which arbitrators had to concern themselves. Just cause is clearly an evolving concept. I submit that the ADA can be used by analogy and example, but the strict enforcement of statutory rights is properly the role of public administrative agencies and the courts.

MANAGEMENT PERSPECTIVE

JAMES J. KELLEY*

Arbitrator Joan Dolan has posed an artful hypothetical that weaves the subtle nuances of an all too typical Americans with Disabilities Act (ADA) claim into the more fundamental question of whether these issues should be arbitrable at all. Academy members have addressed the arbitration of statutory claims on a number of previous occasions, and there is room for differing points of view on the question. This management commentator approaches the issue as a convert. Shortly after *Alexander v. Gardner-Denver Co.*,[1] I routinely counseled clients to restructure the discrimination clauses of their collective bargaining agreements so that they could have the option of pursuing an election of remedies argument to preclude a "second bite at the apple." I reasoned that it was fundamentally unfair for an employer to be subject to an arbitration process that was final and binding on only one side. I am not certain that I still agree with that conclusion.

Clearly the classic advantages of employment arbitration over employment litigation are as valid today as they ever have been. Even if the process is formalized to allow for limited discovery, and hearings become more detailed and routinely transcribed, arbitration is still an inexpensive alternative to litigation. Discovery costs will be decreased. Claims will be resolved more quickly. If the decision is adverse to the employer, potential back-pay remedies will be diminished and there will be little or no appellate recourse. The parties can be confident that their employment dispute will be submitted to a neutral factfinder familiar with principles of industrial justice, an alternative far more preferable in my mind, than an unpredictable jury.

In many respects these advantages inure as much to aggrieved employees as employers. Even though the range of remedies for intentional discrimination has been expanded by the Civil Rights

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[1]415 U.S. 36, 7 FEP Cases 81 (1974).

Act of 1991[2] to include compensatory and capped punitive damages, an employer should not presume that all employees will be driven to pursue an economic windfall by way of the litigation alternative. Many will be interested in a prompt, fair, and inexpensive resolution of their claim which holds out the prospect of job reinstatement and traditional make-whole relief. As discussed more fully below, employees clearly have that option. The law permits an employee to elect binding arbitration over the litigation of statutory claims. There should be a forum that accommodates that preference.

The union may not have a choice when confronted with the arbitration of ADA allegations, at least to the extent that an aggrieved employee contends that the underlying collective bargaining agreement results in prohibited discrimination based on disability. Employers and labor organizations are "covered entities" under the ADA,[3] and the litany of prohibited actions under that statute includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting . . . an employee with a disability to discrimination."[4] Such prohibited arrangements arguably would also include a preclusive arrangement barring submission of disability claims to arbitration, especially when read in conjunction with contractual nondiscrimination provisions or traditional "savings and separability" clauses.[5] Under the circumstances, I now conclude that management is well-advised to encourage submission of ADA claims to arbitration. Even if the employee declines to waive the right to proceed in court, the employer may be well served by going forward in arbitration. There is much to gain and little to lose, even if there is a continued prospect for collateral litigation.

Reconciling *Gilmer* and *Gardner-Denver*

Much has been written about the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.*,[6] which found no deference

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[2]42 U.S.C. §1981(a) (1991).
[3]42 U.S.C. §12111(2).
[4]41 U.S.C. §12112(b)(2).
[5]As Dolan points out, the decision in *EEOC v. Board of Governors of State Colleges & Univs.*, 957 F.2d 424, 58 FEP Cases 292 (7th Cir. 1992), calls the election of remedies approach into serious question. The case appears to apply equally to employee grievances and collateral claims raising ADA issues, and arguably would make refusal to arbitrate ADA claims an independent statutory violation.
[6]*Supra* note 1.

to mandatory arbitration of Title VII claims under a collective bargaining agreement and its intervening 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[7] which enforced a private agreement compelling arbitration of an age discrimination claim.

