CHAPTER 7

LEGISLATION, DISCRIMINATION, AND BENEFITS

PART I. AMERICANS WITH DISABILITIES ACT AND CIVIL RIGHTS: EFFECT ON ARBITRATION

B. GLENN GEORGE*

The landscape of discrimination law—already well populated by the Equal Pay Act, Title VII of the Civil Rights Act (CRA) of 1964, the Age Discrimination in Employment Act (ADEA), the Rehabilitation Act, and numerous state law counterparts—has two significant new additions. The CRA of 1991 makes several important changes in the interpretation and enforcement of discrimination law. The Americans with Disabilities Act (ADA) extends broad coverage for disabled individuals in the employment arena. The ADA both prohibits discrimination and requires accommodations for these employees where reasonable and feasible. A review of this new legislation and its possible impact on collective bargaining agreement arbitration are the purposes of this paper.

Civil Rights Act of 1991

The CRA of 1991 made a number of important changes in the operation of Title VII of the CRA of 1964, the ADEA, the ADA, and section 1981 of the CRA of 1866. Most of these changes, however, should have little impact on arbitration under collective bargaining agreements. The highlights of the legislation will be summarized briefly.

One of the most notable changes of the 1991 amendments is the authorization of compensatory and punitive damages. The

*Associate Professor, School of Law, University of Colorado, Boulder, Colorado.

remedial provisions of the 1964 legislation limited recovery to equitable relief—reinstatement, back pay, and injunctive relief, with an added provision for attorney's fees. The 1991 amendments now permit both compensatory and punitive damages in appropriate cases, but the allowable recovery is capped between $50,000 and $300,000, depending on the size of the employer.[1] Where the plaintiff seeks such damages, a jury trial also may be demanded.[2]

In disparate impact cases, the legislation reverses the more recent effects of *Wards Cove Packing Co. v. Atonio*[3] and returns to the standard of *Griggs v. Duke Power Co.*[4] and its progeny. Consequently, when a plaintiff challenges a neutral employment practice or criterion which disproportionately excludes a protected group, the employer can defend itself only by proving that the practice or criterion for employment is job related and justified by "business necessity."[5]

The 1991 amendments also change the result in "mixed motive" cases, where the plaintiff can establish that an impermissible factor influenced the employer's decision but the employer can prove that the same employment action would have been taken based on a permissible consideration. For example, under prior Supreme Court interpretation,[6] an employer could defeat a discrimination claim by demonstrating that the plaintiff would have been fired for poor work performance even though the employer improperly considered her sex in making the termination decision.[7] Under the current legislation, this type of affirmative defense restricts the plaintiff's remedies but does not eliminate a finding of unlawful employment discrimination. In the hypothetical suggested, judgment would be for the plaintiff based on proof of the employer's consideration of the plaintiff's sex. The relief, however, would be limited to an injunction and attorney's fees. No reinstatement or back pay would be awarded.[8]

---

[1]CRA, §1977A(b)(3), 42 U.S.C. 1981A(b)(3) (Supp. 1991).
[2]CRA, §1977A(c), 42 U.S.C. 1981A(c) (Supp. 1991).
[3]490 U.S. 642, 49 FEP Cases 1519 (1989).
[4]401 U.S. 424, 3 FEP Cases 175 (1971).
[5]CRA, §105(a), 42 U.S.C. §2000e-2(k) (Supp. 1991).
[6]*See Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954 (1989).
[7]The National Labor Relations Board adopted a similar scheme in *Wright Line*, 251 NLRB 1083, 105 LRRM 1169 (1980), *enforced*, 662 F.2d 899, 108 LRRM 2513 (1st Cir.), *cert. denied*, 455 U.S. 989, 109 LRRM 2779 (1982), when considering the validity of disciplinary decisions where the employer has a permissible ground for discipline but also considered an impermissible ground under the National Labor Relations Act (29 U.S.C. §151 *et seq.* (1988)), such as union membership.
[8]CRA, §107(b), 42 U.S.C. §2000e-5(g)(2)(B) (Supp. 1991).

Other changes made by the 1991 amendments include limitations on the circumstances under which consent judgments may be challenged by those not parties to the action,[9] extension of Title VII and the ADA's protections to employees working for American companies in foreign countries,[10] expansion of the right to challenge unlawful practices within a seniority system,[11] the award of expert fees in addition to attorney's fees for prevailing plaintiffs,[12] and the extension of coverage to the House of Representatives.[13]

The Americans with Disabilities Act

The ADA,[14] enacted on July 26, 1990, covers a wide range of disability rights and access issues. Although a review of the employment provisions in Title I will be the primary focus of this discussion, the legislation also covers government programs and services (Title II), public accommodations (Title III), and telecommunications (Title IV).

As of July 26, 1994, the coverage of the ADA will be coextensive with Title VII, applying to any business employing 15 or more persons.[15] (The Act currently covers anyone with 25 or more employees.) Thus, unlike the Rehabilitation Act of 1973,[16] whose scope is limited to federal agencies, federal contractors, and federal fund recipients, the ADA provides broad coverage of private employers.

Although the expansive coverage of the ADA represents a significant change, many of the legal concepts are familiar adaptations from the Rehabilitation Act. Both the legislative history and the regulations issued by the Equal Employment Opportunity Commission (EEOC) indicate that cases decided under the Rehabilitation Act will be relevant authority for interpreting the ADA.

For employers (and perhaps for arbitrators), the ADA contains three primary questions for interpretation:

1. What constitutes a disability?
2. Is the disabled person qualified for the position sought?

---

[9]CRA, §108, 42 U.S.C. §2000e-2(n) (Supp. 1991).
[10]CRA, §109, 42 U.S.C. §§2000e(f), 2000e-1(b)–(c), 12111(4), 12112(c) (Supp. 1991).
[11]CRA, §112, 42 U.S.C. §2000e-5(e)(2) (Supp. 1991).
[12]CRA, §113, 42 U.S.C. §§2000e-5(k), 1988(c) (Supp. 1991).
[13]CRA, §117, 2 U.S.C. §601(a) (Supp. 1992).
[14]42 U.S.C. §§12101–12213 (Supp. II 1990).
[15]ADA, §101(5)(A), 42 U.S.C. §12111(5)(A) (Supp. II 1990).
[16]29 U.S.C. §706 *et seq.* (1988).

