

1-1-1994

The Americans with Disabilities Act in the Unionized Workplace

Ann C. Hodges

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Disability Law Commons](#)

Recommended Citation

Ann C. Hodges, *The Americans with Disabilities Act in the Unionized Workplace*, 48 U. Miami L. Rev. 567 (1994)

Available at: <https://repository.law.miami.edu/umlr/vol48/iss3/3>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

The Americans with Disabilities Act in the Unionized Workplace

ANN C. HODGES*

I. INTRODUCTION	567
II. OVERVIEW OF THE ADA	569
III. THE ADA AND UNIONS	572
A. <i>The Union as a Covered Entity</i>	573
B. <i>The Collective Bargaining Process</i>	575
C. <i>The Union as a Discriminatory Actor</i>	577
D. <i>The Union as a Party to a Discriminatory Contract</i>	579
E. <i>The Union as a Grievance Representative</i>	587
F. <i>The Union and the Duty of Reasonable Accommodation</i>	589
1. THE REHABILITATION ACT CASES	590
2. TITLE VII AND ACCOMMODATION	594
3. ACCOMMODATION UNDER THE ADA	596
4. PROBLEMS CREATED BY THE UNCERTAIN STATUS OF THE ADA ACCOMMODATION OBLIGATION	603
5. RESOLUTION OF THE ACCOMMODATION DILEMMA	608
a. The Exculpatory Clause	609
b. The Confidentiality Issue	610
c. Conflicts Between Accommodations and the Collective Bargaining Agreement	614
G. <i>The ADA and Grievance Arbitration</i>	621
IV. CONCLUSION	625

I. INTRODUCTION

The employment provisions of the Americans With Disabilities Act ("ADA"), which prohibit discrimination against disabled employees and applicants, became effective on July 26, 1992.¹ As is the case with most employee protective legislation, unions were among the supporters of

* Associate Professor of Law, University of Richmond; B.A. 1973, University of North Carolina at Chapel Hill; M.A. 1974, University of Illinois at Urbana-Champaign; J.D. 1981, Northwestern University. This Article benefited from comments on earlier drafts and discussions of the issues with Michael B. Erp and Martha A. Garcia of Katz, Friedman, Schur & Eagle, Connye Y. Harper, Associate General Counsel, UAW, Sandra Scott Ziegler, Senior Attorney Adviser, Office of Legal Counsel, Equal Employment Opportunity Commission, and the participants of the University of Richmond Law Faculty Colloquium. The conclusions and any errors herein are solely those of the author. I also acknowledge the valuable research assistance of Nicole R. Beyer, Class of 1994, Bich Quyen Nguyen, J.D. 1993, and Penny Elaine Nimmo, Class of 1994, University of Richmond School of Law. Grants from the Hunton & Williams Summer Research Fund provided financial support.

1. President Bush signed the ADA (Pub. L. 101-336, July 26, 1990, 104 Stat. 327-378) on July 26, 1990. The employment provisions covering employers with twenty-five or more employees took effect on July 26, 1992. Effective July 26, 1994, the Act will cover employers with fifteen or more employees.

the ADA, but Congress appears to have given little thought to the implications of the ADA for the unionized workplace.² Unlike the Rehabilitation Act of 1973 ("Rehabilitation Act"),³ after which it was patterned, the ADA covers labor organizations. But in contrast to Title VII of the Civil Rights Act,⁴ which also covers labor organizations, the ADA does not contain language expressly defining the nondiscrimination obligations of unions.⁵ Thus, there is no statutory blueprint for applying the ADA in the unionized workplace.

This Article explores the issues raised by application of the ADA in the organized⁶ employment setting. The Article begins with an overview of the statute and then analyzes its applicability in the unionized workplace. In addition to recommending changes in the statute and regulations to clarify the obligations of employers and unions under the ADA, the Article makes recommendations with respect to judicial interpretation of the statute in three major areas. In Sections III C through E, the Article analyzes the circumstances under which the union should be held liable for discrimination, recommending that courts assess liability based on the union's actions with respect to disability discrimination and not solely on the basis of status as a party to the collective bargaining agreement.

