

CHAPTER 4

ARBITRATION OF HEALTH-RELATED ISSUES,  
WITH SPECIAL REFERENCE TO THE ADA

JOAN G. DOLAN\*

Health-related problems are a frequent theme in grievance arbitration. With the possible exception of discipline, fitness for duty, possible malingering, or even fraud, these cases are frequently uniquely uncomfortable for unions, employers, and arbitrators. Grievants are sympathetic, employers are supportive until they feel excessively burdened, and arbitrators may be called upon to reach personally discomfiting results.

By their very nature these cases commonly require critical information from members of other professions not steeped in the realities of labor relations and business necessities. In a work force sorely stressed by job insecurity and a sense of slippage, ever-increasing mental illness, alcoholism, violence, and drug-related problems end up in arbitration. More and more frequently health professionals are called upon to play a key role in arbitration proceedings impacting heavily on patient/client health and course of treatment. General and specialty physicians, psychologists, and social workers are not generally trained in, or particularly comfortable with, the legal process. Although we may know arbitration is not the same thing as going to court, they usually do not. In fact, these experts in their own fields often are understandably threatened by, if not hostile to, what we must accomplish in the arbitration forum and how we go about it.

For advocates and arbitrators, the challenges of trying and deciding these cases can be formidable. They often raise significant problems in terms of the types and sufficiency of evidence of medical facts. Choosing among conflicting medical opinions can be very difficult. Adequacy of representation questions are com-

---

\*Member, National Academy of Arbitrators, Brookline, Massachusetts.

mon. Perplexing difficulties can arise in what might very loosely be called the conflicts of laws area.

For those reasons these cases force us to confront traditional philosophical questions about the arbitrator's role. For example, what is the role of external law when the contract does not clearly define the arbitrator's jurisdiction? What part, if any, does clearly enunciated public policy play in the arbitration process where external law is a factor and judicial review may be invoked? What degree of passivity or activity does an arbitrator deem proper or find comfortable?

There are, of course, no definitive answers to these questions. The goal of this paper is to explore some of the issues raised in health-based cases. Particular emphasis will be placed on the Americans with Disabilities Act<sup>1</sup> (ADA or Act) for three reasons: (1) it is new legislation of concern to all; (2) it places the problems to be considered in sharp relief; and (3) at the potential judicial beginning and end of the arbitration process, ADA cases raise serious risks to established concepts of judicial restraint and arbitral finality that are critical to the continued viability of the institution of arbitration. Discussion will center on The Case of Mr. X.

### The Case of Mr. X

Mr. X is a 47-year-old man who had been employed as a custodian in the elementary wing of a K-12 private school for three years when he was discharged. Grounds stated were insubordination, refusal to follow orders, and use of improper and abusive language in front of co-workers, supervisors, children, and parents.

The union brought the case to arbitration. X hired a private attorney, who filed an ADA charge with the Equal Employment Opportunity Commission (EEOC) and asked the union to delay the arbitration so that she could go to court. The union refused.

Relevant contract language was a provision mandating job pick by seniority, a just cause clause, and a list of dischargeable offenses including the reasons for which X was fired. There was also language reading: "The School agrees not to discriminate against any member of the bargaining unit."

---

<sup>1</sup>42 U.S.C. §12101 *et seq.* Signed into law July 26, 1990, Title I employment provisions (42 U.S.C. §12111 *et seq.*) were effective July 26, 1992, for employers of 25 or more employees and on July 26, 1994, for employers of 15 or more workers.

Mr. X was an excellent employee in terms of his ability to do custodial tasks. During his first year, however, he had a verbal altercation with the assistant principal when she asked him to move some boxes. X swore and yelled that he could not do his job if people interfered with him. The assistant principal expressed her concern, said she would not tolerate that type of behavior, and did nothing further since X ultimately performed the requested task.

