The ADA and the NLRA: Balancing Individual aud Collective Rights

ROBERT A. DUBAULT*

INTRODUCTION

On July 26, 1990, President George Bush signed the Americans with Disabilities Act ("ADA" or "the Act")[1] into law Intended to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[2] the ADA creates significant new rights for the disabled in the areas of employment,[3] public services,[4] public transportation,[5] and public accommodation.[6]

Hailed as "the most significant civil rights legislation in more than 25 years,"[7] the ADA undoubtedly will expand employment opportunities for many of America's forty-three million disabled persons.[8] In addition to generally increasing the responsibilities of employers and labor organizations, the Act also creates the potential for additional conflicts between unions and employers, given their responsibilities under the National Labor Relations Act ("NLRA").[9]

The purpose of this Note is to discuss the potential areas of conflict between the ADA and the NLRA and to propose a method for resolving them. Part I will discuss briefly the obligations imposed by the ADA and the NLRA upon employers and labor unions. Part II will identify the areas of potential conflict between the two statutes, utilizing a memorandum issued by the former general counsel for the National Labor Relations Board ("NLRB") as a model. The purpose of Part III is to demonstrate that under the ADA, Congress has provided stronger protection for the rights of disabled individuals than under prior civil rights statutes. This will be accomplished by first

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* J.D. Candidate, 1995, Indiana University School of Law–Bloomington; M.B.A., 1990, Western Michigan University; B.S.B.A., 1985, Central Michigan University. I would like to thank Professor Terry Bethel, Professor Mark Adams, and Steven Palazzolo for their constructive comments on earlier drafts of this Note. Also, special thanks to my mother and father for their constant support and encouragement.

1. 42 U.S.C. §§ 12101-12213 (Supp. V 1993). For a review of the events leading up to the passage of the ADA, see Arlene Mayerson, *The Americans with Disabilities Act—An Historic Overview*, 7 LAB. LAW. 1 (1991).

Although the ADA was signed into law in 1990, many of the Act's provisions did not immediately become effective. For a discussion of whom the ADA covers and the implementation schedule for the employment provisions of the Act, see *infra* note 11 and accompanying text.

2. 42 U.S.C. § 12101(b); *see also* S. REP. NO. 116, 101st Cong., 1st Sess. 2 (1989); H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 304.

3. 42 U.S.C. §§ 12111-12117.

4. *Id.* §§ 12131-12134.

5. *Id.* §§ 12141-12165.

6. *Id.* §§ 12181-12189. The ADA also imposes barrier-free requirements for new construction projects. *Id.* § 12201.

7. Julia Lawlor, *Disabilities No Longer a Job Barrier*, USA TODAY, July 22, 1992, at 1A.

8. *See* 42 U.S.C. § 12101(a).

9. 29 U.S.C. §§ 151-169 (1988).

reviewing the judicial treatment of discrimination claims under the Rehabilitation Act of 1973. Second, the legislative history and regulations of the ADA will be analyzed. Finally, specific provisions of other civil rights statutes will be discussed and compared to the ADA. Part IV will draw upon Parts I through III to set forth a balancing framework that employers, unions, administrative agencies, and the courts can use to resolve ADA/NLRA conflicts.

I. THE REQUIREMENTS OF THE ADA AND THE NLRA

This Part will lay out, in some detail, the various obligations that the ADA and the NLRA impose on employers and unions. This review lays the foundation for the discussion in Part II of the areas of conflict between the two statutes. Part I.A discusses the various rights and obligations created by Title I of the ADA—the section governing discrimination in employment. Part I.B examines the obligations imposed on both unions and employers by the NLRA.

A. Title I of the ADA

Title I of the ADA governs discrimination in employment. The coverage of the Act is essentially the same as that of Title VII of the Civil Rights Act of 1964 ("Title VII").[10] The ADA defines a "covered entity" as (1) employers and their agents engaged in an industry affecting commerce which employ fifteen or more persons; (2) employment agencies; (3) labor organizations; and (4) joint labor-management committees.[11] In general, the ADA prohibits disability-based discrimination against a "qualified individual with a disability" in the areas of job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment.[12] Covered entities are also prohibited from entering into contractual arrangements (including contracts with labor unions),[13] and from utilizing standards, criteria, or methods of administration which have the effect of discriminating against disabled individuals.[14] Unlike

10. 42 U.S.C. §§ 2000e-2000h (1988 & Supp. V 1993).

11. 42 U.S.C. § 12111(2), (5)(A). Specifically excluded from the ADA's employment provisions are the United States Government, wholly-owned corporations of the United States, Indian Tribes, and bona fide private membership clubs (other than labor organizations) which are tax exempt under § 501 of the Internal Revenue Code. *Id.* § 12111(5)(B).

The employment provisions of the ADA became effective on July 26, 1992, for employers of 25 or more employees. *Id.* § 12111(5)(A). The Act's coverage was expanded to cover employers of 15 or more employees on July 26, 1994. *Id.*, *see also* 29 C.F.R. § I630.2(e) (1994).

12. 42 U.S.C. § 12112(a).

13. *Id.* § 12112(b)(2). Unlike other civil rights statutes, the ADA contains no exception for bona fide seniority systems which have the effect of discriminating against covered individuals. *See, e.g.*, 42 U.S.C. § 2000e-2(h); 29 U.S.C. § 623(f)(2) (1988); *see also infra* part III.D.

14. 42 U.S.C. § 12112(b)(3). The Act and the final regulations do allow the use of such standards or criteria if they are job related and consistent with business necessity. *Id.* § 12112(b)(6); 29 C.F.R. § 1630.7 (1994).

other civil rights statutes which seek to prohibit employers from engaging in discriminatory actions, the ADA imposes upon covered entities an *affirmative duty* to make "reasonable accommodations" for the known physical or mental limitations of otherwise qualified individuals, unless it can be shown that a proposed accommodation would impose an undue hardship on the entity making it.[15] Absent a showing of undue hardship, an employer's failure to make reasonable accommodation will constitute illegal discrimination under the Act.

Employers are not required to reasonably accommodate all disabled individuals, however. Only "qualified individuals with disabilities" are entitled to reasonable accommodation. A qualified individual with a disability is one who, with or without "reasonable accommodation," can perform the "essential functions" of the job held or desired.[16] In general, a reasonable accommodation is any change in the work environment or in the way a job is typically performed which will enable the individual to enjoy equal employment opportunities.[17] Both the statute and the regulations provide examples of potential accommodations, including (1) making existing facilities accessible and usable by disabled individuals; (2) job restructuring; (3) instituting part-time or modified work schedules; (4) reassignment to a vacant position; (5) acquisition or modification of equipment or devices; (6) supplying qualified readers or interpreters; and (7) "other similar accommodations."[18] The regulations accompanying the ADA also provide that in determining the appropriate reasonable accommodation, "it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability."[19]

An employer may restructure a job by reallocating or redistributing *nonessential* job functions or by changing when or how the essential job functions are performed.[20] An employer need not reallocate *essential* job functions since those functions are, by definition, the duties that an employee must be able to perform (with or without reasonable accommodation) in order to qualify for the position.[21] For example, if a security guard develops a

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15. 42 U.S.C. § 12112(b)(5)(A).

16. *Id.* § 12111(8). The Equal Employment Opportunity Commission ("EEOC") regulations outline a two-step process for determining whether an individual is a "qualified individual with a disability" (1) whether the person satisfies the requisite skills, experience, education, and other job-related requirements of the position in question; and (2) whether the person can perform the essential functions of the position held or desired with or without accommodation. *See* 29 C.F.R. § 1630.2(m) (1994).

17. 29 C.F.R. § 1630.2(o)(1) (1994).

18. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2) (1994).

19. 29 C.F.R. § 1630.2(o)(3) (1994); *see also* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 3.8(3) (1992) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL] (stating that the employer should, in consultation with the individual, identify potential accommodations and assess the effectiveness of each).

20. 29 C.F.R. § 1630.2(o) app. at 401 (1994).

21. *Id.* The regulations define essential functions as the "fundamental job duties" of the position. *Id.* § 1630.2(n)(1). Among the factors to be considered in determining whether a given function is "essential" are (1) whether the position exists to perform that function; (2) whether there are a limited number of employees available among whom the job function can be distributed; and/or (3) whether the function is highly specialized. *Id.* § 1630.2(n)(2).

visual disorder and can no longer perform the required task of inspecting employee identification badges, the employer would not be required to reassign this task or hire an assistant to perform the task, since doing so would require another person to actually perform the job rather than merely to assist the disabled individual in performing the job.