The central question in both *Gilmer* and *Gardner-Denver* is one of waiver and, more specifically, who can effectively waive an employee's right to pursue a statutory claim in federal court. Both cases affirm the individual's right to choose arbitration over litigation. *Gardner-Denver* holds that the employee must make the election; the collective bargaining representative cannot waive an individual employee's statutory rights. *Gilmer* holds that if an individual waiver is valid, the arbitration of an employment discrimination claim is legally enforceable.

A brief factual review places the two decisions in context. In *Gardner-Denver*, a discharged employee submitted a grievance under the collective bargaining agreement and filed a separate charge with the EEOC. In both forums the employee alleged that the discharge was not for just cause but was in fact motivated by racial discrimination. The employee requested that the union delay proceeding to arbitration until the EEOC could act upon the discrimination charge. The employee's private counsel expressed concern over the union's ability to effectively advocate a race discrimination claim.

The matter proceeded in arbitration, and the arbitrator concluded that the employee had been discharged for just cause. No statutory claim was presented in arbitration, even though the collective bargaining agreement contained a nondiscrimination clause which for relevant purposes paralleled the prohibitions of Title VII. Subsequently the employee filed suit in the U.S. district court alleging race discrimination, and the employer moved for summary judgment on the basis that the arbitration decision was final and binding. The district court granted the employer's motion, holding that the employee was bound by the arbitral decision and thus had no right to sue.[8] The court of appeals affirmed,[9] but the Supreme Court reversed.

There was no question in *Gardner-Denver* that the employee had not personally waived his statutory right to file suit. The argument was that the union, as collective bargaining agent, had done so in

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[7]500 U.S. 20, 55 FEP Cases 1116 (1991).
[8]*Alexander v. Gardner-Denver Co.*, 346 F. Supp. 1012, 4 FEP Cases 1205 (D. Colo. 1971).
[9]*Alexander v. Gardner-Denver Co.*, 466 F.2d 1209, 4 FEP Cases 1210 (10th Cir. 1972).

the traditional process of referring all differences arising under the terms of the collective bargaining agreement to compulsory arbitration.[10] In finding the union's waiver ineffective, the Court distinguished between collective bargaining rights, which may be waived by the union representative, and individual statutory rights, which require informed personal consent.

Gardner-Denver was the first of three decisions safeguarding an individual's statutory rights from collectively bargained waivers.[11] In all three cases, the Court went to some length to explain that even if an employee withholds consent to the arbitration of an individual statutory claim, the matter may still proceed under a collective bargaining agreement and the arbitrator's decision will not be a nullity. On the contrary, the decision remains the binding, authoritative interpretation of the collective bargaining agreement and may be entitled to substantial deference. This could be a particularly important conclusion in the ADA context, especially where the predicate issue is the degree to which the collective bargaining agreement has the effect of discriminating based on disability. In the Court's closing comments in *Gardner-Denver*, Justice Powell states:

> Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.[12]

The Court's 1991 decision in *Gilmer* is fully consistent with *Gardner-Denver* and its progeny. *Gilmer* did not arise from a collective bargaining agreement, and there was no question whether the employee had individually consented to arbitration. The employee plaintiff, a registered securities representative, executed a standard registration application, which included an agreement to arbitrate any controversy arising from the employment relation-

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[10]The scope of the arbitration obligation arguably was actually broader than the norm. In addition to encompassing all differences "as to the meaning and application of the provisions of this Agreement," all "trouble aris[ing] in the plant" was subject to the duty to arbitrate. *Alexander v. Gardner-Denver Co.*, *supra* note 1, at 40.

[11]*See McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984) (wrongful discharge claim for exercise of protected First Amendment speech under 42 U.S.C. §1983); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 24 WH Cases 1284 (1981) (FLSA minimum wage and overtime entitlements).

[12]415 U.S. at 60 n.21, 7 FEP Cases at 90. *See also McDonald v. City of West Branch, Mich.*, *supra* note 11, at 292 n.13 (even though arbitration decision not entitled to res judicata or collateral estoppel effect, it may be submitted as evidence and accorded great weight); *Barrentine v. Arkansas-Best Freight Sys.*, *supra* note 11, at 743–44 n.22.

ship. When the employee was terminated, he contended it was as a result of age discrimination. The district court denied the employer's motion to compel arbitration, relying on *Gardner-Denver.* The court of appeals reversed[13] and was affirmed by the Supreme Court.