In X's second year, he was mopping the floor when a second-grade class tracked mud on it. In the presence of the children and their teacher, X launched into an obscene tirade. He was discharged the next day. When the union intervened, the discharge was converted to a five-day suspension.

Several months later, X's supervisor told him to clean classroom 106 instead of 107. Again, there was an obscene outburst, only this time X shouted that he would kill his supervisor. The school then exercised its contractual right to have X examined by a psychiatrist or psychologist.

Psychologist Dr. A saw X. He notified the school's director that X had an obsessive-compulsive borderline character disorder with paranoid tendencies, poor impulse control, depression, and a high anxiety level. Dr. A expressed his belief that X was "just talking" and posed no direct threat of harm to children. Dr. A also stated that X's condition was amenable to psychotherapy and drug treatment. An agreement was worked out with the union to place X on medical leave until Dr. A said that he was fit to return.

Four months later, Dr. A wrote to say that X had been in therapy and had been taking Xanax, a mild tranquilizer and anxiety reducer. Dr. A believed that X was better, more flexible, and ready to return to work. At a meeting with X and union officials, the director agreed that, based on Dr. A's letter, X could return to his job the following Monday.

When Monday came, X discovered that the supervisor had changed employees' routine while he was out. On Tuesday, X arrived in the director's office, demanded to see her, and began ranting that it was impossible for him to do his new job and that everyone was trying to get rid of him. The supervisor arrived on an unrelated matter. X saw the man and made a move toward him. The director could not calm him down, believed that X was about to strike the supervisor, and got between the two men. One of the secretaries called the police, who escorted X from the building. The next day he was discharged.

At the hearing the parties stipulated that the issue was whether X had been discharged for just cause. Management witnesses testified that they had not thought X would actually hurt anyone until the last incident. They also stated that they could no longer tolerate his threats and abuse. Those threats were, in management's view, psychologically dangerous for young children and staff to hear. It was also established that there was no vacant position in the system for X. Although management felt that X might do better in the high school for a variety of reasons, the incumbents of those jobs had seniority over X, did not want to leave, and had said they would grieve if they were reassigned. The union president said that he would have no choice but to file a grievance and a charge with the National Labor Relations Board (NLRB) if the school unilaterally switched custodian assignments in violation of the contract. The school decided not to. Management felt that it had done all it could for X and should not have to tolerate his behavior any longer.

The arbitration hearing was held eight months after X was fired. X did not testify or, in fact, speak at all for the entire day. At no point did counsel for the employer raise any objection to postdischarge evidence. Dr. A testified, as did Dr. B, a psychiatrist. Neither witness discussed X's psychological history prior to their experience with him, or the specifics of his treatment with them. Their testimony was limited to the following.

Both Dr. A and Dr. B affirmed Dr. A's diagnosis. They were adamant that X had a mental illness rather than a merely difficult personality. They stated that Dr. B had started X on Prozac immediately after he was fired, that X was doing better, and that no medical end point had been reached in his case. Both men firmly believed that X posed no threat of physical harm, and that keeping his job was very important for his mental health. When pressed, they said they could not guarantee that X's threats would not be translated into action. However, Dr. B said that this was "rare" for people with X's diagnosis. When questioned on X's prognosis, both said there was no clear answer to how much he could be expected to improve. He would always, they said, be an emotional person, although "probably less so" with the Prozac.

The union asked Dr. A what he thought would help X on the job. Dr. A said that the school should have an employee to whom X could go when he felt himself about "to blow up." That person could help X through the crisis and "bring him down." Alternatively, he said, the school should transfer X to a high school

custodian position where older students would be less concerned about his language. At minimum, he ought to have an unrestricted paid leave until he had reached a medical end point. It was established that there was no such leave provision in either the contract or the parties' past practices.

School counsel pressed Dr. A for an opinion on whether it would be harmful for children, parents, and staff to hear X's tirades and threats. Dr. A replied that he thought it would be reassuring for them to know that the school was sensitive to the needs of a sick employee. When Dr. B was asked whether he had considered the risk of harm X might pose to parents, students, and employees, he replied, "No. They're not my patients; X is."