3. If the employee is unable to perform the job without accommodation, what constitutes a reasonable accommodation, which the employer is required to provide?

Defining Disability

The ADA provides three alternative definitions for the term "disability." Disability can include "a physical or mental impairment that substantially limits one or more . . . major life activities," "a record of such impairment," or "being regarded as having such an impairment."[17] Under the third alternative, the employer's own perception of the employee as a disabled individual will bring that person under the Act's protection even in the absence of any disabling condition. A cancer survivor or an individual who tests HIV-positive, for example, may be perceived as disabled by the employer—and thus coming within the ADA's protection—but may not require any accommodation in order to perform the job in question. If that person meets the qualifications for the job, the employer's failure to hire because of a perceived disability would be illegal. Congress explicitly excluded, however, coverage of homosexuality, bisexuality, and "gender identity disorders," as well as current illegal drug use.[18]

Much of the concern about the ADA's application undoubtedly is due to the expansive potential of the disability definition. Experience under the Rehabilitation Act suggests that some of this concern is unfounded. The ADA definition of disability is taken almost verbatim from the Rehabilitation Act, and the EEOC has relied heavily on experience from that statute in developing regulations to govern interpretation and enforcement of the ADA.

To come within the Act's protection, the disability must affect the individual in comparison with the "average person in the general population."[19] Where the "major life activity" affected by the disability is ability to work, the condition must restrict a person in "either a class of jobs or a broad range of jobs in various classes," as opposed to restriction in a single job.[20] Thus, a person suffering from acrophobia, for example, may not be considered disabled under the legislation even though unable to perform certain

---

[17]ADA, §3(2), 42 U.S.C. §12102(2) (Supp. II 1990).
[18]ADA, §§511, 104(a), 42 U.S.C. §§12211, 12114(a) (Supp. II 1990).
[19]29 C.F.R. §1630.2(j) (1992).
[20]29 C.F.R. §1630.2(j)(3)(i) (1992).

maintenance work required in a particular job.[21] Absent a finding of disability, no obligation to provide accommodation arises.

Qualified Individual

Once a person has been identified as disabled under the Act, the next inquiry concerns qualifications. The ADA defines a "qualified individual" as one who, "with or without reasonable accommodation, can perform the essential functions of the employment position."[22]

In determining what constitutes an essential function, an employer may not rely on inability to perform some peripheral and occasional job duty as the basis for a decision that a person is unqualified. A job duty, even if it is a regular part of the job, may not be considered essential if it constitutes a relatively small portion of the tasks required.[23] A court is required by the Act to consider any written job description and the employer's "judgment as to what functions of a job are essential."[24] The regulations add as further relevant evidence: (1) the amount of time spent performing the function, (2) the consequences of not requiring the applicant to perform the function in question, (3) the work experience of others who have held that position in the past, (4) the current work experience of others in "similar jobs," and, notably, (5) the collective bargaining agreement.[25]

Reasonable Accommodation

In some cases a disabled person may possess the necessary qualifications for the job, in terms of skills, education, or experience, but is unable to perform the duties without some accommodation by the employer. In this instance reasonable accommodation is required unless the employer can establish that any accommodation would involve "undue hardship" for the employer.[26]

In the Rehabilitation Act, the term "reasonable accommodation" was left undefined. In the ADA Congress has provided significantly more guidance. "Reasonable accommodation" is defined

---

[21] *See, e.g., Forrisi v. Bowen*, 794 F. 2d 931, 41 FEP Cases (4th Cir. 1986) (decided under the Rehabilitation Act).

[22] ADA, §101(8), 42 U.S.C. §12111(8) (Supp. II 1990).

[23] *See, e.g., Ackerman v. Western Elec. Co.*, 643 F. Supp. 836 (N.D. Cal. 1986) (welder's inability to perform 12% of job did not bar claim of discrimination).

[24] ADA, §101(8), 42 U.S.C. §12111(8) (Supp. II 1990).

[25] 29 C.F.R. §1630.2(n)(3) (1992).

[26] ADA, §102(b)(5)(A), 42 U.S.C. §12112(b)(5)(A) (Supp. II 1990).

to include adaptation of facilities, job restructuring, modified work schedules, reassignment to a vacant position, the acquisition of equipment, and the provision of readers or interpreters.[27] To establish undue hardship, the employer must prove "significant difficulty or expense." Factors in making that determination include the cost and nature of the accommodation, the financial resources of the facility in question, the financial resources of the overall entity, and the type of operations involved.[28]

The most straightforward case of required accommodation may involve a moderate, one-time expense to make the physical facilities accessible. For example, an applicant who is wheelchair-bound and fully qualified to perform word processing duties may need a raised working space to accommodate the wheelchair. Similarly, minor job restructuring may involve reassigning minor tasks which may be difficult to perform in a wheelchair. The necessity of such accommodations may not be the basis for refusing to hire a person otherwise qualified for the position.