An employer can assert "undue hardship" as a defense to the duty to accommodate a disabled employee or applicant. The statute defines undue hardship as "an action requiring significant difficulty or expense, when considered in light of [certain] factors."[22] These factors include the nature and cost of the accommodation, the overall financial resources of either the facility involved or of the covered entity, and the type of operation of the covered entity, including the composition, structure, and functions of the work force.[23] According to the Interpretive Appendix to the regulations, the concept of undue hardship is not limited to financial considerations alone. Undue hardship also refers to any accommodation that would be "unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."[24]

Finally, the ADA includes medical examinations and inquiries within its general prohibition against discrimination.[25] Nevertheless, pre-employment medical examinations are allowed—provided that the examination is performed *after* the employee has been offered the job[26] and it is relevant to the applicant's ability to perform job-related functions.[27] Voluntary medical examinations and health histories are also allowed.[28] The Act requires that all information obtained during medical examinations be maintained in separate, confidential files and limits disclosure of the information to supervisors and managers, safety personnel, and government officials.[29]

B. Applicable Provisions of the NLRA

The NLRA is the primary body of federal law controlling labor-management relations in the private sector.[30] The statute is only one of three separate

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Evidence of the essential nature of a job function may include the employer's judgment, written job descriptions, the amount of time spent performing the task, the consequences of not requiring the employee to perform the task, work experiences of past incumbents in the job, current work experiences of incumbents in similar jobs, and *the terms of a collective bargaining agreement. Id.* § 1630.2(n)(3). The importance of considering the terms of the collective bargaining agreement will be discussed *infra* at Part IV

22. 42 U.S.C. § 12111(10)(A).
23. *Id.* § 12111(10)(B)(i), (ii), (iv); 29 C.F.R. § 1630.2(p)(2) (1994).
24. 29 C.F.R. § 1630.2(p) app. at 402 (1994).
25. 42 U.S.C. § 12112(d)(1).
26. *Id.* § 12112(d)(3).
27. *Id.* § 12112(d)(4)(A).
28. *Id.* § 12112(d)(4)(B).
29. *Id.* § 12112(d)(3)(B).
30. ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 1 (1976).

legislative acts[31] which represent Congress' efforts to promote industrial peace by removing obstacles to, and encouraging the formation of, labor unions—the primary voice for the individual employee.[32] Section 7 of the NLRA gives employees several rights, including (1) the right to form labor organizations; (2) the right to deal collectively with their employer through those organizations; and (3) the right to engage in concerted activities in furtherance of those rights.[33] The NLRA also imposes several obligations on employers and labor organizations—jointly as well as in their individual capacities. For example, § 8(a)(5) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)] of this title."[34] Section 8(b)(3) of the NLRA imposes an identical obligation upon the employee representative.[35] Section 9(a) further states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[36]

These provisions reflect a central principle of American labor law: that the right of exclusive representation belongs to the majority union.[37] Through these provisions, the NLRA creates both an "affirmative and negative mandate" requiring the employer to bargain affirmatively with the labor union selected by the majority of its employees and, simultaneously, to refrain from bargaining with anyone other than the employees' representative on matters covered by the NLRA.[38] The union is responsible for harmonizing the conflicting interests of its constituents no matter how diverse their skills, age, or race. By seeking to establish working conditions with individuals or

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31. The NLRA is the more commonly used name for the Wagner Act of 1935, codified at 29 U.S.C. §§ 151-169. The other two statutes are the Taft-Hartley Act of 1947, codified at 29 U.S.C. §§ 141-144, 171-197 (1988), and the Landrum-Griffen Act of 1959, codified at 29 U.S.C. §§ 401-531 (1988).

32. GORMAN, *supra* note 30, at 1.

33. 29 U.S.C. § 157. Section 7 also gives employees the right to refrain from joining a union. *Id.*

34. *Id.* § 158(a)(5).

35. *Id.* § 158(b)(3).

36. *Id.* § 159(a) (emphasis added). Section 9(a) contains two provisos to the exclusive representation requirement:

> *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Id. (emphases in original).

37. GORMAN, *supra* note 30, at 374; *see also* Medo Photo Supply v. NLRB, 321 U.S. 678 (1944) (holding that an employer may not bypass the bargaining representative and negotiate with individual employees regarding terms and conditions of employment even though the employee(s) initiated the negotiations).

38. GORMAN, *supra* note 30, at 375.

minority subgroups within the union, the employer improperly assumes that responsibility for itself and undermines the position of the union.[39]

The NLRA contains certain limitations on the employer's duty to bargain exclusively with the employees' representative, however. First, the prohibition on dealing directly with individual employees applies only to "rates of pay, wages, hours of employment, or other conditions of employment."[40] Outside of those areas, the employer is free to negotiate directly with individual employees provided that such bargaining does not directly infringe on matters under negotiation or already contained in the collective bargaining agreement.[41] Second, the prohibition applies only "for purposes of collective bargaining."[42] The NLRA does not proscribe dealings which cannot be characterized as bargaining, such as informal discussions or interviews.[43]

Section 8(d) of the statute defines the term "collective bargaining" and provides:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession [44]

Once the parties have entered into an agreement governing the terms and conditions of employment, § 8(d) limits either party's right to demand negotiation on any matter contained in the contract.[45] Sections 8(d) and 8(a)(5) combine to prohibit an employer from unilaterally changing provisions of a negotiated collective bargaining agreement.[46] Where no agreement exists or an agreement is in place but fails to address a particular issue, an employer may not change working conditions without first providing the union with notice and an opportunity to bargain over the proposed change.[47] Finally,

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39. *Id.* at 379; *see also* General Elec. Co., 150 NLRB 192, 194 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

40. 29 U.S.C. § 159(a).

41. GORMAN, *supra* note 30, at 380; *see also* J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944).

42. 29 U.S.C. § 159(a).

43. GORMAN, *supra* note 30, at 380.

44. 29 U.S.C. § 158(d).

45. *Id.* The limitation is intended to provide a certain measure of stability within the workplace. The limitation, however, is not absolute. Specifically, § 8(d) provides:

> [T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Id. Thus, the parties may, by incorporating a reopener clause into their agreement, allow for midterm bargaining on the specific subjects covered by the clause.

46. *See* NLRB v. Katz, 369 U.S. 736 (1962).

47. *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (finding that subcontracting of bargaining unit work constitutes a mandatory subject of bargaining, and the union is therefore entitled to notice and opportunity to bargain over the subcontracting even though no contract is in place).

§ 8(d) explicitly grants a party to the labor agreement the right to refuse to "discuss or agree to any modification" during the term of the collective bargaining agreement.[48]

Unilateral action by an employer with respect to § 7 items is typically referred to as a "per se" violation of the NLRA. In rare circumstances, however, the employer may be justified in taking such action upon a showing of good faith and business necessity.[49] In the seminal case of *NLRB v. Katz*,[50] the Supreme Court affirmed an NLRB finding that the employer had committed an unfair labor practice by making unilateral changes in wages and in its sick leave policy during contract negotiations with the union. The Court implied that under some circumstances, however, such changes may be permissible.[51]

Because § 9(a) confers upon the union the status of "exclusive representative," the union then assumes a concomitant duty to represent *all* employees within the bargaining unit fairly and in good faith.[52] The union violates this duty when it acts (or fails to act) based on, among other things, the employee's race,[53] gender,[54] or membership status in the union.[55] The union's duty does not, however, demand identical treatment for all members. Rather, the union is given a "wide range of reasonableness in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[56] The union's duty of fair representation applies both to the negotiation and the administration of the collective bargaining agreement.[57]

In addition to those obligations specifically set forth in the NLRA, the courts have interpreted § 8(d) as imposing a duty on both parties to disclose relevant information requested by the other so that the party may properly perform its obligations under the Act.[58] The duty to disclose information is

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48. 29 U.S.C. § 158(d).

49. GORMAN, *supra* note 30, at 400; *see also* 1 THE DEVELOPING LABOR LAW 596-98 (Patrick Hardin ed., 1992).

50. 369 U.S. 736.

51. Specifically, the Court stated that "[unilateral action] will rarely be justified by any reason of substance. While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here." *Id.* at 747-48; *see also* 1 THE DEVELOPING LABOR LAW, *supra* note 49, at 598 (noting that impasse, necessity, and waiver are also grounds upon which an employer may base unilateral action).

52. *See* Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65 (1991); Ford v. Huffman, 345 U.S. 330 (1953). An alternative formulation of the rule is that the union breaches its duty when its conduct toward a bargaining unit member is "arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967).

53. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). The action in *Steele* was brought under the Railway Labor Act rather than the NLRA. Nevertheless, its holding has been extended to race-based fair representation claims under the NLRA. *See Huffman*, 345 U.S. at 338.

54. Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972).

55. Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4th Cir. 1963).

56. *Huffman*, 345 U.S. at 338.

57. Vaca v. Sipes, 386 U.S. 171, 177 (1967) (citations omitted).

58. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) (imposing upon the employer a duty to disclose financial information to the union); Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB, 598 F.2d 267 (D.C. Cir. 1979) (imposing a similar obligation upon the union).

not limited solely to the actual negotiation of the labor contract. Rather, it extends throughout the term of the agreement to cover such union functions as grievance arbitration.[59]

The parties' duty to disclose information is not absolute. Rather, courts will engage in a case-by-case balancing of the interests of all the parties involved—employer, union, and employee—to determine if disclosure is warranted.[60] In addition, outside areas such as wages and fringe benefits, the union bears the burden of demonstrating the relevance of the information requested.[61] Finally, if the information is relevant but, because of employee confidentiality reasons, may not be disclosed, the affected employee may waive her privacy rights and allow disclosure.[62]

II. POTENTIAL CONFLICTS BETWEEN THE ADA AND THE NLRA

From the foregoing discussion it is apparent that the duties imposed on unions and employers by the ADA and the NLRA do not neatly coincide. In fact, several areas of potential conflict exist. For example, an employer's duty under the ADA to accommodate employees or applicants may conflict with its duty to bargain under the NLRA—particularly if the employer unilaterally implements an accommodation affecting a term or condition of employment. In addition, an employer may be guilty of direct dealing in violation of the exclusive representation principles of the NLRA if it consults directly with the disabled employee, in the absence of the union, to determine potential reasonable accommodations (as suggested by the ADA). If, on the other hand, the employer decides to involve the union in the reasonable accommodation process, how can it reconcile its ADA obligation to treat all employee medical information as confidential with its duty to provide information under the NLRA? Lastly, for the labor organization, how does the ADA's nondiscrimination requirement complicate the union's duty of fair representation owed both to the disabled employee and to others in the unit whose interests may be affected by any accommodations to which the union agrees?