The union attorney argued that the school had not fulfilled the progressive discipline mandate inherent in the just cause language. His sole comment on the ADA was: "The ADA says you can't fire people with disabilities." Counsel for the school argued that X did not have a disability but simply a difficult, angry personality and that traditional progressive discipline was not required in this case. As to the ADA, X was not protected because he posed a direct threat of harm to students and other employees. If the ADA did apply, the school had done all it could. The accommodations Dr. A had suggested were unreasonable because they posed undue financial hardship and/or exposed the school to risk of legal liability as a result of NLRB proceedings and/or arbitration on the union's potential other claims.

### **Jurisdiction, Election of Remedies, and Conflicts of Law**

We are all used to cases in which collective bargaining agreements contain language that explicitly or implicitly raises external law questions—for example, Social Security, public employee disability retirement, workers' compensation, police and firefighter heart and lung laws, as well as administrative proceedings that cannot be fully separated from the issues at arbitration. Many of these situations can be dealt with relatively comfortably where external law provisions are specifically incorporated into or implied in contract language. Alternatively, parties mindful of their need for finality and decreased expense may not object, and may even request, that an arbitrator resolve external law issues or take the lead where other forums are an option. We have also evolved standard rules for dealing with some of these matters—for example, a workers' compensation determination is not binding

on, or perhaps even relevant to, the determination of certain contract rights.

This is not by any means to gloss over the difficulty of some of these situations. They can indeed be challenging; the debate in judicial, advocate, and arbitrator circles over the role of external law is timeless and ongoing. But my experience is that truly knotty problems occur in a relatively small percentage of these traditional health-related cases. At this point in our experience with the ADA, however, these questions loom very large. Given the newness of the legislation, case law is scanty, but there are a number of recent developments. X's case raises them, and they will be discussed here.

### *Jurisdiction*

X's private attorney was very unhappy that the union refused to delay the arbitration case so that she could go to court instead. What would have happened if she had? The case would certainly have taken longer and been far more expensive, but the potential recovery might have been greater.<sup>2</sup> The question raises the issue of the intersection of statutory claims and arbitration as it is being played out in the *Alexander v. Gardner-Denver Co.*<sup>3</sup> and *Gilmer v. Interstate/Johnson Lane Corp.*<sup>4</sup> lines of cases.

Although the ADA as amended contains a provision endorsing the use of arbitration,<sup>5</sup> nothing suggests that Congress intended arbitration arising from collective bargaining agreements to preclude employees from using the courts to enforce their statutory rights. There is currently a case working its way through the federal courts that may provide the first example of appellate judicial thought in this area, although because of the facts the case does not raise all of the questions.

On January 14, 1994, the U.S. District Court for the Western District of Virginia decided *Austin v. Owens-Brockway Glass Container*.<sup>6</sup>

---

<sup>2</sup>In November 1991 Congress passed the Civil Rights Act of 1991. Among other things, the statute amended the ADA to make attorneys' fees, jury trials, expert witness fees, and compensatory and punitive damages available in certain ADA situations. Pub. L. No. 102-166, §§102, 113, 105 Stat. 1071, 42 U.S.C.A. §§12117(a), 1981a(c)(1).

<sup>3</sup>415 U.S. 36, 7 FEP Cases 81 (1974).

<sup>4</sup>500 U.S. 20, 55 FEP Cases 1116 (1991).

<sup>5</sup>Pub. L. No. 102-166, §118, 105 Stat 1071: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, medication, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title."

<sup>6</sup>844 F. Supp. 1103, 145 LRRM 2445, 2 AD Cases 1649 (W.D. Va. 1994).