Section III F analyzes the statutory accommodation obligation and points out several potential conflicts between statutory obligations imposed by the ADA and those imposed by the National Labor Relations Act ("NLRA"), which governs union-management relations.⁷

2. See S. REP. NO. 116, 101st Cong., 1st Sess. 4 (1989). As one commentator noted, the issues created by application of the ADA in the unionized workplace result from the intersection of the individual rights model of workplace regulation and the "industrial pluralist model of collective bargaining". See Richard A. Bales, *Title I of the Americans With Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J.L. & PUB. POL'Y 161, 164 (1992). Another commentator describes the problem as one created by the dichotomy between public and private rights and proposes modifications of the arbitration system to allow employees to vindicate public rights effectively in the arbitral forum. See Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169, 242-63 (1991). While Rabin does not focus specifically on the ADA, he does analyze the problems created when a disabled worker's statutory rights conflict with the rights of other workers under the collective bargaining agreement. *Id.* at 244-49.

3. The Rehabilitation Act of 1973 prohibits discrimination against individuals with disabilities by federal agencies, federal contractors and federal fund recipients. See 29 U.S.C. §§ 791, 793-795 (1988).

4. 42 U.S.C. § 2000e (1988).

5. Title VII contains express provisions defining unlawful discrimination by unions. See 42 U.S.C. § 2000e-2(c) (1988). The ADA defines "covered entity" to include labor organizations and prohibits discrimination by covered entities. ADA §§ 101(2), 102, 42 U.S.C. §§ 12111(2), 12112 (Supp. II 1990).

6. The Article uses the terms "unionized" and "organized" interchangeably.

7. 29 U.S.C. §§ 151-303 (1988). The NLRA covers private employers in interstate commerce. See 29 U.S.C. § 152(2) (1988).

These potential conflicts include conflicts between the ADA's requirements and collective bargaining agreements negotiated pursuant to the NLRA.⁸ The Article makes several recommendations to resolve the conflicts and effectuate accommodation of employees with disabilities.

First, the confidentiality requirements of the statute should be interpreted to allow disclosure to the union and affected employees of information about the employee's disability that is necessary to accomplish an effective accommodation. Second, the employer should be required to discuss with the union any accommodations that affect terms and conditions of employment. In addition, where an accommodation would adversely affect the collectively bargained rights of other employees, the courts should find that undue hardship relieves the union and the employer of the duty to accommodate. Nevertheless, the ADA permits agreements to accommodate in violation of the collective bargaining agreement, and the Article recommends that challenges to such agreements by other employees be rejected in the absence of evidence of discriminatory motive.

Finally, Section III G reviews the impact of grievance arbitration under the collective bargaining agreement on claims under the ADA. While commending grievance arbitration as an effective method for resolving disability discrimination issues in many cases, the Article recommends that judicial action under the ADA remain available to the employee regardless of the outcome of any grievance arbitration.

These recommendations will best accommodate the purposes of both the NLRA and the ADA by minimizing litigation where possible, while protecting the rights of all employees.

II. OVERVIEW OF THE ADA

Congress passed the Americans With Disabilities Act in 1990 to address the problem of discrimination against the estimated 43 million Americans with disabilities, which Congress concluded costs billions of dollars because of unnecessary dependency and nonproductivity.⁹ The statute contains provisions directed at employment, transportation, public accommodation, and telecommunications.¹⁰ The employment provisions, contained in Title I, prohibit discrimination against "a qualified

8. When a labor organization has been chosen by a majority to represent the employees of a particular employer, the employer and the union are obliged to negotiate with one another in good faith. Any agreement reached is reflected in a collective bargaining agreement which is binding on both parties. See ARCHIBALD COX ET AL., *LABOR LAW* 386-87 (11th ed. 1991).

9. See ADA § 2, 42 U.S.C. § 12101 (Supp. II 1990).

10. See ADA §§ 101-107; §§ 221-230, 241-245; §§ 301-309; §§ 401-02, 42 U.S.C. §§ 12111-12117; §§ 12141-12150, §§ 12161-12165; §§ 12181-12189; 47 U.S.C. §§ 225, 152(b), 221, 611 (Supp. II 1990).

individual with a disability because of the disability . . . in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."¹¹ The three key concepts in the employment provisions are what constitutes a disability, who is a qualified individual with a disability, and what is discrimination.

Disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."¹² This definition is based on Section 504 of the Rehabilitation Act and has been significantly litigated under that statute.¹³ Major life activities are those activities that the average person can perform with little or no difficulty, including walking, seeing, hearing, breathing, learning, working, caring for oneself, and participating in community activities.¹⁴

A qualified individual with a disability is one who, "with or without reasonable accommodation, can perform the essential functions" of the job.¹⁵ The essential functions of the job are determined by the employer. Written job descriptions will be considered as evidence of the essential functions.¹⁶

The ADA details a number of actions constituting discrimination,

11. ADA § 102(a), 42 U.S.C. § 12112(a) (Supp. II 1990).

12. ADA § 3(2)(A), 42 U.S.C. § 12102(2)(a) (Supp. II 1990). The definition of disability also includes "a record of such impairment", ADA § 3(2)(B), 42 U.S.C. § 12102(2)(B) (Supp. II 1990), and "being regarded as having such an impairment". ADA § 3(2)(C), 42 U.S.C. § 12102(2)(C) (Supp. II 1990). Thus, if a person has a history of disability but no longer is disabled, he or she is protected from discrimination on the basis of that record. For example, an employer cannot refuse to hire a cancer survivor whose cancer has been successfully treated. Similarly, if an employer discriminates against an individual based on the belief that the individual is disabled, the individual is protected even though not disabled. For example, an employer cannot refuse to hire an individual whose back x-rays show arthritis, but who has no symptoms or limitations as a result of the arthritis and therefore does not meet the statutory definition of disability.

The statute expressly eliminates certain conditions from the definition of disability, including homosexuality, bisexuality, compulsive gambling, kleptomania, pyromania, current illegal drug use, "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders." ADA § 511, 42 U.S.C. § 12211 (Supp. II 1990).

13. See S. REP. NO. 116, *supra* note 2, at 21.

14. See 29 C.F.R. § 1630.2(i) (1992). Inability to perform a particular job or a small number of jobs is not sufficient to constitute a substantial limit on the major life activity of working.

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

16. See *id.* Of course, if the employer's determination of essential functions is challenged in a discrimination action, the court may decide that the designated functions are not essential. Other evidence to be considered in determining essential functions includes the amount of time spent performing the function, the work experience of incumbents in the job with respect to the function, the terms of the collective bargaining agreement, and the consequences of not requiring the incumbents to perform the functions. See 29 C.F.R. § 1630.2(n) (1992).

which include intentional discrimination;¹⁷ use of standards, criteria, methods of administration, tests or selection criteria that have the effect of discrimination;¹⁸ and failure to reasonably accommodate a qualified individual with a disability.¹⁹ The statute also prohibits participation in a contractual arrangement or relationship that has the effect of subjecting a qualified disabled employee or applicant to discrimination.²⁰ Retaliation against an individual for opposing unlawful actions or for participating in any proceeding under the ADA is expressly banned.²¹

The three primary defenses to a claim of discrimination are business necessity, direct threat, and undue hardship. An employer²² may justify the use of discriminatory job qualifications, selection criteria, or tests by establishing that they are job related and consistent with business necessity.²³ The statute also permits an employer to use a qualification standard requiring that an individual not pose a direct threat to the health or safety of others in the workplace.²⁴ Finally, an employer may refuse to reasonably accommodate a disabled individual if the accommodation would impose undue hardship on the employer's business.²⁵ Additionally, of course, an employer could defend a claim under the ADA by proving that an individual was not disabled or not qualified for the position, or that the individual was not discriminated against because of the disability.

In addition to other prohibitions on discrimination, the ADA directly limits the use of medical examinations. A medical examination may be required of an applicant only after an offer of employment is made.²⁶ The offer may be conditioned on the results of the examination only if all new employees are subjected to the examination, the medical information is kept confidential, and any disqualification resulting from

17. See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2 at 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 310.

18. See ADA § 102(b)(3)(A), 42 U.S.C. § 12112(b)(3)(A) (Supp. II 1990); ADA § 102(b)(6), 42 U.S.C. § 12112(b)(6) (Supp. II 1990). These sections of the ADA codify the disparate impact theory of discrimination.

19. ADA § 102(b)(5), 42 U.S.C. § 12112(b)(5) (Supp. II 1990).

20. See ADA § 102(b)(2), 42 U.S.C. § 12112(b)(2) (Supp. II 1990). This provision expressly incorporates a contract with a labor organization as one that cannot subject an individual to discrimination.

21. See ADA § 503(a), 42 U.S.C. § 12203(a) (Supp. II 1990). The statute further bars coercion, intimidation, threats or interference with individuals exercising rights under the Act or encouraging others to do so. ADA § 503(b), 42 U.S.C. § 12203(b) (Supp. II 1990).