The ADA may provide unions with another basis for obtaining an employer's financial information. For example, the union could refuse to agree to an accommodation (*e.g.*, reassignment to a vacant position) on the ground that it violates some provision of the collective bargaining agreement. The union may then propose an accommodation involving considerable expense to the employer (*e.g.*, modification of equipment). If the employer "pleads poverty," claiming that the union's proposed accommodation would impose an undue financial hardship upon it, the employer would then be required (upon request) to provide the union with information verifying its financial situation. If the union were legitimately fulfilling its obligation to represent its member, requiring disclosure would not be problematic. If, on the other hand, the union was acting with the sole objective of obtaining the employer's financial statements, the employer would be justified in refusing to make disclosure. *See* 1 THE DEVELOPING LABOR LAW, *supra* note 49, at 659 (stating that the union's request must be in "good faith" and be based on "at least one [justifiable] reason").

59. NLRB v. Acme Indus. Co., 385 U.S. 432 (1967).

60. Detroit Edison Co. v. NLRB, 440 U.S. 301, 314-20 (1979); *Truitt*, 351 U.S. at 153-54.

61. *Detroit Edison*, 440 U.S. at 314-15; GORMAN, *supra* note 30, at 413.

62. *Detroit Edison*, 440 U.S. at 317, 318 n.16.

In August, 1992, then-General Counsel of the NLRB, Jerry Hunter, issued a memorandum identifying areas of potential conflict between the NLRA and the ADA and outlining generally how the NLRB would approach claims raising issues under the two acts.[63] This memorandum provides a useful structure for analyzing the ADA/NLRA conflicts identified above. The NLRB memorandum addressed several issues, including (1) potential conflicts between an employer's NLRA § 8(a)(5) and § 8(d) duty to bargain in good faith and its duties under the ADA, and (2) potential conflicts between the union's ADA obligations and its § 9(a) duty of fair representation.[64]

A. Conflicts Between the ADA and the NLRA Duty to Bargain

The potential conflict between an employer's obligations under the ADA and its duty to bargain under the NLRA is most evident when the employer seeks to implement a reasonable accommodation that is inconsistent with the provisions of an existing collective bargaining agreement.[65] In such a situation, the employer may encounter a "Catch 22" of sorts. If the employer unilaterally implements the proposed accommodation, it faces a possible unfair labor practice charge under § 8(a)(5) of the NLRA. On the other hand, if the employer, relying on the collective bargaining agreement and the NLRA, refuses to make the accommodation, it faces a potential ADA-based discrimination charge by the disabled employee.

While the legislative history of the ADA indicates that the drafters were aware of this potential conflict, it offers no real solutions. Both the House and the Senate committee reports state that after the effective date of the ADA, such conflicts may be avoided by including "a provision [within the collective bargaining agreement] permitting the employer to take all actions necessary to comply with this legislation."[66] Although this solution appears desirable, some experts have questioned just how realistic it is.[67] First, even if the

63. General Counsel Memorandum GC 92-9 (Aug. 7, 1992) [hereinafter GC Memo] (copy on file with the *Indiana Law Journal*); *see also* Jerry M. Hunter, *Potential Conflicts Between Obligations Imposed on Employers and Unions by the National Labor Relations Act and the Americans with Disabilities Act*, 13 N. ILL. U. L. REV. 207 (1993).

64. GC Memo, *supra* note 63, at 1, 7. The Memorandum also briefly discusses concerted activities regarding disability issues which affect mandatory subjects of bargaining. The Memorandum concludes that such activities are concerted activities under § 7 of the NLRA, and that an employer would violate § 8(a)(1) of the NLRA by retaliating, or threatening to retaliate, against employees for engaging in these activities. *Id.* at 8-9.

65. For example, an employee may develop a disabling condition, necessitating a transfer to a light-duty position for which she lacks the requisite seniority under the collective bargaining agreement.

66. S. REP. NO. 116, *supra* note 2, at 32; H.R. REP. NO. 485, *supra* note 2, at 63, *reprinted in* 1990 U.S.C.C.A.N. at 346.

67. *See, e.g.*, Erica F. Rottenberg, Comment, *The Americans with Disabilities Act: Erosion of Collective Rights?*, 14 BERKELEY J. EMP. & LAB. L., 179, 184 (1993); Patricia McConnell, Collective Bargaining and NLRA Issues Raised by the Americans with Disabilities Act 10 (paper presented at the annual meeting of the ABA Section of Labor and Employment Law, in New York, N.Y. (Aug. 1993)) (copy on file with the *Indiana Law Journal*). *But see* Barbara Kaminer Frankel, Comment, *The Americans with Disabilities Act: Erosion of Collective Rights?*, 22 SW. U. L. REV. 257, 283 (stating that "labor agreements, which do not include a clause permitting the employer to take all reasonable steps necessary to comply with the ADA, cannot be upheld if to do so would thwart the public policy established by the ADA").

employer proposes that such a provision be included in the collective bargaining agreement, under § 8(d) of the NLRA, the union is not obligated to agree to it. Second, even though the union is also bound to uphold the ADA, given the almost unfettered discretion such a provision would give to the employer in fashioning accommodations which might affect terms and conditions of employment, it is doubtful whether the union would agree to it.[68] Recall, however, that an employer who unilaterally implements a reasonable accommodation which conflicts with the terms of its collective bargaining agreement would violate § 8(a)(5) of the NLRA only if the accommodation caused a "material, substantial or significant" change in working conditions.[69] For example, Mr. Hunter stated in his Memorandum that accommodations such as "putting [an employee's] desk on blocks, providing a ramp, adding braille signage or providing an interpreter" would, as a general rule, not result in a sufficient change in the terms and conditions of employment to invoke the employer's duty to notify or bargain with the union before implementing such accommodations.[70]

An employer might argue that the ADA effectively invalidates any and all provisions of the collective bargaining agreement which have the *effect* of preventing reasonable accommodation of a qualified employee's or applicant's disabilities.[71] The employer may then rely on this interpretation of the Act to justify unilaterally revising the offending clause in order to accommodate an applicant or employee. The General Counsel's Memorandum, however, does not support this particular reading of the Act. Distinguishing the ADA—which gives the employer considerable discretion as to the accommodation ultimately implemented—from laws that *mandate* a change in working conditions (to which an employer may unilaterally conform without violating § 8(a)(5)),[72] the Memorandum states that "[i]t seems unlikely that an employer would be privileged to unilaterally change working conditions to achieve compliance with the ADA without giving a union *any* notice or

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68. McConnell, *supra* note 67, at 10.

69. GC Memo, *supra* note 63, at 2 (citing LaMousse, Inc., 259 N.L.R.B. 37, *enforced*, 703 F.2d 576 (9th Cir. 1983) (mem.) (holding that an employer who granted a five-minute increase in employee break time did not violate § 8(a)(5) since the change was not material, substantial, or significant)).

An employer's ability to implement an accommodation without first bargaining with the union can be a very important consideration since most accommodations are expected to be relatively minor—at least in terms of dollars expended. *See* H.R. REP. NO. 485, *supra* note 2, at 33, *reprinted in* 1990 U.S.C.C.A.N. at 315 (citing testimony of Jay Rochlin, executive director of the President's Commission on Employment of People with Disabilities, before the House Subcommittee on Select Education and Employment Opportunities). This assumes, of course, that there is a positive correlation between the cost of an accommodation and its effect on the workplace.

70. GC Memo, *supra* note 63, at 2-3.

71. *See supra* notes 13-14 and accompanying text.

72. GC Memo, *supra* note 63, at 3 (citing Murphy Oil USA, Inc., 286 N.L.R.B. 1039 (1987) (finding that an employer who banned food and drink in work areas to comply with OSHA did not violate the NLRA), and Standard Candy Co., 147 N.L.R.B. 1070 (1964) (holding that an employer who unilaterally raised wages to comply with the Fair Labor Standards Act's minimum wage requirement did not violate the NLRA)).

opportunity to bargain."[73] The Memorandum also points to the ADA's implementing regulations, which provide that

> [i]t may be a defense to a charge of discrimination under [the ADA] that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required.[74]

These statements imply that an employer could rely on its NLRA obligation to bargain with the union as a *temporary* justification for not making a proposed accommodation. Whether that defense permanently relieves the employer from making reasonable accommodation is uncertain.

The General Counsel's Memorandum raises, but does not fully answer, two questions regarding the scope of the duty to bargain over a proposed accommodation which is inconsistent with the provisions of the collective bargaining agreement:

> (1) When a party to the contract (either an employer or a union) requests bargaining over such a proposed accommodation, may the other party rely on its right under Section 8(d) [of the NLRA] to refuse to discuss any modification of the agreement during the term of the contract or, alternatively, does the creation of new legal duties under the ADA impose on both [parties] a concomitant duty under the NLRA, at least, to bargain over the proposed accommodation?
> (2) If the parties are unable to reach agreement on an acceptable accommodation, does an employer violate its Section 8(d) obligation to refrain from altering the contract without the consent of the union if it implements the proposed accommodation over the union's objection?[75]

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73. *Id.* (emphasis in original). Mr. Hunter supports this statement by noting that the employer possesses the defense of "undue hardship" to an ADA failure-to-accommodate discrimination claim. This statement implies that the General Counsel perceives an unfair labor practice charge against an employer as an undue hardship. Whether the courts or the EEOC hold a similar view remains to be seen.

Furthermore, both the ADA's legislative history and regulations provide that the terms of the collective bargaining agreement are relevant to the undue hardship determination. *Id.* at 4; *see also* S. REP. NO. 116, *supra* note 2, at 32; H.R. REP. NO. 485, *supra* note 2, at 63, *reprinted in* 1990 U.S.C.C.A.N. at 345; 29 C.F.R. § 1630.15(d) app. at 414 (1994). Note, however, that none of these authorities affirmatively state that the labor contract is itself a defense to such a charge.

The General Counsel's statement is strong evidence that the NLRB would find grounds to bring an unfair labor practice charge against an employer who, in the process of accommodating a disabled employee, makes such a unilateral change in working conditions. Therefore, employers would be well-advised to proceed very carefully before implementing any such change by fully considering the impact the proposed accommodation will have on the other employees covered by the collective bargaining agreement and, if at all possible, by implementing the least intrusive accommodation that is feasible under the situation.