The company's collective bargaining agreement with the Glass, Molders, Pottery, Plastic and Allied Workers International Union provided for binding arbitration and contained several model provisions relating to employees with physical handicaps.<sup>7</sup>

Plaintiff Linda Austin was working as a cleaner/oiler-greaser when she fell on a slippery factory floor. She went out on workers' compensation. Although exactly what happened next is unclear from the opinion, the bottom line is that Austin ended up without a job while the only other employee in her classification, a man, was reassigned to another position.

For reasons that are also unclear, Austin did not go through the grievance procedure but filed a suit raising ADA and Title VII claims. The court found that her complaint was subject to mandatory arbitration and applied *Gilmer* to grant summary judgment to the company. The opinion contains no mention of *Gardner-Denver* and no discussion of the ADA or the legal parameters of this difficult area. The case is on appeal to the Fourth Circuit.

In neither X's case nor *Austin* were judicial and arbitration proceedings in progress at the same time, although the possibility lurked in X's situation. Assuming that the arbitration option is still viable and that the courts want to conserve resources by having parties use arbitration where possible, it seems to me that an intermediate approach is possible. Many judges hold cases raising external law matters pending the outcome of an arbitration proceeding. This approach recognizes that the arbitration would be relatively quick, and no statutory or constitutional claim would be lost. Arbitral findings of fact and legal conclusions can be reviewed by the parties, who can then consider their options. Should litigation follow, arbitral findings of fact could be used, perhaps through stipulation or as a form of discovery, to shorten a trial. Although this informal deferral process will not eliminate all of these cases, it seems a sensible, resource-conserving, balancing approach that preserves people's statutory rights, encourages settlements, and diminishes the chances of incurring the tremendous delays, expense, and trauma of litigation.

#### *Election of Remedies*

There was no election of remedies provision in either X's case or *Austin*. It is a possibility that advocates discuss. Had there been

---

<sup>7</sup>Appreciation is expressed to Barbara Hudson, plaintiff's counsel, and Thomas Lucas, company counsel, for supplying copies of the contract language.

such language, how might it have fared? In light of *Gardner-Denver's* specific preservation of both contractual and statutory rights,<sup>8</sup> the probability of success seems remote. Just such a provision was at stake in *EEOC v. Board of Governors of State Colleges & Universities*,<sup>9</sup> an Age Discrimination in Employment Act (ADEA) case. The Seventh Circuit held that unions could not waive employees' ADEA or Title VII rights and struck the election of remedies provision as discriminatory on its face.

#### *ADA-NLRA Conflicts*

ADA requirements may raise section 8(a) (5), 8(b) (3), and 8(d) conflicts under the NLRA where an employer makes a unilateral change or where either party refuses to bargain over changes to an existing agreement. X's case adds to the mix the specter of EEOC proceedings. Both the NLRB and the EEOC have attempted to deal with some of these problems. On August 7, 1992, then-Board General Counsel Jerry Hunter issued a GC Memorandum on the subject of potential ADA-NLRA conflicts.<sup>10</sup> Extensive discussion of the document is outside the scope of this paper, but several points should be made.

One is the General Counsel's note that a unilateral reasonable accommodation would violate section 8(a) (5) only if it produced a material, substantial, or significant change in working conditions. That might occur here if another employee was involuntarily transferred despite seniority, or assigned to help "bring X down" as part of his job duties. Hunter also stated that the ADA would not privilege an employer to make unilateral changes unless they were mandated by law and the employer had no discretion. That is not the situation in X's case and seems an unlikely possibility in most ADA cases. It is more likely in these cases that some accommodation not in conflict with the contract can be found.

Although the memo leaves many issues to a case-by-case determination, it is clear that NLRB charges turning on the interpretation of a contract will be deferred to arbitration under *Collyer*.<sup>11</sup> Also, if all else fails, there may well be situations that give rise to charges at the Board. In light of the novel and complex issues in

<sup>8</sup>See 415 U.S. at 49.