Unlike *Gardner-Denver* which focused on waiver, the Court's inquiry in *Gilmer* centered on whether arbitrators may exercise binding jurisdiction over statutory claims. The Court found no fundamental prohibition. Indeed, over the years between *Gardner-Denver* and *Gilmer,* the Court had expanded substantially the role of arbitration in complex statutory proceedings.[14] Drawing on its decision in *Shearson/American Express,*[15] the *Gilmer* Court noted that the duty to arbitrate is not diminished when a party, bound by an arbitration agreement, raises a claim which is founded on statutory rights. The Court reasoned that the agreement to arbitrate simply signifies an agreement to an alternative forum.

Gilmer was the first Supreme Court decision to clearly declare that the employment discrimination laws do not prohibit arbitration of discrimination claims. Despite the absence of express statutory authorization in the ADEA, the Court ruled in *Gilmer* that age discrimination claims may be submitted to binding arbitration. Congress reached the same conclusion and included in both the Americans with Disabilities Act[16] and the Civil Rights Act of 1991[17] language which expressly allows for and encourages the arbitration of discrimination claims.

Arbitration Is a Suitable Forum for Resolving Statutory Employment Issues

One especially noteworthy element of the discussions of arbitration in *Gardner-Denver, Barrentine,* and *McDonald* is the Court's suggestion that traditional labor arbitration may be procedurally unsuitable for statutory claims. The Court had noted that the relative informality of the process, the role of the union, the inapplicability of rules of evidence and discovery, the absence of a

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[13] *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 52 FEP Cases 26 (4th Cir. 1990).

[14] *See, e.g., Shearson/American Express Co. v. McMahon,* 482 U.S. 220 (1986) (Securities and Exchange Act claims and Racketeer Influence and Corrupt Organization Act (RICO) claims are arbitral); *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985) (international antitrust and Sherman Act claims are subject to compulsory arbitration).

[15] *Supra* note 14.

[16] 42 U.S.C. §12212.

[17] Pub. L. No. 102-166, §118, 105 Stat. 1071.

formal written decision, and the arbitrator's source of authority from the law of the shop and the collective bargaining agreement rather than the statute combine to make arbitration "a less appropriate forum for final resolution of Title VII issues than the federal courts."[18]

In *Gilmer* the Court observed that its attitude toward the adequacy of arbitration had come full circle in the 17 years following *Gardner-Denver.* The majority decision commented that generalized procedural attacks on arbitration are "'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'"[19] Compare the reservations of the three decisions recited above with *Mitsubishi* and *Shearson/American Express Co.*, where the Court stated that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision . . . and that the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights."[20]

The Federal Arbitration Act

Gilmer, Mitsubishi, and *Shearson/American Express* were all decided under the Federal Arbitration Act (FAA),[21] which embraces a "liberal federal policy favoring arbitration agreements." The FAA generally applies to commercial, as distinguished from employment, arbitration agreements, and section 1 of the FAA may pose an impediment to the arbitration of some employment discrimination matters. Section 1 states: "Nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

The Court in *Gilmer* found that section 1 did not preclude arbitration because the securities registration agreement was not a "contract of employment" for purposes of FAA prohibitions. The *Gilmer* dissent challenges that conclusion, but intervening courts of appeals decisions accept the distinction and find no FAA prohibition. It is difficult to predict how the courts would rule

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[18] *McDonald v. City of West Branch, Mich., supra* note 11, at 290–91; *Alexander v. Gardner-Denver Co., supra* note 1, at 58.

[19] *Gilmer v. Interstate/Johnson Lane Corp., supra* note 7, at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477, 481 (1989)).

[20] *Shearson/American Express v. McMahon, supra* note 14, at 232; *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, supra* note 14, at 618, 633–34.

