee. In reaching its decision, the Montana Supreme Court cited its prior decision in *Flanigan* for the view that "[i]t is well-settled in the case law prior to the Act that economic conditions constitute a `legitimate business reason' [for dismissing long-term service employees]."[113] Thus, *Flanigan* is apparently in line with cases like *Biggins*, which place profitability concerns above employee security. *Flanigan* has for this reason eroded the legislative effort in Montana to provide at-will employees with comprehensive protection against wrongful discharge.[114]

The reason that the common law is unlikely to provide older long-term service workers much protection from arbitrary or wrongful dismissals is that the doctrinal law of at-will, like that of the federal antidiscrimination law, has become infused with cost containment rationales that justify the termination of older workers. Employers in the current economic setting can argue that the economic conditions of global competition require cutting high-paid late-career employees to streamline the company's cost of production. However, because older employees are likely to earn a relatively higher salary than younger employees, they will be the ones who are more prone to be dismissed "at the will" (*i.e.*, whim) of the employer.

The reason for this can be explained in terms of how executive compensation of top officers is structured. Because executive compensation is frequently tied to stock values and quarterly profit (or loss) margins, executives in positions of power make labor relations decisions on the basis of the "bottom line," for example, whether or not the decision will enhance the value of the shareholders' investment by increasing stock prices following improved profitability figures. By cutting labor costs, CEOs hope to improve their profit/loss margins on the accounting ledgers so that investors will view

112. 797 P.2d 232, 234 (Mont. 1990).
113. *Id*.
114. *See* Parker, *supra* note 106, at 373–74.

their stock as being currently undervalued.

Manipulation of profitability margins through downsizing can be a temporary means of inflating the value of the corporation's stock. The analysis of stock prices and profit margins, however, only takes into account the labor costs reported on the accounting books of the firm. What is missing in the stock portfolio analysis is a realistic assessment of the relative productivity of workers who have firm-specific skills by reason of longer service with the firm. Many of these workers will be over the age of forty. Their salaries may be reported as being higher than those of younger workers, but a higher salary may be justified by the lifetime of productivity provided by an experienced worker.

Employers may pay a late-career employee a salary which exceeds the value of his or her productivity. However, the wage premium may be justified to compensate the worker for the cost of obtaining firm-specific training over the worker's career with the firm. But as Judge Posner has noted, courts are not likely to take these considerations into account in ADEA cases: "All the court[s] can see is that the employer had a reason unrelated to age for firing the older worker — he was more expensive."[115] In the era of downsizing, the "bottom line" is driving corporate and some judicial thinking today. What is not considered in the mix of corporate and judicial decisionmaking is that "bottom-line" downsizing may fail to take into account the adverse economic consequences on employee training. Younger workers may be less willing to commit to a job for the long run for fear of being displaced when they are old.

Some have argued, however, that if the employer actually tries to discriminate against older workers, the word will get around that the employer is a "bad" employer, and that fear of losing the most productive workers to competitors will then encourage other employers to cease engaging in such opportunistic behavior. Judge Posner and Professor Richard A. Epstein have both concluded that employer opportunism is unlikely to be a significant problem because they believe that the employer's concern for its reputation will place a check on its opportunistic behavior.[116]

A bad reputation, however, even if widely known in the indus-

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115. POSNER, *supra* note 70, at 337. *See also* Minda, *supra* note 12.

116. *See* POSNER, *supra* note 70, at 342; *see also* Richard A. Epstein, *In Defense of the Contract At Will*, 51 CHI. L. REV. 947, 968 (1984).

try, is unlikely to check the employer's behavior because younger workers are likely to discount the employer's bad reputation,[117] and because "[y]oung job entrants cannot easily assess an employer's reputation for how it handles senior workers."[118] In any event, "a reputation for harsh personnel policies may not greatly harm declining firms that are not hiring many new workers."[119]

In other words, reputational effects are "relative." As Peter Cappelli has explained: "When most organizations appear to be downsizing at the same time, there is no place [for workers] to go."[120] In today's downsized employment markets, it is unlikely that unemployed workers will cease seeking a job from a firm because it has downsized older workers. It is more likely that the younger generation of workers will simply accept the fact that they will have to switch jobs many times during their career. In the downsized labor markets of the 1990s, the bad reputation of a prospective employer will not be much of a deterrent to job applicants who have been unemployed for months, if not years. On the other hand, a bad reputation may make the younger employee less willing to incur the sunken cost of firm-specific skills if the employee has reason to believe that he or she will be separated at some time in the future.