Other Prohibitions

Related prohibitions in the ADA include inquiries about an applicant's disability prior to offering employment,[29] requiring a medical examination prior to offering employment,[30] discrimination against a person because of association with someone who is disabled,[31] and using qualification standards or selection criteria tending to exclude disabled persons unless the criteria are job-related to the position (thus permitting the use of disparate impact theory under the Act).[32]

Perhaps more significant for our purposes, however, is an explicit prohibition against "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (this relationship includes a relationship with [a] . . . labor union)."[33] This language

---

[27]ADA, §101(9), 42 U.S.C. §12111(9) (Supp. II 1990).
[28]ADA, §101(10), 42 U.S.C. §12111(10) (Supp. II 1990).
[29]ADA, §102(c)(2)(A), 42 U.S.C. §12112(c)(2)(A) (Supp. II 1990). The employer may, however, inquire about the applicant's ability to perform the duties of the job in question. ADA, §102(c)(2)(B), 42 U.S.C. §12112(c)(2)(B) (Supp. II 1990).
[30]ADA, §102(c)(2)(A), 42 U.S.C. §12112(c)(2)(A) (Supp. II 1990).
[31]ADA, §102(b)(4), 42 U.S.C. §12112(b)(4) (Supp. II 1990).
[32]ADA, §102(b)(6), 42 U.S.C. §12112(b)(6) (Supp. II 1990). *See Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971).
[33]ADA, §102(b)(2), 42 U.S.C. §12112(b)(2) (Supp. II 1990).

suggests that the terms of a collective bargaining agreement may not be used as justification for circumventing obligations otherwise required by the Act. This problem will be discussed in more detail below.

Arbitration and Discrimination Legislation

The use of external law in rendering arbitration decisions was debated before this body more than 25 years ago, but in the context of the National Labor Relations Act (NLRA).[34] In the Academy's 1967 Proceedings, Bernard Meltzer argued that external law appropriately could be considered only where either (1) there was no inconsistency between a loosely formulated contractual standard and the statute, or (2) where the contractual standard was subject to two interpretations, only one of which was compatible with the public law.[35] Robert Howlett argued, however, that arbitrators should always consider both the contract and the law, unless specifically asked by the parties to disregard statutory issues to be presented to the National Labor Relations Board (NLRB).[36] Although the debate persists, studies continue to show that Meltzer's more traditional view prevails: arbitrators are asked to interpret the terms of a contract and generally limit their consideration to that agreement.[37]

The exception to this widespread rejection of external law has been in the area of Title VII. Here, empirical research indicates that arbitrators usually are aware of and comply with Title VII law.[38] One study published in 1979, for example, analyzed 86 cases and found that 60 percent of arbitrators cited EEOC guidelines or federal or state discrimination laws; 40 percent cited judicial decisions.[39] These studies suggest that discrimination law has always played a significant role in collective bargaining agreement arbitration and will continue to do so.

---

[34]29 U.S.C. §151 *et seq.* (1988).

[35]Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration,* in The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books, 1967), 1.

[36]Howlett, *The Arbitrator, the NLRB, and the Courts, supra* note 35, 67.

[37]*See* Greenfield, *How Do Arbitrators Treat External Law,* 45 Indus. & Lab. Rel. Rev. 683, 685–86 (1992) (reviewing history of external law debate).

[38]Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared,* in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books, 1987), 101.

[39]Oppenheimer & LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis,* 34 Arb. J. 12–16 (1979).

Arbitration and the Civil Rights Act of 1991

Most of the changes in Title VII law as a result of the CRA of 1991 are targeted at issues arising only in court litigation. The availability of damages and the right to jury trial, for example, are of little relevance in the arbitration context, unless the contract specifically authorizes relief available under Title VII.

If an arbitrator is asked to evaluate a disparate impact claim, however, familiarity with the new legislation may be valuable. Imagine that an employer has imposed a high school diploma requirement as a prerequisite for transfer into a position within the bargaining unit. If blacks in the community graduate from high school at a significantly lower rate than whites, that requirement creates a disparate impact on blacks by excluding proportionately more blacks than whites from that position. Under Title VII (and possibly a contract provision incorporating or patterned on Title VII) a discrimination claim has been made. To defeat this claim, the 1991 amendments require the employer to prove that a high school diploma is "job related for the position in question and consistent with business necessity."[40] As previously noted, for those already familiar with the standards of *Griggs v. Duke Power Co.*,[41] the new standard represents a return to the *Griggs* formulation.

Arbitration and the Americans with Disabilities Act

In contrast with the CRA of 1991, the ADA is likely to present significantly greater challenges for the arbitrator charged with evaluating claims of disability discrimination. A simple hypothetical illustrates the problem. As noted, "reasonable accommodation" under the ADA for a person with a demonstrated disability may include job restructuring or reassignment to a vacant position.[42] Assume that an employee is unable to perform in the current position because of a disability but can perform in a light duty position. The collective bargaining agreement, however, requires five years of seniority to qualify for such an assignment. The disabled employee has only three years of seniority. Does the duty to accommodate under the ADA override the company's limitations under the contract? Related to this issue is the employer's

---

[40]CRA, §105(a), 42 U.S.C. §2000e-2(k)(1)(A)(i) (Supp. 1991).
[41]*Supra* note 32.
[42]ADA, §101(9)(B), 42 U.S.C. §12111(9)(B) (Supp. II 1990).

duty to bargain under section 8(a)(5) of the NLRA[43] about any accommodation as an alteration in terms or conditions of employment.

Although we usually assume that federal law preempts a private contractual agreement, the problem is not so simple. The collective bargaining process and agreement are also the subject of protection under federal law (the NLRA). If the two acts are in conflict, a court is required to determine whether one act overrides the other or whether the two pieces of legislation can be interpreted so as to accommodate the interests of both.

The issue is further complicated by relevant precedent under the Rehabilitation Act. Decisions under section 504 of the Rehabilitation Act recognize the special status of collective bargaining agreements and permit these contracts to overcome obligations that otherwise would be imposed under section 504. In *Carter v. Tisch,*[44] for example, the plaintiff was employed as a laborer-custodian. Because his asthmatic condition deteriorated while he was in that job, the plaintiff sought reassignment to a light duty custodian position. As with the hypothetical suggested above, the reassignment would have violated the seniority provisions of the collective bargaining agreement, and the employer refused the request on that basis. The Fourth Circuit concluded that, in the absence of an intent to discriminate, the contract provided a valid defense to the plaintiff's claim. Because the plaintiff did not have the seniority required by the agreement, the court reasoned, the plaintiff was not "otherwise qualified" for the light duty position within the meaning of the Rehabilitation Act. Even if the Act did require reasonable accommodation by assignment to a light duty position, the court noted, "such a duty would not defeat the provision of a collective bargaining agreement unless it could be shown that the agreement had the effect or intent of discrimination."[45]

Similarly, in *Daubert v. U.S. Postal Service*[46] the plaintiff was unable to perform the duties of her permanent assignment to "caddy pool" because of a degenerative spine disease. The plaintiff requested a transfer to a light duty position but had been employed less than six months. The collective bargaining agreement required five years' seniority for such a transfer. Because the plaintiff was not capable of performing the heavy lifting required in the caddy position, the

---

[43]29 U.S.C. §158(a)(5) (1988).
[44]822 F.2d 465, 44 FEP Cases 385 (4th Cir. 1987).
[45]*Id.* at 469.
[46]733 F.2d 1367, 34 FEP Cases 1260 (10th Cir. 1984).