74. 29 C.F.R. § 1630.15(e) (1994); *see also* GC Memo, *supra* note 63, at 4. At this point one should ask exactly what action the employee or applicant would be challenging. The challenge likely would not focus on the fact that the employer discussed the accommodation with the union prior to implementing (or not implementing) it—which is all that is required by the NLRA. Unlike federal safety or environmental regulations, the NLRA does not *require* or *necessitate* that an employer maintain a discriminatory condition or *forbid* any particular accommodation. It merely forbids the act of making the accommodation which affects working conditions without first discussing it with the union.

75. GC Memo, *supra* note 63, at 5. These issues are addressed further *infra* at Part IV.B.

Although the Memorandum does not provide answers to these questions, it does clarify certain points. First, neither party to the labor contract has a right under the NLRA to insist on adherence to terms which are facially discriminatory under the ADA.[76] Second, a party may argue that, as to facially neutral contract provisions, it should be able to rely on § 8(d) to refuse to engage in midterm bargaining if another adequate accommodation exists which does not conflict with the collective bargaining agreement.[77] The Memorandum states that "further guidance will be forthcoming" as to the resolution of these two unanswered questions.[78]

In determining reasonable accommodations under the ADA in light of the employer's duty to avoid "direct dealing" under the NLRA, Mr. Hunter noted that the ADA's regulations mandate that the employer confer with the disabled employee to determine potential accommodations.[79] Although the NLRA prohibits direct dealing on the part of the employer, § 9 does allow employers to meet with employees to adjust grievances—provided the resolution is not inconsistent with the terms of the collective bargaining agreement and the union has been given the opportunity to be present during the meeting.[80] The General Counsel's Memorandum indicates that an employer who arranges an accommodation which would affect working conditions without negotiating the change with the union may be liable for direct dealing.[81] Thus, it appears that the employer should invite the union to participate in any such discussions in order to comply with both the ADA and § 9(a) of the NLRA. The EEOC agrees that the union should participate in the discussions: "[T]he employer should consult with the union and try to work out an acceptable accommodation."[82]

This solution, however, raises another conflict between the ADA and the NLRA. As previously discussed, the NLRA requires that an employer disclose to the union all relevant information which will enable it to perform its functions under the collective bargaining agreement. The ADA, on the other hand, requires that the employer maintain all employee medical information in a confidential manner and limit disclosure only to certain individuals—none of whom is the employee's bargaining representative. As to how the NLRB will analyze disclosure of information issues, the General Counsel's

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76. GC Memo, *supra* note 63, at 5. Given the prevalence of state disability discrimination laws and the general concern employers have over discrimination charges, it is doubtful that many "facially discriminatory" provisions actually exist.

77. *Id.* at 5 n.17 (noting that the appendix to 29 C.F.R. § 1630.9 provides that the ADA does not require the employer to provide the "best" possible accommodation). The Memorandum does not define what is meant by "another adequate accommodation." Presumably, it means one that enables the disabled employee or applicant to perform the essential functions of the job and does not violate the collective bargaining agreement.

78. *Id.* at 5-6. As yet, no such guidance has been issued.

79. *Id.* at 6; *see also supra* note 19 and accompanying text.

80. 29 U.S.C. § 159(a). For the exact wording of this provision, see *supra* note 36 and accompanying text.

81. GC Memo, *supra* note 63, at 6; *see also supra* note 36.

82. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 19, § 3.9(5).

Memorandum reiterates the approach discussed earlier, under which the Board balances the interests of the parties and attempts to fashion a remedy that protects the interests of the involved parties.[83]

B. The Union's Duty of Fair Representation and Its Obligations Under the ADA

The General Counsel's Memorandum points out that the union's action or inaction toward a disabled employee may raise two types of fair representation claims. First, the disabled employee may claim that the union breached its duty by agreeing to a facially discriminatory contract provision or by responding in a discriminatory manner to the employee's request that the employer be allowed to implement a particular accommodation. Second, nondisabled employees may raise a duty of fair representation claim if the union acquiesces to a proposed accommodation which infringes upon their rights under the collective bargaining agreement.[84] The Memorandum directs regional offices of the NLRB to evaluate such claims under "traditional principles" of the duty of fair representation.[85]

III. LOOKING FOR GUIDANCE

A. Conflicts or Opportunities?

Many practitioners and members of the academic community agree that, at a minimum, the *potential* exists for conflict between the employer's and the union's obligations under the ADA and the NLRA.[86] In contrast, at least one commentator has suggested that the two acts do not conflict, but that they are actually harmonious.[87] Several commentators who have considered the interaction between the ADA and NLRA appear to favor an approach which holds that rights and obligations under one statute automatically trump those under the other or, at least, are deserving of special preference when balanced

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83. GC Memo, *supra* note 63, at 7; *see also supra* text accompanying notes 60-62.

84. GC Memo, *supra* note 63, at 7-8.

85. *Id.* at 8. For a discussion of the standards applied to fair representation claims, see *supra* notes 52-57 and accompanying text.

86. *See, e.g.*, Joanne Jocha Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 1991 DET. C.L. REV. 925; Hunter, *supra* note 63; Jules L. Smith, *Accommodating the Americans with Disabilities Act to Collective Bargaining Obligations Under the NLRA*, 18 EMP. REL. L.J. 273 (1992); Eric H.J. Stahlhut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate Under the ADA by Claiming a Collective Bargaining Obligation?*, 9 LAB. LAW. 71 (1993); R. Bales, Note, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J.L. & PUB. POL'Y 161 (1992); Frankel, *supra* note 67; Rottenberg, *supra* note 67; McConnell, *supra* note 67.

87. David S. Doty, Comment, *The Impact of Federal Labor Policy on the Americans with Disabilities Act of 1990: Collective Bargaining Agreements in a New Era of Civil Rights*, 1992 B.Y.U. L. REV. 1055 (1992) (asserting that the ADA recognizes the validity of collective bargaining in resolving employment disputes).

against the other.[88] Other commentators recommend that a more genuine form of balancing be employed to resolve conflicts which arise under the two statutes.[89]

Those favoring the former approach have concluded that either the ADA or the NLRA furthers more important rights and social policies than those furthered by the other statute.[90] Other commentators argue that, from an administrative standpoint, this either/or approach would be less confusing and easier to implement.[91] While it is difficult to argue with the notion that such a per se rule would provide more certainty and administrative ease, this position ignores the realities of modern industrial life and the express language of the ADA and its accompanying regulations. Regardless of which rights one may feel deserve more protection, both of these statutes are essential within their spheres of coverage. Discrimination against the disabled is a significant social problem with huge costs that must be eradicated. In addition, the rights and protections created by federal labor laws have helped bring about significant social and economic equality. These laws have managed to co-exist with, and even support, numerous other civil rights statutes in the past, and there is no reason to believe that they will not continue to do so in the future. Therefore, given the legislative history and the policy considerations behind the ADA, and the importance of both the ADA and the NLRA in protecting worker rights, a balancing approach should be employed, since such a technique will better effectuate the goals and objectives of both statutes.

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88. *See* Smith, *supra* note 86, at 282-83 (recommending that deference should be given to collective bargaining agreements); Bales, *supra* note 86, at 192-93, 203 (arguing that the ADA duty of reasonable accommodation should prevail over the NLRA even if an accommodation contravenes the collective bargaining agreement); Frankel, *supra* note 67, at 276-77, 282-83 (arguing that ADA provisions should prevail over clauses in the collective bargaining agreement which conflict with the goals of the ADA); Rottenberg, *supra* note 67, at 186 (arguing that the ADA should not be allowed to adversely impact NLRA rights and obligations).

89. Ervin, *supra* note 86, at 960-62 (arguing that, except in rare circumstances, the ADA duty of reasonable accommodation should prevail over inconsistent terms in the collective bargaining agreement); Stahlhut, *supra* note 86, at 93-95 (recommending that courts proceed on a case-by-case basis by balancing the rights of the disabled individual seeking accommodation against those whose collective bargaining rights are in jeopardy).

90. *See* Bales, *supra* note 86, at 203 (arguing that reassignment in contravention of the collective bargaining agreement poses "few significant impediments" to collective bargaining, and that "disability discrimination, like race and sex discrimination, should be non-negotiable"); Frankel, *supra* note 67, at 260 ("[I]n order to implement the national policy of prohibiting discrimination [on the basis of disability], it is essential that the ADA provisions prevail over provisions in collective bargaining agreements which thwart the goals of the ADA.").

91. *See* Smith, *supra* note 86, at 277 (arguing that unless deference is afforded to collective bargaining agreements, "chaos" will result in the administration of these agreements and the parties will be "burdened by a flood of litigation").

B. Looking for Guidance

Although Congress recognized the potential conflicts between the ADA and the NLRA, it failed to provide any clear answers to the dilemma.[92] There are, however, several areas upon which to draw in formulating a framework for resolving ADA/NLRA conflicts. First, both the legislative history and the implementing regulations make it clear that the Act is modeled upon the Rehabilitation Act of 1973 ("Rehabilitation Act").[93] Thus, a review of the case law developed under the Rehabilitation Act may clarify the role that Congress and the EEOC expect collective bargaining agreements to play under the ADA. Second, the legislative history and the implementing regulations of the ADA strongly suggest a balancing approach. Third, by comparing how the ADA, Title VII, and the Age Discrimination in Employment Act ("ADEA")[94] each deal with seniority provisions in collective bargaining agreements, one can see that the ADA shuns the per se approaches discussed above.

1. The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act prohibits disability-based discrimination by any program or activity receiving federal funds.[95] A fairly substantial and consistent body of case law has developed under § 504 addressing the issues of reasonable accommodation and undue hardship in a unionized workplace. Courts uniformly hold that § 504 does not require employers to accommodate disabled employees if doing so would violate the provisions of the collective bargaining agreement.