22. The term employer is used in this discussion for simplicity, but the provisions apply to covered entities which include, *inter alia*, labor organizations.

23. See ADA § 103(a), 42 U.S.C. § 12113(a) (Supp. II 1990). This defense is applicable to disparate impact cases.

24. See ADA § 103(b), 42 U.S.C. § 12113(b) (Supp. II 1990).

25. See ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990).

26. See ADA § 102(c), 42 U.S.C. § 12112(c) (Supp. II 1990).

the examination is based on criteria that are job-related and consistent with business necessity.²⁷ An employer may inquire about an applicant's ability to perform the job, but not about the applicant's disability.²⁸ Required medical examinations for employees also must be job-related and consistent with business necessity.²⁹

The ADA's substantive provisions are patterned after the Rehabilitation Act and the regulations issued pursuant thereto. The legislative history directs courts and covered entities to the Rehabilitation Act for guidance in interpreting the ADA.³⁰ The enforcement and remedial provisions of the ADA track those of Title VII of the Civil Rights Act.³¹

III. THE ADA AND UNIONS

As noted previously, labor organizations are covered entities under the ADA.³² Yet unlike Title VII of the Civil Rights Act, there are no provisions in the ADA specifically proscribing or defining discrimination by labor unions.³³ Thus, the same nondiscrimination provisions apply to the employer and the union. There are several specific references to unions and collective bargaining agreements in the statute and the regulations. Section 102(b)(2) of the statute bars covered entities from participating in a contractual arrangement or relationship with a labor union that has the effect of subjecting an individual to discrimination.³⁴

The regulations and interpretive guidance issued by the Equal Employment Opportunity Commission ("EEOC") address collective bargaining agreements in two respects. First, the terms of a collective bargaining agreement are one factor in the determination of whether a particular function is an essential function of the job that a person with a disability holds or desires.³⁵ Second, the terms of a collective bargain-

27. See ADA § 102(c)(3), 42 U.S.C. § 12112(c)(3) (Supp. II 1990); 29 C.F.R. § 1630.14(b) (1992).

28. See ADA § 102(c)(2), 42 U.S.C. § 12112(c)(2) (Supp. II 1990).

29. See ADA § 102(c)(4), 42 U.S.C. § 12112(c)(4) (Supp. II 1990).

30. See, e.g., S. REP. No. 116, *supra* note 2, at 25-27, 30, 31, 34; H.R. REP. No. 485 (II), *supra* note 17, at 23, 50, 52, 54-55, 61-62, *reprinted in* 1990 U.S.C.C.A.N. 304, 332, 334, 336-37, 343-44.

31. See ADA § 107(a), 42 U.S.C. § 12117(a) (Supp. II 1990); H.R. REP. No. 485(II), *supra* note 17, at 23, *reprinted in* 1990 U.S.C.C.A.N. 303, 304.

32. See ADA § 101(2), 42 U.S.C. § 12111(2) (Supp. II 1990). The term labor organization has the same definition under the ADA as under Title VII. See ADA § 101(7), 42 U.S.C. § 12111(7) (Supp. II 1990). Under Title VII, the term is defined broadly enough to cover virtually all labor organizations. See 42 U.S.C. § 2000e(e) (1988).

33. Cf. 42 U.S.C. § 2000e-1(c) (1988).

34. See ADA § 102(b)(2), 42 U.S.C. § 12112(b)(2) (Supp. II 1990).

35. See 29 C.F.R. § 1630.2(n)(3)(v) (1992). The EEOC's Technical Assistance Manual notes, however, that mere listing in a collective bargaining agreement does not mean that a

ing agreement "may be relevant" to a determination of whether an accommodation would be unduly disruptive to the employees or the functioning of the business.³⁶

Also relevant to determining the applicability of the ADA in the unionized workplace is Congress's suggestion, repeated in the EEOC's *Technical Assistance Manual*, that employers and unions can avoid conflicts between the ADA's requirements and the collective bargaining agreement by negotiating a contract provision permitting the employer to take all actions necessary to comply with the ADA.³⁷

These references from the statute, legislative history and regulations offer limited guidance regarding the applicability of the ADA in the unionized workplace. Not only are there questions about the obligations of unions under the ADA, but there are also issues about compliance with potentially conflicting obligations under the ADA and the NLRA. The following sections will analyze the application of the ADA in the organized setting, utilizing not only the language and legislative history of the statute, but also the regulations and the case law under the Rehabilitation Act and Title VII of the Civil Rights Act.