Because reputation is not an effective check on employer opportunism, legal checks are needed to guard against such abuses, espe-

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117. As Posner has argued, the aging process entails cognitive changes in the form of knowledge and subjective outlook which cause fundamental mental differences in the individual's self-understanding. *See* POSNER, *supra* note 70, at 8–9, 84–94. As Posner states: "[T]he difference between one's young and one's old self may be so profound that the two selves are more fruitfully viewed as two persons rather than as one." *Id*. at 8–9. This suggests that the self-definition of the individual changes with age, resulting in shifts in the individual's preference function. Multiple self-analysis would suggest that a younger employee might discount the possibility that her employer will act opportunistically toward her, even if she is aware of the fact that the employer has acted opportunistically toward other employees.

> For it is not a lack of information that drives a wedge between the young and the old self. If it were, then as the number of very old people, nursing homes, geriatric specialists, and so forth increased, as has been happening, young people would find the prospect of becoming old less depressing. They would understand better that most old people really do want to keep on living and do actually enjoy life as distinct from merely dreading death. No such change in the outlook of the young is discernable.

Id. at 87.

118. Schwab, *supra* note 41, at 27.

119. *Id*.

120. Cappelli, *supra* note 6, at 588.

cially opportunistic downsizing. And yet the courts have made it difficult for plaintiffs to prove that the downsizing of older at-will employees, because they are more expensive, is a form of wrongful discrimination. Perhaps Judge Posner is right in suggesting that the courts have been slow to do anything about opportunism in age discrimination cases because judges do not want to "make it difficult for firms to take rational steps to reduce their costs when they find, for whatever reason, that they are paying wages in excess of the market . . . ."[121] But if this is the rationale for cases like *Biggins* and *Flanigan*, then the courts are really saying that employment law is largely ineffective to protect aging workers in the current postindustrial era. If this is what the courts are really saying, then there is little, if anything, that the current state of employment law can do to help elderly workers facing job loss in the postindustrial era, unless of course judicial attitudes change in response to new awareness about the plight of aging workers in the postindustrial era.[122] One thing remains certain: America's aging workforce can no longer assume that hard work and company loyalty will ensure job security.

VII. CONCLUSION

At the turn of the last century, American workers experienced great anxiety and job insecurity as the Industrial Revolution transformed work. With the rise of mass-production techniques, jobs became plentiful in manufacturing, but the promise of good wages with job security was an unsure prospect for most workers. Until the union movement organized employees and provided a form of industrial justice through collective bargaining and "just cause" employment, employees found no measure of job security and protection against arbitrary treatment by employers. Today we are witnessing yet another great revolution in work as we approach the end of the current century. At century's end, workers are experiencing a new anxiety brought about by another great revolution in firm organization.

Like the industrial revolution, the contemporary "reengineering

121. POSNER, *supra* note 70, at 337.

122. For the author's proposal for rendering age and pension discrimination law more responsive, see Minda, *supra* note 12.

revolution" is changing the nature of work itself by bringing new informational technologies and managerial ideas that are changing what workers do. These changes have brought about increases in productivity, but at a great cost to workers who have been replaced as a result of such changes. Downsizing, restructuring, reduction-in-force (with the attendant consequences of unemployment), premature retirement, and loss of income have been part of the darker side to the reengineering revolution in the postindustrial era.

While the United States' economy is now in its sixth year of recovery following the recession of 1990–91, Americans' wages have stagnated and income inequality has reached all time highs.[123] These economic conditions have persisted in part because the union movement is on the decline, and because the common law regime of employment at-will for most workers is a weak check on the exercise of arbitrary and strategic behavior of employers. While all of this is happening, the population is aging and the baby boom generation is preparing to retire.