Tenth Circuit held that she was not "otherwise qualified" under the Rehabilitation Act.

Other courts have reached the same result using a different rationale. In *Shea v. Tisch*[47] the First Circuit upheld the employer's refusal to reassign the plaintiff in violation of the seniority bidding system in the collective bargaining agreement. The plaintiff suffered from an anxiety disorder and sought transfer to a position closer to his home. Because of the limitations of the contract, the court concluded that the accommodation was not reasonable under the Rehabilitation Act. Under these and other decisions,[48] the courts repeatedly have interpreted the Rehabilitation Act to deny an employee's request for a transfer or reassignment which would violate the seniority provisions of a collective bargaining agreement.

Should the courts transplant this analysis from the Rehabilitation Act to the ADA, the arbitrator's role will be simplified. If the provisions of a collective bargaining agreement can be used either to limit an employee's claim of "otherwise qualified" (because of lacking the requisite seniority under the contract, for example) or to render an accommodation unreasonable (because it is in violation of the contract), then the arbitrator will be justified in limiting the decision to interpretation of the agreement. If the collective bargaining agreement does not override the employer's ADA duties, however, the arbitrator may be faced with the far more difficult task of accommodating the terms of the contract to the requirements of the legislation.

Whether the courts will follow Rehabilitation Act precedent in considering the impact of a collective bargaining agreement on ADA obligations is an open question. Arguments are available on both sides of the issue. In favor of such precedent are statements from both the legislative history and the EEOC that case law under the Rehabilitation Act should be used in interpreting requirements under the ADA. The legislative history notes that the regulations under the Rehabilitation Act were incorporated in the ADA "to

---

[47]870 F.2d 786, 49 FEP Cases 625 (1st Cir. 1989).

[48]*See, e.g., Jasany v. U.S. Postal Serv.*, 755 F.2d 1244, 37 FEP Cases 210 (6th Cir. 1985) (employee with visual disability lawfully denied accommodation where accommodation would violate seniority provisions under collective bargaining agreement); *Hurst v. U.S. Postal Serv.*, 653 F. Supp. 259, 263, 43 FEP Cases 1367 (N.D. Ga. 1986) ("rights afforded by the Rehabilitation Act cannot prevail over the rights created by a bona fide seniority system"); *Bey v. Bolger*, 540 F. Supp. 910, 32 FEP Cases 1652 (E.D. Pa. 1982) (accommodation of reassigning plaintiff to light duty would have violated collective bargaining agreement and thus created "undue hardship" on employer).

ensure the factors that have been used in these and other Section 504 cases continue to apply."[49] The EEOC report reaffirms the intent to use applicable case law under the Rehabilitation Act as a guide to the ADA.[50] Furthermore, the EEOC amended its interpretive guideline to the ADA to indicate that a collective bargaining agreement may be used in determining whether a proposed accommodation constitutes an "undue hardship" on the employer.[51] At least one commentator has argued that this intended reliance on the Rehabilitation Act, in conjunction with the special status of collective bargaining agreements under federal law, should result in continued deference to contractual limitations on obligations under the ADA.[52]

Other factors, however, suggest that the courts may take a closer look at the issue of collective bargaining agreements and their relationship to the ADA. The regulations explicitly permit consideration of a collective bargaining agreement in examining the employer's obligations under the ADA but state that the contract is not determinative.[53] The legislation itself specifically prohibits participation in a collective bargaining agreement "that has the effect of subjecting . . . [an] employee with a disability to the discrimination prohibited by this title."[54] Nothing comparable was included in the Rehabilitation Act.

Given the overriding policy behind the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[55] courts undoubtedly will look carefully at the problem of accommodating the collective bargaining relationship to the requirements of the Act. Given the explicit provision prohibiting the use of a labor contract as a means of discrimination otherwise prohibited by the Act, it seems unlikely that a court routinely would permit a seniority provision to defeat the duty to accommodate under the ADA. Given the existence of two important competing federal statutes and sets of policies, a more careful, case-by-case analysis is required.[56]

---

[49]3 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT, v. at 2332 (1990).

[50]56 Fed. Reg. 35,726 (July 26, 1991).

[51]*Id.* at 35,727 (codified at 29 C.F.R. §1630) (supplementary information following the regulation).

[52]Smith, *Accommodating the Americans with Disabilities Act to Collective Bargaining Obligations Under the NLRA*, 18 Employee Rel. L.J. 273, 278–83 (1992).

[53]56 Fed. Reg. 35,726, 35,735 (codified at 29 C.F.R. §1630.2(n)(3)(v)).

[54]ADA, §102(b)(2), 42 U.S.C. §12112(b)(2) (Supp. II 1990).

[55]ADA, §2(b)(1), 42 U.S.C. §12101(b)(1) (Supp. II 1990).

[56]*See,* 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).

Returning to our original hypothetical, there is little question that, in the absence of a collective bargaining agreement, an employer is required to transfer a disabled employee to a vacant light duty position as a reasonable accommodation under the Act. A seniority requirement does not affect an employee's qualifications for the position because it is unrelated to the "essential functions" of the job, as that term is defined in the legislation. Only if a court is willing to consider breach of the contract an undue hardship does the contract protect the employer. The purpose and language of the statute militate against this result.