A. *The Union as a Covered Entity*

The inclusion of labor organizations in the definition of "covered entities" under the statute suggests that unions are subject to the same prohibitions on discrimination as employers.³⁸ Unquestionably, when the union acts as an employer *vis a vis* its own employees, it will be treated like any other employer under the statute.³⁹ When the union acts

function is essential. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Technical Assistance Manual on Title I of ADA* § 7.11(a), 8 Lab. Rel. Rep. (BNA) 405:6981, 7050 (1992).

36. See 29 C.F.R. § 1630.15(d), app. (1992). The EEOC's *Technical Assistance Manual* notes that where a collective bargaining agreement reserves particular jobs for individuals with a certain amount of seniority, that "may be" a factor in determining whether it would be an undue hardship to assign a disabled individual without such seniority to the job. See *Technical Assistance Manual*, *supra* note 35, at § 7.11(a), 8 Lab. Rel. Rep. (BNA) 405:7050. The regulations conform to suggestions in the legislative history. See S. REP. NO. 116, *supra* note 2, at 32; H.R. REP. NO. 485(II), *supra* note 17, at 63.

37. See S. REP. NO. 116, *supra* note 2, at 32; H.R. REP. NO. 485 (II), *supra* note 17, at 63, reprinted in 1990 U.S.C.C.A.N. 303, 346; *Technical Assistance Manual*, *supra* note 35, §§ 3.9, 7.11(a), 8 Lab. Rel. Rep. (BNA) 405:7007, 405:7050.

38. See Joanne Jocha Ervin, *Reasonable Accommodation and the Collective Bargaining Agreement Under the Americans with Disabilities Act of 1990*, 3 DET. C.L. REV. 925, 960 (1991).

39. See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 618 (2d ed. 1983) ("A union acts in the role of an employer with respect to persons it itself employs, and, like any other employer is subject to liability under the employment discrimination laws for discrimination against its employees or applicants for employment."). When a union is sued as an employer, the union must meet the definition of employer under the statute, however. See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 270 (2d ed. Five Year Cum. Supp. 1989).

as a union, however, its obligations are less clear. The only mention of unions in the section defining discrimination is the prohibition on participation in a contract with a union that subjects an employee or applicant to discrimination.⁴⁰ Since a union does not contract with itself, the language suggests that only employers are covered by the prohibition. Even if that provision applies only to employers, however, one could argue that all other prohibitions on discrimination apply to employers and unions alike.

Since the Rehabilitation Act does not cover unions, it provides little direction for interpreting the ADA in this regard. Title VII provides more assistance, but unlike the ADA contains prohibitions tailored to the union's role in the workplace.⁴¹ By way of contrast, the ADA prohibits discrimination in regard to application procedures, hiring, promotion, discharge, compensation, training, and "other terms, conditions and privileges of employment."⁴² These functions are generally performed by the employer rather than the union, although the employer's actions may be circumscribed by the collective bargaining agreement.⁴³ This language in the ADA provides further support for limiting many of the discrimination provisions to employers. The EEOC, however, has taken the position that the ADA imposes the same obligations on unions that it imposes on employers.⁴⁴

In light of the clear definition of covered entity, and the express application of the discrimination prohibitions to covered entities, the

40. See ADA § 102(b)(2), 42 U.S.C. § 12112(b)(2) (Supp. II 1990).

41. Title VII provides:

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or to classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

42 U.S.C. § 2000e-2(c) (1988).

42. ADA § 102(a), 42 U.S.C. § 12112(a) (Supp. II 1990).

43. The Supreme Court described the role of management in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). "Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function . . ." *Id.* at 583. See also David Offen Simon, Note, *Union Liability Under Title VII for Employer Discrimination*, 68 Geo. L.J. 959, 961 (1980).