Elderly workers in today's ruthless economy are finding that they are more vulnerable than ever in the postindustrial era. That vulnerability has important legal as well as social policy implications. For example, between 1990 and 2030, the number of Americans over sixty-five will double, while the working age population will grow by just twenty-five percent. This trend means that just 2.8 workers (instead of the current 4.8 workers) will be available to produce the goods and services consumed by each retired worker over sixty-five.[124] Consequently, as the baby boom generation approaches retirement, retired workers will outnumber active workers. If social security taxes do not increase while paid-out benefits decrease, then the next generation of retirees may no longer have a comfortable living standard after retirement, and many may be forced to accept menial employment just to maintain a minimal

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123. *See* HEAD, *supra* note 6, at 47. As Simon Head reports:

> [B]etween 1990 and 1995, the productivity of all non-farm private sector employees increased by 10.3 percent, while during the same period the real hourly wages of rank and file workers were unchanged. This is the first time in American postwar history that the real wages of most workers have failed to increase during a recovery.

Id.

124. *See* Peter Passell, *You Saved, but They Didn't: So Now What? — Cracking the Baby-Boomer Nest Egg*, N.Y. TIMES, July 7, 1996, § 3, at 1.

living standard.

American workers have always lost jobs as a result of economic and technological changes. Older workers, like younger ones, cannot expect to be immune from the uncertainties of the economy. But never before have American workers, especially late-career workers, been faced with the prospect of permanent lay offs in the midst of an economic recovery. Many older workers today are experiencing a form of permanent lay off which is on the same analytical and emotional footing as an involuntary dismissal. From the worker's point of view, there is a world of difference between a temporary lay off and being "fired." Because discharge is the "capital punishment" of the workplace, most employees react negatively to the experience of being dismissed, regardless of the economic "justification."

The downsizing of aging workers in the prime of their working careers will have a profound impact on the way workers think about work and the future. The aggregate effect of this has been the creation of a deep-seated pessimism in many Americans, causing workers to question what dreams of possibility are available to them and to future generations.[125] As a result of downsizing, aging workers can no longer expect to receive the rewards of hard work from a lifetime of devotion to a single employer. The more common experience today is that most workers can expect to be fired at least once during their employment career. The pending threat of being fired, especially when it occurs late in the employee's career with a particular employer, can have a serious negative impact on the older worker even if he or she can find another job after being downsized.

Studies suggest that "exposure to unemployment can affect the psychological well-being of [workers] . . . including . . . their attitude toward work."[126] Because unemployment can be hazardous to the worker's emotional health, the threat of being fired for reasons of age can have negative consequences on the productivity of otherwise productive workers.[127] Studies of managers in firms that have experienced lay offs suggest that the "survivors" suffer psychologically.[128] "Many managers reported that lay offs have a decidedly negative

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125. *See generally The Downsizing of America* series, *supra* note 10.

126. *See* William Darity, Jr. & Arthur H. Goldsmith, *Social Psychology, Unemployment and Macroeconomics*, 10 J. ECON. PERSP. 121, 121–22 (1996).

127. *See id*. at 124.

128. *See id*.

effect on subordinates' productivity, morale and commitment to the organization."[129]

The threat of downsizing can thus affect the degree to which all workers will be willing to invest in their own job training. Human capital theory predicts that "worker's expected investment horizons are important determinants of the probability of receiving training."[130] The adverse effect on job training will, however, be heightened if career employees are threatened with downsizing. Workers who have devoted a life-time of service to their employer should therefore not be fired at the end of their career solely because they are more expensive, even if they are paid a wage which may exceed their current productivity. The wage of a late-career employee accounts for more than just that employee's current level of productivity; it also covers the employee's investment in the job measured in terms of years of efficient and loyal service. Downsizing of older, late-career workers thus undermines the willingness of workers to invest in their own job training. Reengineering may in the long run encourage the next generation of workers to be less willing to invest in their own job-specific training.

When employers downsize those employees nearing retirement, they send a message to all workers that hard work and loyal service are not likely to be valued at the workplace. All workers may have less reason to adhere to the work ethic which has heretofore sustained America's standard of living. Downsizing of aging workers in the postindustrial era thus presents a threat to our society by undermining worker morale, adversely affecting the work ethic; widening income inequality, exacerbating the pending retirement crisis, and further deepening the unemployability of elderly workers. These are important issues which serve to link employment law with the emerging field of elder law. It is time that scholars and practitioners in these two legal specialties unite in a common effort to meet the coming challenge of an ever increasing, aging world in the postindustrial era.

129. *Id*.

130. Anne Beeson Royalty, *The Effects of Job Turnover on the Training of Men & Women*, 49 INDUST. REL. & LAB. REV. 506, 520 (1996). Royalty's study of data from the national Longitudinal Survey of Youth supports such a prediction. *See id*. at 520.