One of the first cases to address an employer's competing obligations under the NLRA and § 504 was *Daubert v. United States Postal Service*.[96] The plaintiff in *Daubert* was discharged after a back condition rendered her unable to perform all the duties of her position. The Tenth Circuit Court of Appeals affirmed the lower court's dismissal of the complaint and held that the U.S. Postal Service had articulated a legitimate business justification for failing to

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92. It is reasonably safe to assume that the lack of a determinative answer reflects a conscious omission by Congress. Had Congress stated that the provisions of a collective bargaining agreement provide an automatic and complete defense to a contradictory request for reasonable accommodation, the protections provided by the ADA would be seriously weakened. On the other hand, if Congress had provided that a disabled individual's rights under the ADA always trump the labor agreement, it would have opened the door for substantial abuse of the collective bargaining process and would have run the risk of alienating organized labor—a well-organized contingent of voters.

93. 29 U.S.C. § 794 (1988 & Supp. V 1993); *see also* S. REP. NO. 116, *supra* note 2, at 2 ("The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business."); 29 C.F.R. § 1630.2(g) app. at 395 (1994) (stating that Congress intended that the relevant case law developed under the Rehabilitation Act be generally applicable to the term "disability"); *id.* § 1630.15(d) app. at 414 (analogizing the concept of "undue hardship" to that which was developed under the Rehabilitation Act as opposed to Title VII).

94. 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993).

95. *Id.* § 794(a).

96. 733 F.2d 1367 (10th Cir. 1984).

reassign the plaintiff or restructure her position: such action was foreclosed by the seniority provisions of the collective bargaining agreement.[97] Unfortunately, the court did not elaborate on its conclusory statement that the Postal Service's obligations under the labor agreement "clearly articulate[d] a legitimate business reason for Daubert's discharge."[98]

The Sixth Circuit Court of Appeals reached a similar result in *Jasany v. United States Postal Service*.[99] The court held that a low-seniority employee, who suffered from a congenital vision disorder which interfered with his ability to operate a letter sorting machine, was not "handicapped" as that term is defined in the Rehabilitation Act. In the court's view, the plaintiff's impairment did not substantially limit him in a major life activity [100] The court noted that even if the plaintiff were handicapped, he would not have been entitled to reassignment under the terms of the collective bargaining agreement, which limited reassignment to those employees who had suffered job-related injuries. The court stated that "[a]n employer cannot be required to accommodate a handicapped employee by restructuring a job in a manner which would usurp the legitimate rights of other employees in a collective bargaining agreement."[101]

Finally, in *Carter v. Tisch*,[102] an asthmatic post office custodian brought suit when he was discharged as a result of an inability to perform the essential functions of his position. He claimed that the Postal Service, which had temporarily assigned him to a light-duty position prior to terminating his employment, unlawfully discriminated against him by failing to permanently assign him to light-duty work. The EEOC found no discrimination, and the district court agreed on the ground that the terms of the collective bargaining agreement precluded the plaintiff's request.[103] The court of appeals affirmed, holding that the Postal Service had no duty to accommodate the plaintiff by assigning him to permanent light duty [104]

Interestingly, the court's decision rested partly on dictum from a U.S. Supreme Court decision which stated that, under § 504 of the Rehabilitation

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97. *Id.* at 1369, 1372.

98. *Id.* at 1370.

99. 755 F.2d 1244 (6th Cir. 1985).

100. *Id.* at 1248-50; *see also* 29 C.F.R. §§ 1613.703, 1613.708 (1994). The *Jasany* court added that, even assuming the employee were handicapped, he was not otherwise qualified for his position since visual acuity was required for the position. As such, the Postal Service was not required to accommodate him by eliminating one of the essential functions of his position (*i.e.*, running the mail sorting machine). *Jasany*, 755 F.2d at 1250.

101. *Jasany*, 755 F.2d at 1251-52 (citing, among others, *Daubert*, 733 F.2d at 1367). Although this was not the primary basis for the court's holding, it is interesting to note that no evidence was introduced which showed that accommodating the plaintiff by restructuring his position or reassigning him to another job would have disappointed any of his co-workers' expectations.

The approach discussed *infra* at Part IV.B recommends that whether a co-worker's expectations would *actually* be disappointed (as opposed to viewing the matter in the abstract) is a relevant factor in determining whether an employer failed to make a reasonable accommodation or was unjustified in unilaterally imposing such an accommodation.

102. 822 F.2d 465 (4th Cir. 1987).

103. *Id.* at 466-67.

104. *Id.* at 469.

Act, an employer is under no duty to reassign an employee who can no longer perform his job.[105] As additional support for its decision, the court of appeals pointed to the terms of the collective bargaining agreement, which limited reassignment to employees with five or more years of seniority [106] The court also noted that, even if reassignment were a permissible accommodation, unless the plaintiff could show that "the [collective bargaining] agreement had the effect or intent of discrimination" the employer was under no duty to provide such an accommodation.[107]

These cases show how judicial treatment of the employer's duty to make reasonable accommodation has severely weakened the protections provided to disabled individuals under § 504 of the Rehabilitation Act—at least in a union setting. As such, it is not surprising that Congress, in drafting the ADA, added additional safeguards[108] and did not rely solely upon the judicial interpretation of § 504. For example, the Senate Report accompanying the ADA states that the concept of undue hardship "is derived from and should be applied consistently with interpretations by *Federal agencies* applying the term set forth in regulations implementing sections 501 and 504 of the Rehabilitation Act."[109] This statement supports the notion that Congress disagreed with past judicial treatment of the undue hardship issue. Nevertheless, it would be premature to conclude that statements such as this evince a congressional intent that the rights of the disabled should always prevail over an employer's defense grounded in the collective bargaining agreement. If Congress had intended such a result, it could have easily said so.[110]

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105. School Bd. v. Arline, 480 U.S. 273, 289 n.19, *reh'g denied*, 481 U.S. 1024 (1987).

106. *Carter*, 822 F.2d at 467. The court stated that "[the Postal Service] was bound by a collective bargaining agreement. Reassigning Carter to permanent light duty, when he was not entitled to one of a limited number of light-duty positions, *might have* interfered with the rights of other employees under the collective bargaining agreement." *Id.* (emphasis added). The court also cited *Jasany* and *Daubert* in support of its holding that employers are not required to make accommodations which might usurp the expectations of other workers under the collective bargaining agreement. *Id.*

107. *Id.* at 469; *see also* Shea v. Tisch, 870 F.2d 786, 789 (1st Cir. 1989). The *Shea* court relied in part on *Carter* in affirming the district court's grant of summary judgment against the employee's discrimination claim for failure to make reasonable accommodation. The plaintiff in *Shea* requested reassignment in violation of the seniority-based job bidding provisions of the collective bargaining agreement.

108. Unlike the Rehabilitation Act, the ADA includes reassignment as a potential accommodation. *See* 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(i).

109. S. REP. NO. 116, *supra* note 2, at 36 (emphasis added). *But cf.* 29 C.F.R. § 1630.2(g) app. at 395 (stating that "Congress intended that the relevant *caselaw* developed under the Rehabilitation Act be generally applicable to the term 'disability'") (emphasis added).

110. Note also that although the EEOC has generally been more willing to find handicap discrimination despite the employer's obligations under a collective bargaining agreement, the agency has not been entirely consistent in ruling that the disabled employee's rights under the Rehabilitation Act automatically prevail. *Compare Jasany*, 755 F.2d at 1248 (in which the EEOC found in favor of the employee on a handicap discrimination claim) *with Carter*, 822 F.2d at 466 (where the EEOC found no such discrimination).

2. *TWA v Hardison*

Only one U.S. Supreme Court case has dealt with the issue of reasonable accommodation within a unionized workplace. In *TWA v. Hardison*,[111] an employee brought a religious discrimination suit against his employer and union under Title VII of the Civil Rights Act of 1964.[112] Hardison claimed that the defendants had illegally discriminated against him by refusing to modify his work schedule to accommodate his religious practices. Both the statute and the implementing regulations required the employer to make "reasonable accommodations" for the religious needs of its employees unless doing so would create an "undue hardship."[113]

Initially, Hardison was able to avoid any conflicts between his work schedule and his religious observances because the collective bargaining agreement granted shift preference to employees based on their accumulated seniority Problems surfaced, however, when he transferred to another department, thereby forfeiting his seniority Although TWA was willing to bypass the collective bargaining agreement and allow Hardison to work a shift which did not conflict with his religious practices, the union refused to permit the accommodation.[114]

The court of appeals found in favor of Hardison based on two grounds: (1) TWA had failed to make reasonable accommodation for his religious practices; and (2) TWA had actually rejected three reasonable alternatives which would have satisfied its obligations without imposing an undue hardship.[115] The Supreme Court reversed, finding that, not only had TWA made reasonable efforts to accommodate Hardison, but that each of the court of appeals' proffered alternatives would have imposed an undue hardship "within the meaning of the statute and EEOC guidelines."[116] With respect to TWA's obligations under the collective bargaining agreement, the Court stated:

> [N]either a collective-bargaining contract nor a seniority system may be employed to violate [Title VII], but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a *clear and express* indication from Congress,

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111. 432 U.S. 63 (1977).
112. 42 U.S.C. § 2000e-2(a)(1).
113. *Hardison*, 432 U.S. at 66; *see also* 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.1(b) (1994).
114. *Hardison*, 432 U.S. at 67-68.
115. *Id.* at 76. The proposed accommodations were as follows:
First, within the framework of the seniority system, TWA could have permitted Hardison to work a four-day week, utilizing in his place a supervisor or another worker Second[,] the company could have filled Hardison's Saturday shift from other available personnel competent to do the job Third, TWA could have arranged a "swap between Hardison and another employee either for another shift or for the Sabbath days."
Id.
116. *Id.* at 77.