44. In its Technical Assistance Manual, the EEOC states that labor unions are covered by the ADA and have the same obligations as employers to comply with its requirements. Technical Assistance Manual, *supra* note 35, §§ 3.9, 7.11(a), 8 Lab. Rel. Rep. (BNA) 405:7007, 405:7050.

more persuasive argument is that the ADA's discrimination prohibitions apply equally to unions. This interpretation is consistent with the ADA's goal of eliminating discrimination against the disabled. This conclusion does not answer the question of what role the union must play in the discrimination in order to be held liable. Does the existence of a contract provision that results in discrimination impose liability on the union? Or must the union take an active role in the conduct alleged to be discriminatory? Furthermore, does the discrimination ban apply to the union in its contract administration role? And finally, does the union have an affirmative duty to contest discrimination by the employer?

B. *The Collective Bargaining Process*

In order to analyze these questions, it is necessary to have an understanding of the collective bargaining process. Once employees have chosen a union to represent them, the NLRA imposes upon their employer a duty to bargain in good faith with the union.⁴⁵ This duty requires the parties to meet and negotiate wages, hours, and terms and conditions of employment, but does not require the parties to reach agreement.⁴⁶ Each party has available certain economic weapons to attempt to convince the other party to accept the contract provisions that it desires.⁴⁷ The primary union weapon is the strike.⁴⁸ The employer, however, may lock out the employees,⁴⁹ permanently replace the employees if they strike,⁵⁰ and implement the terms and conditions of employment that it desires if the parties reach an impasse in negotiations.⁵¹ The agreement reached, if any, is generally a function of the relative economic power of the parties and the strength of their desire for particular contract provisions.⁵² The union's "desire" is not merely the

45. See 29 U.S.C. § 158(a)(5), (d) (1988).

46. See 29 U.S.C. § 158(d) (1988); *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970).

47. See *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 489 (1960).

48. 2 THE DEVELOPING LABOR LAW 1088 (Patrick Hardin et al., eds., 3d ed. 1992) [hereinafter "Hardin"].

49. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965); *Harter Equip. Inc.*, 280 N.L.R.B. 597 (1986), *review denied sub nom. Local 825, IUOE v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

50. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938). Employees engaged in an unfair labor practice strike must be reinstated, even if the employer must discharge permanent replacements to do so. See *NLRB v. Efco Mfg., Inc.*, 227 F.2d 675, 676 (1st Cir. 1955), *cert. denied*, 350 U.S. 1007 (1956). Currently, legislation is pending that would bar employers from permanently replacing strikers. The Workplace Fairness Act, Bill No. S. 55 was reintroduced in the 103d Congress, 1st Session. 139 CONG. REC. S191 (daily ed. January 21, 1993). The bill has been named the Cesar Chavez Workplace Fairness Act, and passed the House on June 15, 1993. H.R. 5, 103d Cong., 1st Sess., 139 CONG. REC. H3527 (daily ed. June 15, 1993).

51. *NLRB v. Katz*, 369 U.S. 736, 741-42 (1962).

52. See ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE

desire of the union as an entity, or its employees, but the desire of the employees in the bargaining unit and their willingness to strike over particular issues.⁵³ Each party may accept certain undesirable provisions in the contract in exchange for other provisions that are more important or less costly to obtain.⁵⁴ There is significant pressure for the parties to reach agreement because of the substantial cost of failing to do so.⁵⁵

Once agreement is reached, the parties generally accomplish enforcement of the agreement through the internal mechanism of a grievance and arbitration procedure. Virtually all collective bargaining agreements contain such a procedure, whereby the union, on behalf of affected employees, may challenge management actions as violative of the agreement.⁵⁶ The procedure is usually controlled by the union⁵⁷ and culminates in binding arbitration by a neutral party.⁵⁸ Exhaustion of the grievance and arbitration procedure is required before an employee, or the union, can file suit to enforce the contract.⁵⁹ The courts give great deference to the resolution reached in the grievance and arbitration procedure.⁶⁰

The foregoing brief description of the collective bargaining process as circumscribed by federal law illustrates that the collective bargaining agreement is not the product of two willing parties reaching a voluntary

BARGAINING 431-34 (1976); see also BRUCE FELDACKER, *LABOR GUIDE TO LABOR LAW* 180-81 (West 2d ed. 1983).