[21] 9 U.S.C. §1 *et seq.*

on compulsory arbitration agreements outside the securities industry.

There are strong arguments that an individual agreement to arbitrate, in resolution of a specific statutory dispute, would not derive from an "employment contract" and thus would not be barred by the FAA.[22] Both *Gardner-Denver* and *Gilmer* recognize that an individual employee is entitled voluntarily to submit statutory claims to arbitration, and under Title VII precedent and the 1991 Civil Rights Act such claims cannot be waived prospectively. Enforceability of an individual agreement to arbitrate is reinforced when the issue is combined with a more traditional contractual grievance under the discrimination provisions of a collective bargaining agreement. The Supreme Court decided, long ago, in *Textile Workers v. Lincoln Mills*,[23] that the FAA posed no impediment to judicial enforcement of labor arbitration decisions arising under a collective bargaining agreement.

Improving the Prospects for Deference

If an aggrieved employee agrees to submit statutory claims to arbitration, the arbitrator is authorized under *Gilmer* to resolve the issue and, absent gross irregularities or a defective waiver, the decision will have binding effect. Even if the union advances the discrimination issue as the collective bargaining representative, without individual employee consent, *Gardner-Denver* allows for due consideration of the arbitrator's award in subsequent court proceedings. In either case the prospects for binding effect or "due consideration" can be substantially improved if the parties incorporate a number of procedural safeguards in the process. We recommend the following:

1. Elicit a Signed Individual Submission Agreement

Even if there is specific contractual discrimination language, a signed individual waiver is highly recommended. The agreement to submit a statutory dispute to arbitration can be equated with the agreement to release a federal statutory claim. These waivers or releases have historically been enforceable in Title VII actions,

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[22]In addition, there is an antiquated line of cases that narrowed the application of §1 to the transportation industry as specifically described. *See, e.g., Tenney Eng'g v. Electrical Workers (UE) Local 437*, 207 F.2d 450, 21 LA 260 (3d Cir. 1953).

[23]353 U.S. 448, 40 LRRM 2113 (1957).

provided they are "knowing and voluntary." In 1990 Congress enacted the Older Workers Benefit Protection Act (OWBPA)[24] which, in part, established statutory standards for the "knowing and voluntary" waiver of age discrimination claims. The parties are well advised to model the waiver on OWBPA criteria. The pertinent standards include:

a. A written agreement between the individual employee and the employer phrased in terms that are understandable to the employee.
b. Specific reference to the statutory rights or claims that are to be submitted to arbitration.
c. A description of the scope of remedies and agreement on the conclusory effect of arbitration. If the parties intend to allow a right of appeal, the standard of review should be stated, such as the standard generally applicable to a trial court's review of Magistrate proceedings.[25]
d. An express recognition that the waiver does not affect prospective claims.
e. Written confirmation of the right to consult with a private attorney and adequate time for consultation prior to execution.
f. A reasonable time after execution either to reconsider the agreement or to revoke an executed agreement before it becomes binding and effective.

2. Assure Adequate Preparation and Opportunity for Case Presentation

a. Provide for meaningful discovery. This may not require oral depositions but should, at a minimum, include a prehearing exchange of relevant documents, identification of exhibits, and perhaps written interrogatories.[26]

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[24]29 U.S.C. §626(f).

[25]*See* Fed. R. Civ. P. 71 ("clearly erroneous" on factual and procedural decisions, "de novo" on dispositive legal issues); or the NLRB "Univesal Camera" rule (*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 27 LRRM 2373 (1951) (findings of fact not subject to review if supported by "substantial evidence," and decision should be disturbed only if it is "fundamentally inconsistent with the structure of the Act"); or the NLRB "Ford Motor Co." rule (*Ford Motor Co. v. NLRB*, 441 U.S. 488, 101 LRRM 2222 (1979) (if decision is "reasonably defensible," it should not be rejected merely because a court might prefer another construction).