> we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances.[117]

The Court added: "'This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong policy interest.'"[118] Relying on "the strong congressional policy against discrimination," the Court refused to interpret Title VII as requiring the abrogation of some employees' seniority rights in order to accommodate the religious needs of other employees:

> It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.[119]

Finally, the Court held that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."[120]

In formulating Title I of the ADA, Congress explicitly rejected the de minimis standard of *Hardison*. According to the legislative history:

> The Committee wishes to make it clear that the principles enumerated by the Supreme Court in *TWA v. Hardison* are not applicable to this legislation. In *Hardison*, the Supreme Court concluded that under title VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a de minimis *cost* for the employer.[121]

The Committee's emphasis on the cost aspect of the *Hardison* decision leaves open the possibility that the portion of *Hardison* discussing collective bargaining rights and their relationship to the duty of reasonable accommodation may still be good law under the ADA. Nevertheless, given the "clear and express" indications of Congress that collective bargaining agreements are only one factor to be considered in the undue hardship analysis, it is doubtful that the *Hardison* standard still applies.

C. The Legislative History and Regulations of the ADA

The ADA's legislative history and implementing regulations indicate that its drafters did not intend for rights under either the ADA or the NLRA to consistently trump the obligations under the other, but instead intended that

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117. *Id.* at 79 (emphasis added) (footnote omitted).

118. *Id.* at 79 n.12 (quoting Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976)).

119. *Id.* at 81. The Court further supported its conclusion by pointing to § 703(h) of Title VII, which exempts bona fide seniority systems from certain Title VII requirements. For a further discussion of § 703(h), see *infra* Part III.D.

120. *Hardison*, 432 U.S. at 84 (italics in original).

121. S. REP. NO. 116, *supra* note 2, at 36 (emphasis added) (citation omitted). The House Report accompanying the ADA contains an identical statement. H.R. REP. NO. 485, *supra* note 2, at 68, *reprinted in* 1990 U.S.C.C.A.N. at 350-51.

the two should be balanced against one another. For example, the committee reports issued by both the House and Senate state:

> The section 504 regulations provide that "a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement to which it is a party."
>
> The collective bargaining agreement could be relevant, however, in determining whether a given accommodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered *as a factor* in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to that job.[122]

The House Report adds that "the [labor] agreement would not be determinative on the issue."[123] This language clearly evinces a legislative intent that the terms of the labor agreement do not automatically prevail over the individual's rights under the ADA or preclude a covered entity from its obligation to make reasonable accommodation. Likewise, it indicates that the employee's ADA right to reasonable accommodation does not automatically trump the rights and obligations imposed by the collective bargaining agreement. Therefore, to argue, as some commentators have,[124] that the rights and obligations under the ADA or the NLRA should receive favorable treatment when they conflict with the rights and duties under the other statute is to ignore Congress' intent.

In discussing the resolution of disparate impact claims under the ADA (in which a disabled applicant or employee alleges that a facially neutral provision of the labor contract has the effect (but not necessarily the purpose) of discriminating against her), the House and Senate reports further stress that a balancing-type approach be employed: "In other situations, the relevant question would be whether the collective bargaining agreement articulates legitimate business criteria. For example, if the collective bargaining agreement includes job duties, *it may be taken into account as a factor* in determining whether a given task is an essential function of the job."[125]

The EEOC regulations implementing the ADA follow the same general approach outlined above: neither the ADA nor the collective bargaining agreement should automatically prevail when the two come into conflict. For example, with respect to possible defenses to a request for reasonable accommodation, the regulatory appendix provides: "[A]n employer could demonstrate that the provision of a particular accommodation would be unduly

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122. S. REP. NO. 116, *supra* note 2, at 32 (alteration in original) (emphasis added) (citation omitted); *see also* H.R. REP. NO. 485, *supra* note 2, at 63, *reprinted in* 1990 U.S.C.C.A.N. at 345.

The fact that the covered entity's obligations to comply with the ADA are not affected by the terms of a collective bargaining agreement does not necessarily mean that the agreement must yield to the ADA, however.

123. H.R. REP. NO. 485, *supra* note 2, at 63, *reprinted in* 1990 U.S.C.C.A.N. at 345.

124. *See supra* notes 88, 90-91, and accompanying text.

125. S. REP. NO. 116, *supra* note 2, at 32 (emphasis added); H.R. REP. NO. 485, *supra* note 2, at 63, *reprinted in* 1990 U.S.C.C.A.N. at 345 (emphasis added). The House Report then adds, "Again, however, the agreement would not be determinative on the issue." *Id.*

disruptive to its other employees or to the functioning of its business. The terms of a collective bargaining agreement may be relevant to this determination."[126] The mere fact that a reasonable accommodation negatively affects the morale of other employees will not be sufficient to establish undue hardship, however.[127]

The ADA's legislative history and regulations also favor individualized determinations rather than per se rules. For example, as to whether an employee or an applicant is a qualified individual with a disability, the Senate Report states: "[T]his legislation prohibits use of a blanket rule excluding people with certain disabilities except in very limited situations where in all cases [the] physical condition by its very nature would prevent the person from performing the essential functions of the job, even with reasonable accommodations."[128] Similarly, both the House and Senate reports state that "the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case."[129] Finally, to further reinforce the notion that per se rules are not to be adopted, the EEOC's regulations state that "[w]hether a particular accommodation would impose an undue hardship for a particular employer *is determined on a case by case basis.*"[130]

Given the general policy in the legislative history and the regulations favoring case-by-case, fact-based, individualized assessments, it would be anomalous to require an employer to engage in such an exercise only to have a court or an administrative agency apply a per se rule to the very same situation and hold that either the employee's ADA rights or the employer's collective bargaining obligations automatically control. Only balancing the rights and obligations under each statute will assure that these acts continue to serve their proper role in protecting individual employee rights.

D. Comparing the ADA to Other Civil Rights Statutes

Comparing the provisions of the ADA with those of Title VII and the ADEA, it is evident that Congress did not intend for the collective bargaining agreement to override the rights and obligations created by the ADA. Both Title VII and the ADEA contain specific exemptions for seniority systems—one of the most common features of collective bargaining agreements. Title VII includes a specific exemption for bona fide seniority agreements which have the effect of discriminating against covered individuals:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system

126. 29 C.F.R. § 1630.15(d) app. at 414; *see also supra* note 21 (discussing the relevance of the collective bargaining agreement in determining whether a job function is essential).

127. 29 C.F.R. § 1630.15(d) app. at 415.

128. S. REP. NO. 116, *supra* note 2, at 27.

129. *Id.* at 31; H.R. REP. NO. 485, *supra* note 2, at 62, *reprinted in* 1990 U.S.C.C.A.N. at 344-45.

130. 29 C.F.R. § 1630.15(d) app. at 414 (emphasis added).

> provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.[131]

The ADEA contains a similar provision:

> It shall not be unlawful for an employer, employment agency, or labor organization to observe the terms of a bona fide seniority system which is not a subterfuge to evade the purposes of [the ADEA], except that no such seniority system shall require or permit the involuntary retirement of any individual because of the age of such individual.[132]

Without question, Congress was aware of these seniority-based exceptions to Title VII and the ADEA when it drafted the ADA. The fact that Congress chose not to include a similar exemption under the ADA is strong evidence that collective bargaining rights do not automatically supersede those provided to individual employees under the ADA. As stated previously, however, the same can be said for ADA rights. If Congress had intended for them to automatically prevail over the terms of a collective bargaining agreement, it could very easily have said so.

IV A PROPOSED BALANCING APPROACH

To conclude that the ADA shuns per se determinations and requires a genuine ad hoc balancing of ADA and NLRA rights and obligations is only the beginning. The more difficult question is what factors must be considered when balancing those rights and obligations and why

A. An Ounce of Prevention

Obviously, the need to balance interests will not arise until an employer decides to implement an accommodation which conflicts with the collective bargaining agreement. If a nonconflicting accommodation exists, the employer should choose it.[133] Given the flexible approach adopted by the statute and the regulations, the wide discretion the employer has in making reasonable accommodation,[134] and the interests of all parties in avoiding conflict, the vast majority of cases should be resolved without allowing ADA obligations to conflict with the parties' NLRA obligations or the expectations of other employees covered by the collective bargaining agreement. If, however, a potential accommodation exists which adequately meets the disabled employee's needs and which does not conflict with the collective bargaining agreement, but the employer instead chooses to implement an accommodation which runs counter to the labor agreement, the union would be justified in

131. 42 U.S.C. § 2000e-2(h).
132. 29 U.S.C. § 623(f)(2).
133. Stahlhut, *supra* note 86, at 93.
134. *See supra* text accompanying note 18.

bringing an unfair labor practice charge or breach of contract action against the employer.[135]

To avoid conflicts such as these, the employer and the union could take any number of preemptive steps. First, to help guard against the unilateral implementation of an accommodation by the employer,[136] the parties might enter into a "memorandum of understanding" outlining the way in which they will handle accommodation requests from disabled employees.[137] Alternatively, the parties could incorporate a "reopener" clause into the labor contract which would allow them to engage in midterm negotiations over accommodation requests. Of course, the party wishing to include such a provision (generally the employer) would likely have to make certain concessions in order to secure its inclusion in the labor agreement. The costs of these concessions would have to be weighed carefully against both the probability and the cost of potential discrimination, unfair labor practice, or breach of contract claims. Another challenge would be to fashion a provision that is both broad enough and flexible enough to cover most (if not all) of the potential situations which might arise.