53. See Gorman, *supra* note 52, at 484.

54. See Simon, *supra* note 43, at 961.

55. See Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1004 (1955). The costs of failure to reach agreement may be even greater today than they were in the 1950s. See 137 CONG. REC. S701-03 (daily ed. Jan. 14, 1991) (statement of Sen. Metzenbaum); 137 CONG. REC. H2073-75 (daily ed. March 22, 1991) (statement of Cong. Owens); 137 CONG. REC. H5518-19 (daily ed. July 17, 1991) (statement of Cong. Moakley); 137 CONG. REC. H5528-35 (daily ed. July 17, 1991) (statement of Cong. Ford) (citing to strikes involving PATCO, the air traffic controllers union, Continental Air Lines, Phelps Dodge Copper Co., International Paper Co. and Greyhound Bus Lines).

56. Each of 400 sample collective bargaining agreements surveyed by BNA contained grievance and arbitration provisions. See *Basic Patterns: Grievances and Arbitration*, 2 Collective Bargaining Negot. & Cont. (BNA) 51:1 (Jan. 23, 1992).

57. See Gorman, *supra* note 52, at 541.

58. See Gorman, *supra* note 52, at 541-42.

59. See *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). Suits for enforcement of the collective bargaining agreement are authorized by Section 301 of the NLRA, 29 U.S.C. § 185 (1988). See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 449-50 (1957). Under limited circumstances—for example, where the union breached its duty of fair representation—exhaustion of the grievance procedure is excused. See *Vaca v. Sipes*, 386 U.S. 171, 184 (1967).

60. See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

agreement that is mutually beneficial. This understanding is essential to an analysis of the liability of the union under the ADA. Also important is the extensive regulation of collective bargaining and union-management-employee relationships by the NLRA. This regulation has significant implications for the interpretation of the ADA in the union setting.

C. *The Union as a Discriminatory Actor*

In some industries, the union's role extends beyond that of negotiator and administrator of the agreement with respect to certain aspects of hiring and otherwise determining the terms and conditions of employment. For example, the union may operate a hiring hall through which the employer obtains its employees.⁶¹ The collective bargaining agreement may obligate the employer to obtain its employees through the hiring hall exclusively, or may allow the employer to seek employees from other sources as well.⁶² Where the union operates a hiring hall that furnishes the employer with employees, the union will be liable for intentional discrimination against qualified applicants with disabilities in referrals for employment.⁶³ The union also will be liable if the hiring hall utilizes standards, tests, or criteria for referral that screen out individuals with disabilities, unless the union can establish their job-relatedness and business necessity.⁶⁴

Under Title VII of the Civil Rights Act, unions have been held liable for discrimination in hiring hall referrals.⁶⁵ On the other hand, referral criteria based on experience have been held lawful even if discriminatory in effect, where they constitute a bona fide seniority sys-

61. Hiring halls are common in the construction and maritime industries, for example. SCHLEI & GROSSMAN, *supra* note 39, at 619.

62. See *Bullard v. Sercon Corp.*, 846 F.2d 463, 467 (7th Cir. 1988) (nonexclusive hiring hall); *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1355 (D.C. Cir. 1988) (exclusive hiring hall); Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 162 n.163 (1992) citing *Breining v. Sheet Metal Workers Local 6*, 493 U.S. 67, 71 n.1 (1989).

63. Regardless of the formality of the hiring hall arrangement, unions have been held liable for discrimination in the operation of hiring halls under Title VII. MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 429 (1988). Employers will also be liable for union discrimination in hiring halls since discrimination under the ADA includes participating in a contractual relationship that subjects the employer's applicants or employees to disability discrimination. See ADA § 102(b)(2), 42 U.S.C. § 12112(b)(2) (Supp. II 1990).

64. See ADA § 102(b)(6), 42 U.S.C. § 12112(b)(6) (Supp. II 1990).

65. See, e.g., *Ingram v. Madison Square Garden Ctr., Inc.*, 709 F.2d 807, 810 (2d Cir.), *cert. denied*, 464 U.S. 937 (1983); *Asbestos Workers Local 53 v. Vogler*, 407 F.2d 1047, 1050 (5th Cir. 1969); *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123, 131 (8th Cir. 1969); see also *Pennsylvania v. Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 370 (E.D. Pa. 1978), *aff'd without opinion*, 648 F.2d 923 (3d Cir. 1981), *rev'd on other grounds sub nom. General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982) (union liable under Section 1981 for discriminatory operation of hiring hall).

tem.⁶⁶ These decisions are based on Section 703(h) of Title VII, which allows use of a bona fide seniority system even if its effect is to lock members of statutorily protected groups into inferior jobs held as a result of previous discrimination.⁶⁷ The ADA has no comparable provision, and it might be argued that the omission was intentional. As a result, it is unclear whether seniority-based criteria that screen out individuals with disabilities because they have been historically excluded will survive challenge under the ADA, absent proof of job-relatedness and business necessity.⁶⁸