[26]In December 1993, the Federal Rules of Civil Procedure (FRCP) were amended to provide for mandatory disclosure. The changes to FRCP Rule 26 and FRCP Rule 16(b), which require litigants to disclose relevant documents upon the filing of a claim and a mandatory pretrial exchange, would appear to be a practical and workable model for arbitration.

b. The arbitrator should generally adhere to the federal rules of evidence and procedures pertaining to the conduct of adversary proceedings. This does not require slavish technical adherence. The NLRB's standard for its hearing examiners has been to adhere to the federal rules "so far as practicable."[27]
c. At the commencement of the hearing, the arbitrator should ensure that the issue is clearly stated on the record and is understood by both parties. Even if there is no consent by the aggrieved employee, the statement of the issue should make specific reference to the statutory implications of the matter under review.
d. The arbitrator should prepare a written decision. Detailed "findings of fact and conclusions of law" should not be required in the usual disparate treatment case. A written summary of the evidence presented, the contentions of the parties, and the rationale for the arbitrator's conclusions which enables a reviewing court to make an assessment regarding the adequacy of the process and ensure that statutory issues were duly considered should suffice.

Arbitration of Americans with Disabilities Act Claims

The Americans with Disabilities Act (ADA) expressly provides for and encourages alternate dispute resolution procedures for ADA claims. Section 513 states:

> Where appropriate and to the extent authorized by law, the use of alternate means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Chapter.[28]

At least one federal court, applying the *Gilmer* precedent, has ruled that grievances involving ADA-related issues arising under a collective bargaining agreement must be referred to the agreement's compulsory arbitration process.[29]

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[27] *See* NLRB Rules and Regulations §101:10. That standard should suffice for arbitration. If statutory claims are at issue, a transcript of proceedings would be well advised.

[28] 42 U.S.C. §12213.

[29] *See Austin v. Owens-Brockway Glass Container,* 844 F. Supp. 1103, 145 LRRM 2445, 2 AD Cases 1649 (W.D. Va. 1994).

Future litigants should be cautious not to place undue reliance on the *Owens-Brockway* decision.[30] The district court based its decision exclusively on *Gilmer* and did not distinguish *Gardner-Denver*. There was no individual waiver in *Owens-Brockway*, and the case has been appealed to the Fourth Circuit. In an amicus brief filed June 30, 1994, the Equal Employment Opportunity Commission (EEOC) argued that neither *Gilmer* nor the ADA compels the arbitration of disability claims filed by employees covered by a collective bargaining agreement. The EEOC pointed out that *Gilmer* was premised on the distinction between an enforceable individual waiver of rights as opposed to a union's prospective waiver of the rights of all its members. The EEOC argued that congressional preference "that discrimination lawsuits be resolved in alternative dispute forums" does not require dismissal of claims brought by represented employees who choose not to pursue arbitration.[31]

Summary of the ADA

When the ADA was passed in July 1990, Congress intended to correct generations of discrimination in every walk of life, which had been levied systematically against over 43 million Americans.[32] The law has an exceptionally broad mandate and, like all remedial employment statutes, is intended to be construed liberally.

The employment provisions of the Act are substantial. The ADA prohibits discrimination against any qualified individual with a disability and requires an employer to provide reasonable accommodation to the known disabilities of a protected applicant or employee if such accommodations will enable the employee to perform the essential functions of a job.[33] Critical terms, such as "disability," "essential functions," and "reasonable accommodation" are loosely defined in order to provide maximum deference to persons within, or close to, the ambit of the statute.

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[30] *Owens-Brockway* has already been discredited by at least one federal court. In *Block v. Art Iron*, cited in Daily Lab. Rep. (BNA), No. 213, at A-4 (Nov. 7, 1994) (N.D. Ind., Oct. 19, 1994), the U.S. district court in Indiana refused to require arbitration of an ADA claim under a collectively bargained arbitration procedure.

[31] Daily Lab. Rep. (BNA), No. 158, at A-2–3 (July 21, 1994).

[32] 42 U.S.C. §12101.

[33] 42 U.S.C. §12112.