A related preemptive measure the parties could take would be to incorporate the notion of reasonable accommodation directly into the collective bargaining agreement's job promotion/job transfer provision. The following example illustrates one possible framework:

> XX. PROMOTIONS AND JOB TRANSFERS
>
> Other factors such as skill, knowledge, training, and ability being equal, seniority shall be the determining factor in making promotion or job-transfer decisions. However, in the event of a promotion or a job-transfer decision prompted by a request for reasonable aceommodation under the Americans with Disabilities Act, provided that the employee requesting the accommodation possesses at least 75% of the seniority required for the position, that individual shall be given first priority as to the position. If no employee bidding for the promotion or the transfer meets the requisite seniority requirements, the employee requesting accommodation shall be given priority regardless of her seniority.[138]

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135. Rottenberg, *supra* note 67, at 189. A breach of contract action is based on § 301 of the Labor Management Relations Act. 29 U.S.C. § 185.

136. In his Memorandum, Mr. Hunter does not definitively classify such action as a § 8(a)(5) unfair labor practice—at least in the context of an employer implementing the accommodation after discussing the matter with the union and failing to reach agreement.

137. A memorandum of understanding is an agreement between an employer and a union which modifies or adds to the provisions of a collective bargaining agreement. Such agreements are binding upon the parties and typically deal with a single issue. Rottenberg, *supra* note 67, at 187 n.52; *see also* Buckingham v. United States, 998 F.2d 735, 741 (9th Cir. 1993) (noting that the parties had entered into a memorandum of understanding governing geographic transfers which provided that local economic conditions and "EEOC factors" were valid concerns in making transfer determinations, provided that the employee had at least one year of service).

A well-thought-out memorandum of understanding would serve to minimize or eliminate many of the transaction costs associated with midterm bargaining or unfair labor practice claims—both monetary (*e.g.*, legal fees, lost work time on the part of both management and union representatives, etc.) and nonmonetary (*e.g.*, increased employer-union tension, decreased employee morale, etc.).

138. The specific provisions of this type of clause could be altered to fit the needs of the parties. For example, the employer could be given discretion in determining the relative skills and abilities of the

It is difficult to imagine why an employer would *not* want to somehow involve the union in the accommodation decision—regardless of the cost of the accommodation or the ADA's confidentiality requirements. Aside from the obvious benefit of helping to avoid breach of contract or unfair labor practice claims, involving the union in the decision would help foster a cooperative atmosphere in the workplace and, given the vast experience which unions have in balancing the diverse interests of their members, the union's assistance may very well prove invaluable. In addition, because the employee desires to continue working, it would seem to be in her best interest to permit the union's involvement in the process by waiving, if necessary, the confidentiality requirements of the ADA.[139]

As another preemptive step, the parties should perform a job analysis for each of the various positions in the bargaining unit. To determine how close the job-physical requirement nexus really is, this analysis would focus on the requirements for, and the various tasks performed within, each job classification covered by the collective bargaining agreement. The results of this analysis would then be incorporated into the collective bargaining agreement by way of position descriptions. If a discrimination claim should later arise, the EEOC has indicated that it will consider these job descriptions as evidence of whether a given function is truly "essential" to the job in question.[140]

B. Resolving ADA/NLRA Claims Via a Balancing Approach

The General Counsel Memorandum discussed in Part III provides considerable insight into how the NLRB will approach disputes implicating the ADA and the NLRA. Aside from the regulations and the Technical Assistance Manual, the EEOC has yet to issue further guidance on how it views the role of the collective bargaining agreement in ADA complaints. On November 16, 1993, the General Counsel of the NLRB and the Acting Chairman of the EEOC issued a "Memorandum of Understanding" which outlines the

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employees (as is usually the case), or that determination could be made in conjunction with the union. Alternatively, the percent-of-seniority provision could be raised, lowered, or eliminated completely if the parties so desired. The critical point is not necessarily the specific provisions of the clause but rather that the employer and the union consider beforehand how to address accommodation requests. For a useful discussion of the promotion, transfer, and assignment clauses in collective bargaining agreements, see UNION CONTRACT CLAUSES 481-99 (1954).

139. *See supra* notes 60-62 and accompanying text. If the employee refused to waive her ADA privacy rights, the union might still be able to participate in the accommodation process if the information can be structured so as to avoid disclosure of any sensitive material. *See also* Doty, *supra* note 87, at 1067 n.61 (suggesting that, although many disabled employees seek accommodation for nonmedical conditions, the ADA prohibition applies only to the results of "medical examinations").

140. *See* EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 19, § 7.11 (noting, however, that the inclusion of position descriptions is not determinative); Doty, *supra* note 87, at 1059; *supra* note 21 and accompanying text.

While such an analysis would not necessarily foreclose all potential disputes which could arise, it may help avoid some problems by pointing out areas where jobs could be restructured before a request for accommodation is actually made. In addition, it is likely that m investigating a claim, the EEOC, the NLRB, or some other factfinder would look more positively on a before-the-fact analysis of job factors than on an analysis put together after a claim or charge has been filed.

procedures for coordinating enforcement of Title I of the ADA and § 8 of the NLRA.[141] Unfortunately, the memorandum does not add any substantive guidance as to how the two agencies will resolve complaints. It merely stipulates that whenever either agency receives a charge or a complaint—the determination of which will turn in part upon an interpretation by the other agency—it will consult with the other agency before issuing a final determination.[142]

Given the overlapping nature of the various claims or charges discussed above, it is likely that the courts and administrative agencies will adopt similar approaches to resolving disputes. As such, the balancing approach outlined below would generally apply to both unfair labor charges brought before the NLRB and discrimination claims brought before the EEOC or a court.[143] The two questions raised, but not answered, in the General Counsel's Memorandum discussed in Part III will help illustrate the proposed balancing approach.

The first question is whether either party may rely on its § 8(d) right to refuse to discuss midterm modifications to the labor agreement when the other party requests bargaining over a proposed accommodation which in some way impacts upon the collective bargaining agreement.[144] In other words, does the ADA impose a duty upon the parties to bargain over proposed accommodations? The answer to this question must be "yes."

First, in the vast majority of situations, the employee will initially approach her employer to request some type of accommodation for her disability Thus, under the typical scenario, the employer will initiate discussions with the union regarding potential accommodations. The union then has two options. It could refuse to discuss the accommodation relying on § 8(d) of the NLRA. Alternatively, the union could enter into discussions with the employer regarding which of the potential accommodations would be most "reasonable" given the employee's condition, the employer's situation, and the effect the accommodation would have on other employees covered by the collective bargaining agreement. The NLRA merely requires that the union discuss the matter—it is under no obligation to agree to any of the employer's proposals.

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141. Memorandum of Understanding Between the General Counsel of the National Labor Relations Board and the Equal Employment Opportunity Commission, *reprinted in* The Americans with Disabilities Act Manual (BNA) 70:1019 (Dec. 1993).

142. *Id.*

143. Many collective bargaining agreements also empower arbitrators to resolve discrimination claims involving bargaining unit employees. One federal court recently indicated its receptivity to contract-based arbitration of disability discrimination claims. *See* Austin v. Owens-Brockway Glass Container, Inc., 844 F. Supp. 1103 (W.D. Va. 1994) (dismissing the plaintiff's disability discrimination claim for failure to submit the dispute to mandatory arbitration as stipulated in the collective bargaining agreement). *But see* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (holding that the plaintiff's prior submission of his race discrimination claim to arbitration did not foreclose his cause of action under Title VII, and that Title VII rights may not be prospectively waived as they form no part of the collective bargaining process).

144. Recall that the employer is obligated to discuss the matter with the union only if the change would materially affect wages, hours, or other terms and conditions of employment. *See supra* note 69 and accompanying text.

If the union were to refuse to discuss the matter with the employer, it may have failed to act in "good faith" or in a "reasonable" manner and thus may have violated its duty to fairly represent the employee.[145]

In addition, the employee may have an independent ADA claim against the union for intentional discrimination.[146] Aside from the union's duty of fair representation, a second reason for imposing a duty on the union to discuss proposed accommodations is Congress' desire to create a national mandate for the elimination of discrimination against the disabled.[147] By including labor organizations within the definition of a "covered entity" and outlawing discriminatory collective bargaining agreements, Congress effectively "drafted" unions into its ongoing war against disability-based discrimination. If the union were allowed to stand behind its § 8(d) right to refuse midterm discussions when an accommodation is proposed, it would not be fulfilling its role in eradicating discrimination and Congress' objectives would be seriously undermined.

Obviously, if the situation were reversed and the employer refused to consider the employee's or the union's request to discuss the accommodation, the employee would have a discrimination claim against the employer.[148] In addition, if the employer and the union had previously incorporated a memorandum of understanding or a reopener provision into the labor agreement, the union would have a breach of contract claim against the employer.[149] Therefore, under this scenario, not only is it an employer's duty to bargain over the accommodation, but it is in its best interest to do so.

The second question posed by the General Counsel's Memorandum is whether an employer, after negotiating and failing to reach agreement with the union over a proposed accommodation, violates its § 8(d) obligation not to take unilateral action when it implements the accommodation over the union's objection. The answer to this question is considerably more difficult.[150]

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145. See *supra* notes 52-57 and accompanying text for a discussion of the union's duty of fair representation.

The union could defend against a breach of fair representation claim by arguing that it considered the interests of all of its members—including those of the complaining employee—when it initially negotiated the collective bargaining agreement. This argument would be persuasive if the parties had somehow addressed accommodation decisions in the agreement or if the employee had been, in fact, been disabled at the time contract negotiations took place. If, however, the parties did not address the accommodation issue, or if the employee became disabled during the term of the agreement (thereby changing her interests), the union's argument would be substantially weakened. Its best course of action would then be to discuss the matter with the employer. By refusing to discuss the matter with the employer, the union has not *merely* "treated two of its member employees differently" because it has given no consideration whatsoever to the interests of the disabled employee. By at least discussing and considering the matter, the union has accounted for the interests of all of its constituents and satisfied its duty of fair representation.

146. *See* 42 U.S.C. §§ 12112(a), (b)(5)(A). In order to prevail on such a claim, the employee would have to prove that the union failed to take action *because of* her disability status and not because of the union's coincidental obligation to its other members.