In defining the arbitrator's role, ultimately much will depend on provisions included in future collective bargaining agreements dealing with the issue of disability discrimination. The parties may simplify or complicate the arbitrator's task depending on the language chosen. The possibilities, of course, are as varied as the imaginations of the negotiators. For example:

1. If the labor contract contains no prohibition of discrimination on the basis of disability, the arbitrator may rely on the traditional role of interpreting only the agreement. This is appropriate, however, only if the employer's obligations under the ADA are uncertain. An arbitrator is not likely to be comfortable rendering a decision which results in a clear violation of the ADA.

2. If the labor contract prohibits the proposed accommodation (such as the seniority requirement for transfer to a light duty position) and also prohibits discrimination on the basis of disability, the arbitrator may have to resolve the conflict. Here the arbitrator may adhere to a more traditional role of resolving a conflict within the contract itself. If the arbitrator concludes that the transfer was appropriate, that decision may rest on a finding that the contract's prohibition of discrimination preempts the seniority provision. In interpreting the discrimination prohibition, of course, the arbitrator would turn to the ADA for guidance, just as arbitrators have used Title VII law in the past.

3. If several accommodations are possible and at least one alternative does not violate the agreement, the arbitrator may hold true to the contract and at the same time condemn the employer's unlawful refusal to implement a reasonable accommodation consistent with the agreement.

The Duty to Bargain

The duty to bargain issue may arise in the context of the collective bargaining agreement, although this problem more

suitably may be handled by the NLRB. The NLRA prohibits employers whose employees are represented by a union from modifying employment terms without bargaining with the union and from dealing directly with employees.[57] The ADA arguably combines both obligations in the duty to reasonably accommodate a disabled individual otherwise qualified. The EEOC regulations specifically encourage "an informal, interactive process with the qualified individual" in order to determine an appropriate accommodation.[58]

Both the EEOC and the NLRB recognize this potential conflict but have provided no clear guidance. Although representatives from the two agencies met last year to establish joint guidelines on this problem, they were unable to reach agreement. In a memorandum from the general counsel to all regional directors on August 7, 1992, the Board acknowledged that an employer's unilateral implementation of a reasonable accommodation might result in an unfair labor practice charge under section 8(a)(5).[59] Although no unfair labor practice occurs when a employer makes changes "mandated" by federal law,[60] the general counsel noted, a violation may occur when the employer is given some discretion in the means of compliance.[61] "Thus it would appear that, in most cases, an employer has sufficient discretion under the ADA to warrant requiring it to afford a union notice and an opportunity to bargain about a proposed accommodation."[62] Similarly, the general counsel concluded that an employer who arranges an accommodation with the affected employee without negotiating with the union may be liable for "direct dealing" if the accommodation changes working conditions.[63]

The general counsel reached no final conclusion on the more difficult issue of the scope of bargaining required under section 8(d).[64] He left open the question of whether a violation of that duty occurs when the employer implements an accommodation in violation of the terms of the contract after the union refuses to agree to the change. The Board will continue to defer to arbitration under the *Collyer*[65] doctrine when the charge depends on interpretation of

---

[57]29 U.S.C. §158(a)(5), 158(d) (1988).
[58]29 C.F.R. §1630.2(o)(3) (1992).
[59]29 U.S.C. §158(a)(5) (1988).
[60]*See Murphy Oil USA*, 286 NLRB 1039, 1042, 127 LRRM 1111 (1987).
[61]NLRB, Office of the General Counsel, Memo. GC 92-9 (Aug. 7, 1992).
[62]*Id.* at 4.
[63]*Id.* at 6.
[64]29 U.S.C. §158(d) (1988).
[65]*Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

the agreement. If the accommodation is clearly inconsistent with the contract, however, no deferral is warranted.[66]

A Note on Gilmer

No discussion about the arbitration of discrimination claims would be complete without some mention of the Supreme Court's recent decision in *Gilmer v. Interstate/Johnson Lane Corp.*[67] For almost 20 years arbitrators have been operating under the assumption that arbitration under a collective bargaining agreement does not prevent the grievant from pursuing claims of discrimination independently through the EEOC under Title VII. In 1974 the Supreme Court in *Alexander v. Gardner-Denver Co.*[68] held that the plaintiff was not barred from pursuing a claim of race discrimination under Title VII even though he had unsuccessfully arbitrated his discharge under a collective bargaining agreement. The case was widely understood to provide unlimited access to Title VII litigation and remedies regardless of the right to pursue arbitration under private contractual arrangements.

In *Gilmer* the Court limited the *Gardner-Denver* doctrine. The employee in that case was required to register with the New York Stock Exchange as a condition of his employment as manager of financial services. His registration included a provision requiring him to arbitrate controversies with his employer. When the plaintiff sought to challenge his termination under the ADEA, the employer filed a motion to compel arbitration. The Supreme Court agreed that arbitration was required.

In distinguishing *Gardner-Denver,* the Court made several points. First, *Gilmer* involved an agreement to arbitrate statutory claims, while *Gardner-Denver* involved the arbitration of a contract-based claim. Second, the arbitration in *Gardner-Denver* involved union representation, thus creating a tension between "collective representation and individual statutory rights." Finally, *Gilmer* was decided under the Federal Arbitration Act, unlike *Gardner-Denver* and its progeny.[69]

The ultimate impact of *Gilmer* is not entirely clear. The fact that the Court distinguished *Gardner-Denver* may signal the development of two lines of doctrine. In a decision rendered after *Gilmer,*

---

[66] *Supra* note 61, at 6 n.18.
[67] 111 S.Ct. 1647, 55 FEP Cases 1116 (1991).
[68] 415 U.S. 36, 7 FEP Cases 81 (1974).
[69] 111 S.Ct. at 1657.

the Fifth Circuit interpreted *Gardner-Denver* as now limited to arbitration in the collective bargaining context.[70] If the Fifth Circuit is correct, arbitration under labor contracts will be unaffected.