ADA Issues Amenable to Arbitration

The requirements of the ADA are expressly intended to be factually and individually specific, and many ADA issues are manifestly suitable for arbitration. For example, the employment provisions of the ADA do not extend protection to every employee or applicant with a disability. Instead, ADA protections extend only to "qualified" individuals with a disability.[34] A critical element of the qualification definition is the ability to perform the essential functions of the job.[35] Who is better qualified than an experienced labor arbitrator to ascertain the "essential" functions of a position or whether a particular applicant or employee is qualified to perform them at an acceptable level? Qualification is not precisely defined in the statute, but an experienced labor arbitrator who has dealt over the years with matters of transfer, promotion, and job performance has a strong and practical experience base to determine acceptable qualifications.

In Dolan's hypothetical case of Mr. X, both advocates focused on whether the grievant had a disability or, alternatively, whether the school system had just cause to discharge him. Both advocates apparently assumed that he was protected under the ADA. The school system could have argued that he was not a "qualified" individual with a disability because he could not maintain acceptable behavior in the workplace. Experienced labor arbitrators could decide, more knowledgeably than many judges, whether it is "essential" that a custodian have the ability to communicate with the supervisor and to have sufficient flexibility to deal with a modified work schedule or task assignment without explosive confrontations.

Similarly, a qualified individual with a disability is entitled to reasonable accommodation. The statute provides illustrations of what "may" be required but is purposefully vague about what constitutes "reasonable" accommodation.[36] The focus is left on the workplace and the central functions of the job.[37] Arbitrators are uniquely well qualified to determine what is "reasonable" in the workplace and to assess the relative hardship associated with job modification and the elimination of so-called "marginal" functions for distribution among other employees. Arbitrators have

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[34]42 U.S.C. §12112(a).
[35]42 U.S.C. §12111(8).
[36]42 U.S.C. §12111(9).
[37]Equal Employent Opportunity Commission, Technical Assistance Manual (hereafter EEOC Manual), chapter III.

been evaluating the "reasonableness" of management's rules and decisions for years.

An accommodation resulting in "undue hardship" is by statutory definition not reasonable. One example of the undue hardship exception suggested by the EEOC is the disruptive impact of the accommodation on the remaining employees.[38] Arbitrators have the experience to make that decision. An arbitrator's resolution of these basic ADA concepts would most likely receive the highest degree of deference or, at a minimum, "due consideration" under the *Gardner-Denver* rationale. They flow directly from the arbitrator's knowledge and experience with the law of the shop.

Issues Less Amenable to Arbitration

Other issues are more technical, and arbitrators may have no special expertise. The most critical and complicated issue is the threshold question of whether or not an individual is "disabled" under the ADA. In rare cases the issue may be a pure question of law but will be a mixed question of law and fact in most circumstances.

The scope of protection is further complicated by the ubiquitous term "disability." Disability is the predicate requirement under the Social Security Act, workers' compensation statutes, employee benefit plans, and many state and local handicap discrimination laws, but the definition of the same operative term is rarely identical. Each statute or benefit plan has subtle and critical nuances, and the ADA is no exception.

In order to constitute a protected disability under the ADA, a physical or mental condition must cause "a substantial impairment to a major life activity."[39] Major life activities are generally well and broadly defined, but "substantial" is left open to interpretation, as is the causal connection between the physical and medical condition and the asserted impairment.

The complexities associated with determining the scope of protected disability seem particularly acute with mental disabilities. Not unlike the case of Mr. X, several courts have addressed whether employees suffering from manic or other severe personality disorders are qualified individuals. Because of the individual

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[38] *Id.* §3.9.
[39] 42 U.S.C. §12102(1).

specifics of each case and the varying symptomatology, no clear and consistent construction of the ADA has emerged, even at the district court level. In a recent decision a U.S. district court in Tampa, Florida, denied summary judgment to an employer in a case where the plaintiff was terminated for carrying a gun onto company property. The employee asserted a mental disorder that impaired his judgment. The employer argued that it was simply bad judgment, an unprotected condition. The court ruled that the linkage between the employee's judgment and the asserted disability was a question of fact to be resolved by the jury.[40] The current focus on violence in the workplace and the logical applicability of the "direct threat" defense in cases like *GTE Data Services* are likely to make the threshold disability question even more frequently litigated and elusive in personality disorder cases.