<sup>9</sup>957 F.2d 424, 58 FEP Cases 292 (7th Cir. 1992).

<sup>10</sup>NLRB General Counsel's Memorandum to Field Personnel on Potential Conflicts Raised by Americans with Disabilities Act, Daily Lab. Rep. (BNA) No. 158, at E-1 (Aug. 14, 1992).

<sup>11</sup>*Id.* at E-2-3; *Collyer Insulated Wire*, 192 NLRB 837, 77 LRRM 1931 (1971).

ADA cases, the GC Memo states that the regions must refer any unfair labor practice raising ADA issues to the Division of Advice for review.<sup>12</sup> Although there is much discussion among arbitrators and advocates about the possibilities of NLRA conflicts, Board experience to date does not indicate a major problem. For example, as of April 1, 1994, no such unfair labor practices have been filed in NLRB Region I, an active area.<sup>13</sup> Only five such cases have been submitted to the NLRB's Division of Advice.<sup>14</sup>

When there are both NLRB and EEOC charges, the situation gets more complicated. A 1993 NLRB-EEOC Memo of Understanding<sup>15</sup> sets out a procedure essentially providing for deferral by one agency to the proceedings of the other depending on which law is the crux of the charge.

### Arbitral Approaches to ADA Cases

Reported arbitration cases mentioning the ADA are rare at this point. Two Academy members, Daniel Winograd and Richard Kanner, have issued decisions that are readily retrievable.

*Eastwood Printing*<sup>16</sup> is a just cause case where an employee was terminated a year after he injured his wrist on the job. Between the time of his injury and the discharge, the company gave the grievant the only work he could perform with one arm. The employee had undergone various treatments, but no medical end point had been reached. After a year, the employer decided not to continue the situation in light of the employee's uncertain prognosis and the burden his situation imposed on the company.

This case arose before, but was tried after, the effective date of the ADA. The union argued that the Act prohibited the termination. The company argued that it could no longer accommodate the grievant, but appears from the opinion not to have raised the ADA. Acknowledging new approaches to employees with disabilities without mentioning the ADA, the arbitrator used a traditional just cause analysis without getting into external law. He reversed the discharge on the grounds that the company had inadequately investigated the current medical situation, relying instead on obsolete information, and had terminated the grievant without

---

<sup>12</sup>*Supra* note 10, at E-1.

<sup>13</sup>Personal communication, Rosemary Pye, Regional Director.

<sup>14</sup>Personal communication, Jane Clark, Advice Branch Chief.

<sup>15</sup>Daily Lab. Rep. (BNA) No. 220, at F-1 (Nov. 17, 1993).

<sup>16</sup>99 LA 957 (Winograd 1992).

prior notice, thus denying him the opportunity to present medical evidence offsetting that of the company. As to any required accommodation, the arbitrator noted, again without mentioning the ADA, that the nature and duration of accommodation required need not be determined until the nature and extent of permanent disability was accurately known.

*City of Dearborn Heights*<sup>17</sup> was a very different case. It arose when a physician recommended his patient's transfer from the night shift to the day shift. The employee was a police officer with brittle diabetes, a life-threatening disease. His condition was deteriorating, a reality his doctor believed was caused by his night work. Shift assignment by seniority was the practice. When the employer granted the shift change, two more senior employees were transferred to shifts they did not want. The union brought the case on their behalf.

There were two issues. The first was substantive arbitrability, which was phrased as whether the question of the predominance of the ADA over the past practice was arbitrable. The second asked whether, relative to the accommodation of a disabled employee, the ADA predominated over the shift preference by seniority practice.

Arbitrator Kanner held the dispute substantively arbitrable. His reasoning arose from the presumption of arbitrability, lack of exclusionary language in the grievance procedure, and the "invalidity by operation of law" portion of the severability clause. He went on to discuss the ADA extensively, concluding that the contractual shift preference by seniority right was one, but not the determining, factor in an ADA analysis. When that factor was weighed against the ill employee's serious health problem, the latter predominated, since no other reasonable accommodation was available. The grievance was denied.