Alternatively, *Gilmer* may signal a more general trend of increased deference to arbitration. Potentially, *Gilmer* may be the first step in the erosion and ultimate reversal of *Gardner-Denver*. If so, arbitration under collective bargaining agreements seeking to enforce antidiscrimination provisions could become increasingly more important as the employee's primary means of redressing discrimination.

Conclusion

Even without the complication of a collective bargaining agreement, application of the ADA presents a variety of complexities. In the context of a labor contract, those complexities may have to be resolved by the arbitrator. Some problems may be circumvented if the courts follow precedent under the Rehabilitation Act, which permits a labor contract to override accommodations otherwise required. There is reason to believe, however, that the same deference will not be afforded under the new legislation. And, even with such deference, cases may arise requiring the arbitrator: (1) to determine whether the grievant is disabled within the meaning of the Act, (2) to determine whether the grievant is otherwise qualified for the position sought, and (3) to evaluate the reasonableness of accommodations which do not violate the agreement. If the courts decline deference to collective bargaining agreements, arbitrators may be faced with the even more difficult task of reconciling the demands of the ADA while attempting to protect the bargain of the parties.

LABOR PERSPECTIVE

ELAINE BERNARD*

There is an unfortunate tendency in discussions about the Americans with Disabilities Act (ADA), or indeed in any area of workplace reform or antidiscrimination initiatives, for employers

---

[70]*Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991).

*Executive Director, Harvard Trade Union Program, Cambridge, Massachusetts.

to respond with alarm and exaggerated claims of the chaos such changes will bring to the workplace and the economy. So a healthy dose of skepticism is in order when discussing the new constraints, regulations, conflicts, and confusion that the ADA will cause in industrial relations. The ADA is only the latest in a long line of workplace legislation which employers have argued would place terrible restrictions on their ability to stay in business. Recall that similar exaggerated claims were made with the introduction of the Family Leave Act, the Occupational Safety and Health Act (OSHA), pay equity legislation, Civil Rights Title VII, and, one might add, many years ago even the National Labor Relations Act (NLRA) itself.

While it is hoped that the ADA will bring about some changes in the workplace, we should not lose sight of the fact that this legislation was required because of extensive discrimination against people with disabilities and a widespread recognition of the need to extend to the disabled protections granted to others who have experienced long-term, systemic discrimination as a group, including African Americans and women. Voluntary measures simply had not worked. From the very beginning of the legislative process, organized labor was a supporter of the ADA and was part of the coalition that worked for its adoption by Congress. Labor viewed the ADA as a just and necessary extension of basic rights to the disabled, both in and outside the workplace. And now that the ADA is law, it is reasonable to expect that organized labor will cooperate with management to ensure that reasonable accommodations are made in workplaces for disabled employees.

Weaknesses in the ADA

While applauding the important gains made for the disabled with the ADA, we should not lose sight of the legislation's limitations. Four examples follow where the legislation fell far short of what advocates for the disabled would have liked.

First, the ADA is not an affirmative action program, nor does it imply affirmative duties. Rather, it is simply antidiscriminatory, prohibiting employers from openly discriminating against the disabled. Employers are still free to choose the best qualified applicant for a job, but in the current loose labor market, the best qualified in the employer's eye may be the candidate without a disability. Employers interested in avoiding lawsuits will probably be cautious in their hiring practices and will not directly discrimi-

nate against the disabled. But without an affirmative action provision, the disabled will still have a hard time finding a job. Even with the 1991 amendments to the civil rights law returning to the "disparate impact" proof, proving discrimination in hiring will remain very difficult.

Second, while employers have an affirmative duty to make reasonable accommodation for disabled employees, a large escape clause qualifies this accommodation; that is, the required reasonable accommodation is bounded by "undue hardship" caused by "significant difficulty or expenses." What is a significant difficulty or expense? An AFL-CIO study reports that 50 percent of the accommodations to date have cost under $100.

Third, while the ADA covers both private and public employees, it is currently limited to workplaces with 25 or more employees, although this figure will be reduced to 15 or more in July 1994. It still leaves a considerable portion of small business exempt from the provisions requiring reasonable accommodation.

Fourth, serious limitations exist in the crucial area of employer-based health care benefits. While the ADA guarantees the disabled coverage equal to that of other employees, it permits the widespread discriminatory practice of limiting or excluding payment for preexisting conditions even when this policy adversely affects persons with disabilities.

Litigation Versus Collective Bargaining

Although it is not a specific limitation of ADA, another concern worth noting is that the ADA joins a growing body of anti-discrimination law and worker protection measures which cover workers whether or not they are covered by a collective agreement. In and of itself, this action might be commendable, but it has contributed to a growing gap between the protections and remedies for workers via collective bargaining and law vis-à-vis those for all workers through litigation. This fact underlines a growing shift toward the use of litigation rather than collective bargaining as a method to promote employee rights in the workplace.

These actions, triggered by individual rather than concerted activity, carry considerably more weight than a violation of a collective agreement or an unfair labor practice. A violation of individual rights can entail extensive legal fees, including attorney's and expert fees for the plaintiff, and punitive damages, up to $300,000 in the case of ADA. Violations of collective agreements,

on the other hand, carry no punitive penalties and rarely result in financial exposure and liability equivalent to this new class of workplace individual rights. In a sense we have created a hierarchy of rights, with litigation far more attractive to aggrieved employees than collective bargaining and contract protection. While this is a problem well beyond the scope of today's discussion, I believe it is an important issue for arbitrators and anyone interested in the state of labor relations in this country.

ADA and Collective Agreements

The ADA requires that both parties under a collective agreement work to ensure compliance with the Act. Unions as organizations are covered by the provisions of the ADA and must ensure that the provisions of their collective agreements also measure up to the new law. As in other areas of labor law, in the vast majority of cases employers, unions, and disabled employees will be able to implement a reasonable accommodation consistent with both ongoing work practices and the provisions of the collective agreement. However, if things always worked smoothly, there would be no need for ADA, unions, or arbitrators. So it is reasonable to predict areas of conflict.