Some argue that until the courts of appeals produce a body of interpretive case law, private decision makers should be reluctant to rule on these statutory claims. In my view the argument is not persuasive. The relatively sparse case law under the ADA, especially on technical and mental disability issues, will undoubtedly make arbitral handling of ADA claims difficult, but arbitrators have no less guidance under this statute than a federal district court and in many respects far greater experience with the questions at issue. As noted before, the Supreme Court has found that qualified arbitrators are no less equipped than the federal district courts to deal with complex questions of statutory interpretation.

Availability of Medical Evidence

Dolan notes the difficulty in securing competent and credible medical evidence in disability cases. It should not be so problematic. Generally the ADA places the burden on the employee to advise the employer of a need for accommodation and provide medical evidence of a disabling condition.[41] Even though compulsory, medical examinations of employees are severely restricted,[42] the ADA permits an employer who receives a request for accommodation to seek a verifying opinion.[43] Employers should be encouraged to fully utilize those rights and procedures in the preparation of their positions. If management fails to do so, the arbitrator

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[40]*Hindman v. GTE Data Servs.*, Daily Lab. Rep. (BNA), No. 141, at AA-1 (July 26, 1994).
[41]EEOC Manual, *supra* note 36, at §§3.1, 3.6.
[42]42 U.S.C. §12112(d).
[43]EEOC Manual, *supra* note 36, at §6.6.

should request evidence supporting the employer's position. If the employer refuses, for reasons of economy or otherwise, the arbitrator must decide the issues based on the medical record presented.

If the arbitrator convenes a prehearing conference and requires the parties to exchange documents and exhibits, there should be ample opportunity to produce an adequate medical record. It is important that the medical evidence be responsive to the relevant issues. The question is not merely the existence of a physical or mental condition but both an impairment of a substantial life activity *and* an interference with performing the essential functions of the position which cannot be ameliorated by reasonable accommodation. If an employee is required to undergo a physical examination to ascertain the ability to perform a job, an accurate job description should be submitted to the doctor, and a medical opinion should be requested, describing the employee's immediate physical or mental condition, the anticipated duration of the condition, and the demonstrable effect of that condition on the specific job in question. Constructive use of this process prior to the hearing should provide a practical answer to Dolan's concern about credible medical evidence.

Burden of Proof

In the typical discharge case the employer carries the burden of establishing just cause for the adverse action. In contrast, in discrimination litigation the burden at all times remains on the plaintiff to establish that the adverse action is the product of intentional discrimination. Typically a discrimination plaintiff satisfies the burden either by introducing direct evidence of discrimination or by employing the three-part analytical framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[44] reiterated in *St. Mary's Honor Center v. Hicks*.[45]

The two burdens are not irreconcilable in the typical arbitration. Indeed, any experienced labor arbitrator will be familiar with the fact pattern from *St. Mary's Honor Center*. The plaintiff, a black supervisor, offered evidence that the employer's reasons for terminating him were pretextual, in part based on the fact that white coworkers had been treated less severely for similar conduct. The

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[44]411 U.S. 792, 5 FEP Cases 965 (1973).
[45]113 S. Ct. 2742, 62 FEP Cases 96 (1993).

trial court credited plaintiff's arguments but found no evidence of discrimination. The court reasoned that plaintiff's termination could have been motivated as much by a personal vendetta against him as by intentional discrimination.[46] Ultimately the Supreme Court affirmed the trial court's holding.

The case poses a familiar scenario for labor arbitrators and a workable structure for dealing with discrimination claims in discharge actions. An arbitrator confronted with the same fact pattern could regard the racial discrimination elements of an employee's grievance as a defense against the employer's claim of just cause. The employer would still have the burden of establishing just cause but could not do so if plaintiff produced sufficient evidence of intentional discrimination, either directly or by application of the *McDonnell Douglas* proof format.