Given the pre-ADA facts and the stipulated just cause issue, *Eastwood Printing* strikes me as a skillful approach to the problem. In a case permeated by, but not tried under, the ADA, the decision resolves the matter in accordance with sound traditional principles while meeting ADA standards. Most striking is its solid reliance in a just cause context on the objective medical evidence which, as will be discussed below, the ADA requires. *Dearborn Heights* is the hypothetical we all discuss and X's case raises. It is also a decision in complete accord with the ADA, and one that would probably fare well on review by an agency or court.

---

<sup>17</sup>101 LA 809 (Kanner 1993).

### **X's Case Under Traditional and ADA Standards**

#### *The Problems*

X's case does not raise a very typical problem. It involves the so-called "dueling experts" situation with competing medical opinions. Although these conflicts can be very difficult, judges and even lay juries cope with the problem routinely, if not easily. So do arbitrators. There are other problems, however.

Most frustrating in health-based cases is the ubiquitous proof problem. Because of physician availability concerns and the need to minimize expenses, medical evidence is often presented secondhand through written reports or letters. In addition to being illegible, these documents are often out-of-date, superficially prepared at the last minute in contemplation of litigation, and raise more questions than they answer. Since their writers are not present to be examined, it is impossible to ascertain the circumstances and knowledge base from which they were written.

When expert testimony is available, it is partisan. We have no body of impartial experts who present a truly objective, rounded view of the medical situation. Although the Independent Medical Examiner (IME) practices that have sprung up in recent years hold out the promise of objectivity in their title, the IME seems more myth than reality. As any member of the workers' compensation or labor bars will quickly and wryly state, there are plaintiff-worker IMEs and defendant-employer IMEs.

Perhaps an even more fundamental point is the one illustrated by Dr. B's remark that he was not concerned with the effects of X's tirades and threats on others because they were not his patients; X was. I know of no health professionals who do not profess the primary ethical precept that their first duty is to support and advocate for their patients/clients.

Other factors add to ethical concerns inhibiting objectivity. Given the variability of human bodies and minds, medicine is not, and cannot be, an exact science. The softest science of all may be the prediction of human behavior. Additionally, health professionals freely discuss their concerns about lawsuits, which they view as a clear and imminent danger attending virtually every exercise of their professional duties, including testifying. Like everyone else, they suffer from the weaknesses of inadequately examined jargon and assumptions, oversights caused by overwork, and occasional failures to think hard about the matters at hand. All of this

is, of course, accentuated by the polarization inherent in the adversarial process.

### *Standards*

The medical testimony in X's case is typical. Often uncomfortably, we live with its ilk all the time in the ordinary health-related case lacking any operative contractual or external law standard. X's case, however, involves contract language obligating the school not to discriminate against members of the bargaining unit. It is assumed for purposes of this discussion that actions violating the ADA cannot be just cause for X's discharge. Thus, the ADA comes into play. ADA standards reflect both a recognition of the problems and an attempt to solve some of them by particularizing factors operative in all health-based cases. Non-ADA case standards will be suggested, and the testimony of Dr. A and Dr. B will be examined in light of what the ADA would require in X's case.

In an ideal world, there are many things we would look for in a case lacking a defined standard. A list of the principal ones might read:

1. An expert's qualifications, with particular exploration of knowledge of, and experience dealing with, the question at issue.
2. An exploration of factors indicating bias based on personal attachments, money, business relationships, personal beliefs, or intellectual espousal of one among competing points of view on a given medical question.
3. Specific knowledge of a grievant's work situation based on a job analysis, or at least a current, detailed job description.
4. A full picture of the expert's examination of the grievant and the specifics of the medical problem in order to assess the completeness and timeliness of the data used, as well as the depth of the analytical process applied to the situation.
5. A detailed explication of the rationale behind the chosen treatment plan and its relationship to the job situation, the grievant's compliance with the plan, and progress and prognosis in both general and job-specific terms.
6. The limits of the expert and general current medical knowledge.