While the ADA is silent on the union's role in negotiating reasonable accommodation for a disabled employee, this does not mean that the employer may take unilateral action without consulting the union. Under the NLRA the union remains the sole bargaining agent for all employees; therefore, management has a duty to notify and consult with the union when a disabled employee makes a request for accommodation. Also, because an accommodation can affect the terms and conditions of work, the union—not simply the affected employee—should be involved in such discussions and negotiations. As organizations covered by the ADA and in order to fairly represent all members, unions have both a duty and an interest in finding a reasonable accommodation.

There are two obvious ways to accommodate a disabled employee. One method is through changes and reorganization of the existing job. This can mean redesigning equipment or procedures, providing more flexible job structure, or removing marginal duties the disabled employee finds difficult or burdensome. It should be noted that the ADA draws an important distinction between "essential" duties of a job and "marginal" aspects. Many jobs do not have formal job descriptions, and even those with clearly spelled out

descriptions do not always make a sharp distinction between essential and marginal duties. The new importance of this distinction is likely to push employers and unions to rework job descriptions, giving particular consideration to the "essential" duties. But this type of formal job analysis runs counter to multiskilling and new flexible work organization models, where seemingly marginal aspects of the job (such as getting along with others and working in teams) become crucial.

The second method of accommodation is to transfer a disabled employee to a new job or a vacant job with duties more compatible with the disability. However, a number of conflicts can arise with transfers. For example, a transfer could entail moving a classified employee out of the bargaining unit, which the union and/or the employee is likely to reject as unacceptable. While such a transfer could be an acceptable accommodation in a nonunion setting, in an organized setting it would end rights under the collective agreement and thus would clearly not be acceptable. Action open to employers in nonunion firms is not usually helpful as a guideline for reasonable accommodation. Union recognition, certification, and collective bargaining confer on an employer special obligations not required in the nonunion sector. The ADA does not imply a wholesale abandonment of those responsibilities, nor does it sanction unilateral action by an employer even when motivated by a desire to accommodate a disabled employee.

Another scenario (which has already occurred under the Rehabilitation Act) is the transfer of an employee without sufficient seniority into a vacant position. Collective agreements often include seniority as a crucial qualification for job transfer. Here, there exists a potential conflict between the ADA requirement of reasonable accommodation and the seniority provisions of the collective agreement. Unions have been reluctant to adopt special seniority provisions for a particular class of employees, whether on racial, gender, or ability grounds, and it is hard to imagine that this attitude will change under the ADA.

Forced bumping (or displacing) an employee already in a job is explicitly not required by the ADA, but a disabled employee with insufficient seniority might argue for reassignment to a vacant position as a method of reasonable accommodation. Here, the provisions of the ADA clash directly with the protection of a collective agreement. A case might be made that a violation of a collective agreement constitutes undue hardship, but most employers, forced to choose between violating the collective

agreement and violating the ADA, will probably chose the former because no punitive damages are associated with a violation of a collective agreement.

I do not mean to minimize the significance of potential conflicts that might arise with the ADA; however, the imagined scenarios are weak in that they assume only one possible reasonable accommodation, which usually runs smack into the collective agreement. Rather, reasonable accommodation is a wide open area; ongoing discussions and anticipation of problems can prevent conflict. Also, this is a perfect area for new, imaginative problem-solving techniques, such as grievance mediation, whereby the union, management, and the affected employee can work out a solution to everyone's advantage.

The ADA will not bring about a revolution in the workplace. It is simply too weak, has too many loopholes, and is too easy to circumvent. But embraced properly, even with all of its limitations, it can provide impetus for workplace redesign—for the disabled and, by extension, for all workers.

MANAGEMENT PERSPECTIVE

LAWRENCE W. MARQUESS*

It is my task to comment from the perspective of the employer concerning the relationship between the Americans with Disabilities Act (ADA)[1] and arbitration, and the presentation of Professor Glenn George on that topic. She provided a good, concise summary of the Act; therefore, there is no need to replow that ground. I intend to present the employer's perspective on an important problem in those situations where employees are represented by a labor organization and covered by a collective bargaining agreement including a grievance and arbitration procedure. Specifically, the problem arises from the ADA requirement that the employer, presented with an employee who is a "qualified individual with a disability" and thus protected by the Act, make a reasonable accommodation to the disability, when the accommodation is available and does not present an undue hardship. When this obligation conflicts with specific terms of the collective bargaining agreement, the employer is placed in a very difficult predicament.

---

*Harding & Ogborn, Denver, Colorado.

[1]42 U.S.C. §12111–12117.

The Employer's Predicament

For example, assume that the employer has an employee who has become disabled within the meaning of the ADA and can no longer perform the essential tasks of the present job without reasonable accommodation, involving either restructuring of the job or transfer to an open position. Assume further that the only reasonable accommodation available involves a transfer to another job category. However, the collective bargaining agreement prohibits the transfer because of bidding and seniority requirements.

Here is the employer's predicament: Implementing the reasonable accommodation violates the collective bargaining agreement. Not implementing the reasonable accommodation and terminating the employee due to inability to perform the present job almost certainly violates the ADA.

Obviously, the employer's first step should be to contact the union and attempt to reach an agreement allowing implementation of the reasonable accommodation, thus meeting the employer's obligation to bargain under the National Labor Relations Act (NLRA) and, hopefully, avoiding a grievance. But if the union refuses for any number of reasons, not the least of which may be the wishes of other employees to bid on the job, the employer has a real problem.

The employer must consider that a violation of the ADA could result in a jury trial and a judgment not only for back pay but also for other compensatory damages, such as emotional distress, and for punitive damages. These compensatory and punitive damages could add up to a maximum of $300,000 depending on the size of the employer. Also, the employer could receive an order to reinstate the disabled employee with the same reasonable accommodation that violates the contract.[2]

Of course, unilateral implementation of the reasonable accommodation could bring a grievance and probably arbitration over the breach of the collective bargaining agreement. There may also be unfair labor practice charges under section 8(a)(5)[3] and

---

[2]For reasons of space and time limitations, I am putting aside questions of the effect of a successful grievance concerning the termination of the disabled employee, which could result in an order to return the employee to work in the original job. Also, I will not discuss the implications of a successful grievance, filed after the employer has already acted in accord with an ADA judgment and reinstated the employee with the reasonable accommodation, arguably in violation of the contract.