The Union's ADA Conundrum

The ADA places unions in a difficult position. There is inherent tension between a union's NLRA responsibilities and ADA obligations. For example, the ADA requires that each employment decision be made on an individualized basis. Questions concerning the essential functions of a job and reasonable accommodation are to be resolved in the context of a specific individual, the requirements of that individual's particular job, and the precise limitations of the personal disability. Unlike Title VII or the Age Discrimination in Employment Act, the ADA acknowledges no deference to a bona fide seniority system nor does it accord any preference to collectively bargained rights over individual interests. Thus, the union's responsibilities to the collective interests of a bargaining unit spelled out in the duty of fair representation will inevitably collide with a union's equally compelling responsibility to its individual disabled members.

Gail Lopez-Henriquez, the labor commentator on this program, suggests that unions should not be required to choose between the rights of their individual members and collective rights. She explained that no union wants to go on record opposed to the interests of its disabled members, but that unions cannot undermine the rights of the majority, especially more senior

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[46] *Hicks v. St. Mary's Honor Center,* 756 F. Supp. 1244, 55 FEP Cases 131 (E.D. Mo. 1991), *rev'd and remanded,* 970 F.2d 487, 59 FEP Cases 588 (8th Cir. 1992).

employees, under the collective bargaining agreement. Thus, she argued that unions should be permitted to take a position of neutrality when individual rights conflict with the collective bargaining agreement.

The argument has some practical appeal, but the law does not provide for that luxury of choice. A union has an independent duty under the ADA not to discriminate against qualified individuals with a disability or to be party to a contract, including a collective bargaining agreement, which has that effect.[47] Thus, to the extent that a collective bargaining agreement is alleged to have a discriminatory effect on the disabled (e.g., blocking an otherwise available reasonable accommodation), the union may have an affirmative obligation to advance a grievance whether or not there is a specific reference to the ADA in the contract or even a general nondiscrimination clause. From a contractual perspective the traditional savings and separability language included in most collective bargaining agreements would provide the predicate violation necessary to support the most technical contractual grievance requirement.

There are other technical conflicts between a union's NLRA obligations and ADA duties. For example, the ADA establishes stringent confidentiality requirements with regard to individualized medical information, and there is no exception for union representatives. The NLRA entitles collective bargaining representatives to request and review documentary information relevant to the duty to bargain and to administer collective bargaining agreements. An employer's willingness to accommodate a disabled employee may give the union a basis to pursue similar treatment for the nondisabled in the course of collective bargaining. Similarly, the apparent unequal treatment of two otherwise similarly situated individual employees may be explained by accommodation to an otherwise unknown disability, which the employee is statutorily entitled to keep confidential. As Dolan points out, the NLRB's former general counsel and the EEOC tried to work out a protocol for handling conflicting ADA/NLRA claims and obligations. Their early efforts were unsuccessful but eventually produced complementary regulations. Few decisions have been released to date under the new joint agency initiative.

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[47]42 U.S.C. §12112(a)(6).

Conclusion

The Americans with Disabilities Act has spawned an explosion of claims (more than 30,000 charges filed), which exceeded the EEOC's most liberal projections. At the same time, even though the EEOC was designated as the exclusive enforcement agency, Congress has not increased the commission's budget to reflect the added case load, and, predictably, a substantial backlog has resulted.

Many ADA charges reflect the sort of contractual grievances that have traditionally been submitted to labor arbitrators. The procedures of arbitration can be readily adapted for the handling of those complaints and arbitrators can competently and expeditiously resolve the issues presented. Both in the 1991 Civil Rights Act and in the ADA, Congress has expressly encouraged the resolution of employment discrimination complaints through a process of alternative dispute resolution. Employers, unions, and arbitrators should take heed and make a conscious effort to persuade employees to submit discrimination allegations to arbitration. It is to all parties' mutual advantage.