How does the testimony of Dr. A and Dr. B fare when examined under these standards? As is often the case in these matters, not

very well. It may be helpful to walk through the ADA standards and examine the testimony in that light.

The ADA definition of "disability" applies to both physical and mental impairments.<sup>18</sup> The EEOC and the Department of Justice have jointly issued a handbook containing EEOC regulations and interpretive guidance applicable to these regulations<sup>19</sup> (hereafter the EEOC Handbook). In this document the EEOC has stated that the mental impairment definition "does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder."<sup>20</sup> In X's case the testimony of Dr. A and Dr. B seems clearly sufficient to bring the employee within the ambit of ADA coverage and overcome the school's argument that X is nothing more than a difficult person.

After that point things become more problematic. Individuals with a disability must be qualified to perform the essential functions of a position. It is debatable that an employee who cannot follow orders without going into a tirade is qualified. Also, an employer may have a qualification that "an individual shall not pose a direct threat to the health or safety of other individuals in the workplace."<sup>21</sup> Section 1630.2(r) of EEOC regulations<sup>22</sup> covers direct threats that may be raised by physical or mental impairment. The regulation states that direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination must be based on an individualized assessment of the person's present ability to safely perform the essential functions of the job. That assessment must rely on a reasonable medical judgment based on the most current medical knowledge and/or the best available objective evidence. Four risk factors must be considered: (1) duration of the risk, (2) nature and severity of potential harm, (3) likelihood that the potential harm will occur, and (4) imminence of the potential harm.

The difficulty comes in defining and proving the degree of risk, a burden that clearly belongs to employers. As the regulation says, the risk must be "significant." The EEOC Handbook states that

---

<sup>18</sup>42 U.S.C. §12102(2).

<sup>19</sup>EEOC and Department of Justice, *Americans with Disabilities Act Handbook* (U.S. Gov't Printing Office, Oct. 1992).

<sup>20</sup>*Id.* at 1-26.

<sup>21</sup>42 U.S.C. §12113(b).

<sup>22</sup>29 C.F.R. 1630.2(r).

there must be a high probability of substantial harm. A speculative or remote risk is insufficient. Employers must identify specific behaviors or physical aspects that pose the direct threat and must do so in light of the four risk factors. In keeping with the purposes of the ADA, these considerations must be based, as the EEOC puts it, "on objective, factual evidence, and not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of a particular disability, or of disability generally."<sup>23</sup>

What is the problem with the medical testimony in X's case? It is clear from the ADA and the EEOC regulations that evaluations must be based on individualized assessments rather than broad assumptions or perceived generalized truisms about the disability in question. Also apparent is the vigorous attempt to make ADA medical determinations based on fact rather than perception. Medical opinion cannot be arbitrary or undocumented. Finally, there must be a far more rigorous risk-assessment process than previously.

Management presented no expert testimony in X's case, but tried to meet the burden of establishing direct threat through cross-examination of the union's witnesses. This, too, is typical. However, nowhere in the record are there facts, or even questions, relating to key types of information. For example, although there is no definitive medical risk-assessment model, what are the base rates for recurrence of this type of problem? How might they be affected by individual and job-specific factors? Immediately suggesting themselves are such factors as employee responses to standard psychological tests, length of time between outbursts, increased or decreased physical nature of episodes. Also, it is common in these cases to say that an employee has cooperated in treatment. As in X's case, it is rare for a mental health professional to go beyond this statement, which may mean nothing more than that the employee has kept appointments. The ADA seems to require far more fact-based information—for example, whether the employee has gained any insight into the problems, discussed difficulties at work, or begun to formulate a plan for alleviating whatever manifestations of impairment were apparent on the job.