[3]29 U.S.C. §158(a)(5).

section 8(d)[4] of the NLRA for failure to bargain with the union and for unilateral implementation of a change in the contract terms. Either or both could result in orders to comply with the contract language, and thus again place the employer in jeopardy of violating the ADA.

The Employer's Solution

Given the opportunity before the situation arises, the obvious remedy for the employer is to negotiate specific contract language to prevent this predicament. The employer could propose the following language:

> The employer and the union mutually agree that they must comply with the Americans with Disabilities Act and that the employer may take all actions necessary for such compliance, even when such actions conflict with the terms of this agreement. Similarly, the parties agree that such action by the employer will not be deemed to be a violation of the National Labor Relations Act and that the union has waived the right to bargain over the subject of such actions.

In the absence of this specific language, the employer, faced with our hypothetical Hobson's choice, must make some difficult decisions. What follows is a general description of my advice to a client in this predicament. I assume that the employer is faced with a single disabled employee and a reasonable accommodation which does not require a massive breach of the collective bargaining agreement or affect large numbers of other employees so that an arbitration remedy for the breach would be extremely expensive. Obviously, changes in that assumption and other variations in the particular situation would change my advice.

If failure to make the reasonable accommodation would result in a severe impact on the disabled employee, such as termination, the employer probably should go ahead and make the reasonable accommodation, even if the union refuses to agree. Why? First, because the economic impact of failing to do so, in terms of potential damages and the cost of litigation, generally will be significantly more severe than that resulting from breach of contract.

Second, there is always the possibility of a favorable award by the arbitrator. Depending on the contract, the employer may be favored by several arguments before the arbitrator. A study cited by

---

[4]29 U.S.C. §158(d).

Professor George suggested that arbitrators are more willing to consider external law which prohibits discrimination. Thus, the need for the employer to obey the ADA may cause the arbitrator to deny the grievance. If the contract has an antidiscrimination clause, the arbitrator may rely on that to override other specific terms of the contract if enforcing those terms would violate the antidiscrimination provision. Finally, if the contract contains a savings clause preventing the violation of external law, the arbitrator may rely on that to rule that no other contract provisions may be interpreted and applied so as to violate external law.

Third, an employer who is unsuccessful in arbitration and is ordered to "undo" the reasonable accommodation has two choices. Compliance with the arbitration award strengthens the employer's argument that the reasonable accommodation presents an undue hardship because of the required breach of the collective bargaining agreement. In the arbitrator's award, the employer now has a binding interpretation of the contract demonstrating that it would be breached by the reasonable accommodation. The employer can argue to the court that failure to honor the arbitrator's award will bring immediate accountability. Alternatively, the employer can decline to honor the arbitration award and seek to overturn it on the basis that (1) the award breaches public policy, and (2) the court cannot enforce an arbitration award requiring the employer to violate the law. In the latter instance, the court would be, in effect, ordering an illegal act, which it may not do.

This would be the more productive course for the employer, given the assumptions, because the alternative is almost certain to create greater liability. If the employer chooses not to make the reasonable accommodation and terminates the employee for inability to perform the work of the present position, the almost certain result will be an action under the ADA in federal court, unless the employer is willing to "buy off" the disabled employee, probably at great expense. That action may take up to two years, and possibly longer, to wend its way to a resolution at trial, particularly if it is appealed. During that time the employer is likely to expend substantial amounts in attorney's fees and expert witness costs, unless there is an early settlement, again at a substantial cost.

If the resolution calls for reinstatement of the employee with reasonable accommodation, the employer is again faced with a grievance over the reasonable accommodation and the need to spend more money to defend the grievance in arbitration and, possibly, in a court suit to overturn the arbitrator's award. In short,

this route, once chosen, is likely to ensure a substantial expenditure of money over a long period of time with uncertain results.

The Arbitrator's Role

It is, of course, the arbitrator's responsibility to interpret and apply the contract as intended by the parties. In doing so, however, the arbitrator must bear in mind public policies established by legislation, such as the ADA, and must make the presumption that the parties did not intend to violate the law in making their agreement. It is appropriate for the arbitrator to consider the ADA and other discrimination laws and to seek a resolution of the grievance which is, to the extent possible, loyal to the contract but allows both parties to meet their obligation to comply with the ADA and other laws banning discrimination.

PART II. FAMILY BENEFITS AND HOMOSEXUAL EMPLOYEES' COHABITANTS

STEVEN BRIGGS*

As most of us realize, the term "family" has taken on an expanded meaning in our lifetimes. In the 1940s family meant mom, dad, and the kids—and mom and dad were married to each other. Divorce was not openly discussed in polite circles. Even in the 1950s the thought of unmarried persons of the opposite sex living together "in sin" was considered shocking. Television programs of the era portrayed the perfect family as husband and wife with two or three children. That is not true today. To underscore this point, just compare the families in "Father Knows Best" and "Leave It to Beaver" with those portrayed in "One Day at a Time" and "Three's Company." By the 1970s there were 47 divorced adults for every 1,000 who were married and living with a spouse. By 1990 the number of those divorced had tripled. Today 1 in 4 American adults spend at least part of their lives living with a person of the opposite sex without the sanction of marriage.[1] And 1 in 4 infants

---

*Member, National Academy of Arbitrators; Associate Professor of Industrial Relations, DePaul University, Chicago, Illinois.

The author is indebted to Tim Scott, for his capable research assistance, and to Ken Thompson, Chairman of the Department of Management at DePaul University, for funding the research.

[1]Weber, *Redefining the Family,* Ins. Rev. (May 1992), 12. The corresponding ratio for those between the ages of 30 and 34 is an almost unbelievable one out of two.