147. *Id.* § 12101(b)(1).

148. *See id.* §§ 12112(a), (b)(5)(A).

149. *See supra* note 135 and accompanying text.

150. *See* NLRB v. Katz, 369 U.S. 736, 747-48 (1962) ("While we do not foreclose the possibility that there might be circumstances which the [NLRB] could or should accept as excusing or justifying

To make this determination, courts, administrative agencies, and arbitrators must consider the totality of the circumstances and balance the rights and duties of the parties involved.[151] Specifically, the trier of fact must consider (1) the employer's interest in avoiding an ADA discrimination charge or an unfair labor practice charge under the NLRA; (2) the union's desire to protect the bargaining agreement and the interests of its membership; (3) the specific type of accommodation at issue and whether, and to what extent, the accommodation affects the rights of other bargaining unit employees; and (4) the interest of the disabled employee in maintaining her livelihood.[152]

For example, an employer may desire to reassign a disabled employee to a currently vacant position for which she does not meet the requisite seniority requirements.[153] If reassignment is truly the only accommodation that will satisfy the disabled employee's needs, this would cut in favor of upholding the employer's unilateral action.[154] On the other hand, if other, less intrusive options exist,[155] the employer's unilateral action would seem less justified and the union could file an unfair labor practice charge.[156]

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unilateral action, no such case is presented here."). The situation described above may be such a situation. In addition, while most cases involve unilateral employer actions which affect all, or a large part, of the bargaining unit, the situation described above affects only one or two employees.

151. Other approaches to balancing the interests of the parties can be found in Ervin, *supra* note 86, at 969, and Stahlhut, *supra* note 86, at 93-96.

152. To be sure, the focus of the ADA is on the interests of the employer and the disabled employee. However, given that one of the statutory factors is "the type of operation of the covered entity, including the composition, structure, and functions of the workforce," it seems reasonable to consider the interests of the union and the co-workers. *See* 42 U.S.C. § 12111(10)(B)(iv); 29 C.F.R. § 1630.2(p)(2)(iv).

153. Reassignment to a *vacant* position is the only type of accommodation suggested by the ADA. 42 U.S.C. § 12111(9). The Act does not require an employer to "bump" another employee to accommodate a disabled individual. On the other hand, the Act does not forbid such action either. *See* S. REP. NO. 116, *supra* note 2, at 32.

154. Such cases will indeed be rare given the latitude that the Act provides in formulating accommodations. In addition, in this age of "leaner" organizations, fewer companies leave positions "vacant" for any length of time. Such positions are either quickly filled or eliminated. For a discussion of how the parties may avoid such problems before they arise, see also *supra* Part IV.A.

155. For example, perhaps a modified work schedule or some type of mechanical assistance would be sufficient to enable the employee to perform her job.

156. The questions still remain as to what exactly is a "reasonable" accommodation and how does one determine whether one accommodation is more or less "intrusive" than another. Assuming that the accommodation succeeds in enabling the employee to perform the essential functions of the job, and given the ADA's emphasis on the economic impact an accommodation has on an employer, the logical starting point of the "reasonableness" analysis is the economic aspects of the accommodation. Those accommodations which effectively enable the employee to perform her job, and, at the same time, are less costly, are presumptively more reasonable. The "intrusiveness" question, on the other hand, focuses on the impact that the proposed accommodation has on other bargaining unit employees. Those accommodations with a larger negative impact on other employees are, per se, more intrusive. The two concepts, however, are not mutually exclusive. For example, a relatively inexpensive accommodation could so intrude on the interests of other employees that its implementation would be unreasonable. The discussion, *infra*, addresses such situations.

Considerable difficulty will arise in those situations in which two or more accommodations will each succeed in meeting the employee's needs but one accommodation entails an immediate monetary outlay (*e.g.*, specialized tools) while the other does not (*e.g.*, modified work schedules or job reassignment). The latter, however, might be more intrusive on the interests of other employees than the former. In such cases, the relative bargaining strength of the parties (employer and union) will largely determine which accommodation is chosen. The employer should keep in mind that although one accommodation

The factfinder must also inquire into whether the seniority requirement at issue is really a "qualification" which must be met in order to perform the job. The mere fact that it has been incorporated into the collective bargaining agreement, although relevant, is not determinative.[157] In many instances, past job experience is an appropriate proxy for measuring the skills, technical ability, and knowledge needed to perform a higher-level job. In such situations, one can safely argue that a disabled employee who lacks the requisite seniority is not "qualified" for the position and, therefore, the employer is under no duty to accommodate her via reassignment. Unilateral reassignment of such an employee by an employer is difficult to justify—especially if another employee possesses the required seniority and will lose the opportunity to obtain the position. Arguably, the position, although currently unoccupied, is technically not "vacant" for ADA reasonable accommodation purposes because another employee could fill it. This would be true *only* if another employee meets the seniority requirements and is, in fact, interested in the position.[158]

There are some situations, however, where the seniority-job qualification connection is more attenuated. For instance, some less labor-intensive positions may be reserved for more senior employees as a reward for the longevity of their employment. In this situation, the harm caused by the employer's unilateral action could be seen as less severe—but further inquiry is necessary to determine the actual threatened injury to other affected bargaining unit employees.[159] For example, an economic loss, such as the loss of additional pay or benefits, could be viewed as more severe than the lost opportunity to work a more desirable shift or to work an "easier" job because the affected employee suffers an actual, monetary loss as opposed to a more amorphous psychological harm.[160] A related concern is the degree to which the non-disabled employee's expectations are infringed upon. If the difference in seniority between the disabled employee and the non-disabled employee is great, or the seniority requirement to obtain the position in

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does not entail any *immediate* economic outlay, if it were to implement the accommodation over the union's objections, or, worse yet, implement it without any discussion at all, the employer would almost certainly incur substantial costs in litigating the matter before an arbitrator, the NLRB, or the courts.

157. *See supra* text accompanying notes 122-23.

158. Given the individualized attention required for resolving accommodation requests, viewing the matter in the abstract without consideration of whether, in a particular case, there is actually another employee whose seniority-based expectations in the position will be disappointed would be analogous to adopting a per se approach similar to those discussed in the Rehabilitation Act cases. *See supra* part III.B.1. Such an approach would be a direct contradiction of the policies of the ADA and the implementing regulations. *See supra* part III.C.

159. It must be recognized, however, that the union has a legitimate interest in rewarding its long-term members and that seniority provisions are a particularly effective way of doing so. Ideally, the union would look past the symbolic value of preserving these sweetheart positions and recognize that, in order for it to meet its ADA obligations, an exception to the seniority requirements may be in order.

160. This is, however, not always the case. Many employees are willing to forgo higher wages for the opportunity to work the "day shift" or to have their weekends off. It is precisely for this reason that many employers provide additional compensation in the way of shift or weekend premiums for employees who work nontraditional shifts.

question is fairly large, the frustrated expectations and the resultant harm may rise to the level that the employer's unilateral action is more objectionable.[161] Another important consideration is whether the accommodation would affect only one employee other than the employee requesting accommodation, or whether the interests of several employees would be involved.[162] Obviously, the more employees affected by the accommodation, the more significant it is to the employer's operation and the higher the likelihood that the burden imposed would be "undue." In assessing these issues, a relevant question would be whether the parties have waived or modified the seniority requirements or other provisions of the collective bargaining agreement.[163] If so, the expectations of bargaining unit employees may be less settled and the injury, therefore, not as great. In ADA terms, the accommodation would not be "unduly disruptive," nor would it "substantially alter" the nature of the employer's operation."[164]

Finally, it would be useful to consider what a failure to make reasonable accommodation would mean to the disabled employee. If it would entail a loss of employment or a long-term layoff, the importance of allowing the accommodation seems particularly strong—especially when considered in light of the express congressional intent to provide opportunities for the disabled. On the other hand, if a similar position will become available in the near future, the employer's unilateral reassignment at this time may be less justified because the requested accommodation could be made when the position becomes available, while some other less-intrusive accommodation could be made in the short term.[165]

CONCLUSION

The obligations imposed on unions and employers by the ADA are indeed numerous, and the conflicts such obligations may cause with respect to the NLRA are difficult to resolve. Nevertheless, the union and the employer must strive to make the effort. In the vast majority of situations, the employer and the union can avoid potential conflicts between their NLRA and ADA obligations by planning ahead and working cooperatively. When problems do

161. *See* Stahlhut, *supra* note 86, at 94-95 (arguing that seniority differences and the length of time that the collective bargaining agreement has been in place are relevant considerations in assessing whether other employees' expectation interests will be frustrated by a proposed accommodation).

162. *See* Ervin, *supra* note 86, at 969 (stating that the union should consider the number of bargaining unit employees adversely affected before agreeing to a proposed accommodation).

163. *See* Tawzer v. Foote & Davies, Inc. of Delaware, 109 L.R.R.M. (BNA) 2042 (D. Ga. 1981) (holding that a mid-term modification of employee seniority rights by the employer and union is permissible under certain circumstances, even though it adversely affects some employees); 1 THE DEVELOPING LABOR LAW, *supra* note 49, at 699-710 (discussing waiver in the collective bargaining process and noting that the waiver doctrine has been narrowly defined by the NLRB and the courts).

164. 29 C.F.R. § 1630.2(p) app. at 402.

165. Conversely, one could argue that the employer's unilateral action in such a situation is actually less harmful since, by placing the disabled employee in the position, it has met its duty to make reasonable accommodation. Further, the more senior nondisabled employee does not suffer a great injustice since she will have to wait only a short time before a new position becomes available.

arise, only by balancing the interests of all the parties involved can we adequately further the goals of the ADA while simultaneously recognizing the importance of the national labor policy in promoting industrial peace and in helping to eradicate discrimination against the disabled.