Then there is the question of the limits of medical testimony and knowledge, something that is hardly ever explored in health-

---

<sup>23</sup>*Supra* note 19, at I-47.

related cases. In X's situation what is the objective basis for Dr. B's statement that actual physical violence by people with X's diagnosis was "rare"? Is that a perception from Dr. B's own practice? Valid studies in peer-reviewed major journals? War stories of other psychiatrists? The record provides no clue. X's case also illustrates the problem of how much medical professionals know about the specifics of a patient's job situation and whether they have gone through an analytical process tying the diagnosis, disability, and treatment to a job analysis.

The same type of fact-based process must be applied to all ADA requirements. X's situation is somewhat gray. Does he pose a high probability of substantial harm, or is the risk speculative or remote? Do the medical witnesses' suggested accommodations pose an undue hardship to the school? Arbitrators might not be unanimous in their answers to these questions, but the ADA requires that the answer arise from a rigorous analysis based on record evidence.

### **Implications of X's Case**

As we all know, the institution of American labor arbitration is experiencing stresses unparalleled in its history. It was an independent, extrajudicial, private procedure. It was devised to solve largely local, internal problems. Contractual standards were agreed to entirely by those affected, who owned and controlled the process. It was fast, inexpensive, final, and fully accessible to nonlawyers.

As X's case illustrates, however, the model cannot fit many cases we see in the 1990s. Now there are often agency and judicial proceedings that impact on arbitration. External laws, such as the ADA, may provide statutory rather than contractual case-trying and decision-making standards. Public policy concerns, such as those codified in the ADA, may direct parties and arbitrators to go outside the collective bargaining agreement, or at least change the private tone of the proceedings. Concerns about fair representation suits, extracontractual union and management liabilities, and judicial intervention abound. In this climate it is no wonder that arbitration is becoming less fast, more expensive, and increasingly akin to litigation in the courts.

Finally, there is the role of advocates, judges, and arbitrators. It seems unlikely that the principles of judicial noninvolvement set

out in the *Steelworkers Trilogy*<sup>24</sup> will, when tested, survive untouched in variants of X's case. However, the resource-allocation problems plaguing the courts have, if anything, increased rather than diminished. Perhaps some kind of limited deferral, circumscribed deference, or different review process will be applied to arbitrations involving statutory versus completely private issues. Only time will tell. Lacking clear guidance on the legislative and judicial fronts, advocates and arbitrators must consider whether stricter, more comprehensive standards of advocacy and decision making must apply in these ADA cases. Arbitrators must ponder whether we ought to play a more active role in ensuring that, after hearing X's case and those like it, we have the information we need to decide issues raised by external laws such as the ADA.

#### LABOR PERSPECTIVE

GAIL LOPEZ-HENRIQUEZ\*

As a labor advocate, I have become very concerned about the consequences, for both unions and for individual workers, of some of the views that have been advocated concerning arbitration of disability discrimination issues. There are six major issues that raise the thorniest problems in this area. These are: (1) group rights versus individual rights; (2) deferral to arbitration; (3) election of remedies; (4) the arbitrator's authority to interpret or enforce statutory law; (5) conflicts between contract language or accepted past practices and the Americans with Disabilities Act (ADA); and (6) the ramifications of the *Goodman v. Lukens Steel*<sup>1</sup> decision of the Supreme Court holding that a union could not refuse to grieve and arbitrate issues of racial discrimination.

The issue of group rights versus individual rights is the first mentioned because, for me as a union advocate, it is a very central concern and my position on many of the other issues derives from it. It is necessary for me to point out, however, that I have represented and continue to represent individual employees in disability discrimination cases as well as other types of employment

---

<sup>24</sup>*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

\*Freedman and Lorry, P.C., Philadelphia, Pennsylvania.

<sup>1</sup>482 U.S. 656, 44 FEP Cases 1 (1987).