Unions that discriminate in apprenticeship programs, or use admissions criteria that screen out the disabled and are unjustified by business necessity or job relatedness, will also be liable under the ADA.⁶⁹ Similarly, the union will be liable under the ADA if it discriminates against qualified disabled individuals with respect to membership and the discrimination adversely affects job opportunities or any other aspect of terms and conditions of employment.⁷⁰ Although the ADA does not expressly prohibit discrimination with respect to membership as does Title VII, such discrimination would seem to come within the parameters of the ADA if it has an adverse impact on the individual's employment.⁷¹

66. See, e.g., *Hameed v. Iron Workers Local 396*, 637 F.2d 506, 516 (8th Cir. 1980).

67. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 349-50 (1977) (interpreting 42 U.S.C. § 2000e-2(h) (1988)).

68. See discussion *infra* notes 204-09 and accompanying text regarding the omission of a provision comparable to § 703(h) from the ADA. In contrast to the history of intentional discrimination by some unions based on race, gender or ethnicity, intentional discrimination by unions against the disabled has been largely absent. It may, therefore, be more difficult to prove that a system of seniority-based referrals perpetuates prior discrimination.

69. Apprenticeship programs are job training. See ADA § 102(a), 42 U.S.C. § 12112(a) (Supp. II 1990). Cf. *Hameed v. Iron Workers Local 396*, 637 F.2d 506, 510 (8th Cir. 1980) (union liable under Title VII and Section 1981 for use of selection criteria for apprenticeship program that had a disparate impact on African-Americans); *Eldredge v. Carpenters Joint Apprenticeship and Training Comm.*, 833 F.2d 1334, 1337 (9th Cir. 1987) (joint labor-management committee liable for system of providing apprentices with first jobs that had disparate impact on women).

70. A denial of membership might reduce an individual's chances for obtaining a job. For example, under the NLRA a union may lawfully operate a hiring hall solely for members, so long as it is not exclusive and all employers are allowed to hire from other sources. See *Penzel Construction Co.*, 185 N.L.R.B. 544 (1970), *enfd.*, 449 F.2d 148 (8th Cir. 1971). If few employers actually hire from other sources, however, lack of union membership may hinder an individual's chances for employment. Also, priority of referrals may be lawfully based on experience, seniority, or residency requirements that may be correlated with union membership. See *Hardin*, *supra* note 48, at 1534-36 for a discussion of lawful referral preferences. But see *supra* note 68 and accompanying text regarding the use of seniority-based referral preferences under the ADA.

71. According to Section 102(b)(1), discrimination includes "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." ADA § 102(b)(1), 42 U.S.C. § 12112(b)(1) (Supp. II 1990).

D. *The Union as a Party to a Discriminatory Contract*

In contrast to the situation that existed prior to 1964 with respect to race and gender, collective bargaining agreements do not commonly contain provisions expressly discriminating against qualified individuals with disabilities.⁷² An agreement might contain provisions that have the effect of discrimination, however. For example, an agreement might contain promotion criteria that adversely impact employees with disabilities. Assuming the establishment of the criteria's illegality, the employer responsible for utilizing the criteria would be liable. If the union played no direct role in implementing the promotional system, the question of whether the union violated the ADA would turn on whether liability would attach by virtue of the collective bargaining agreement alone, or whether the union's role in negotiating the provision was relevant.

There are two statutory provisions specifically addressing employment criteria. Section 102(b)(6) prohibits the use of "qualification standards, employment tests or other selection criteria" that screen out individuals with disabilities unless the criteria are job-related and consistent with business necessity.⁷³ Section 102(b)(7), requires that tests be selected and administered to judge the skills that they purport to measure and not any impairments of the test taker.⁷⁴ If neither the union nor the collective bargaining agreement plays a role in the discriminatory conduct, it seems clear that the union would not be liable. For example, if the agreement leaves test administration to the employer's discretion, either explicitly or implicitly, and the test administration disadvantages a disabled employee such that it does not reflect the employee's job-related skills,⁷⁵ then the employer should be solely liable.⁷⁶ If the agreement specifies use of a test or standard that unjustifiably⁷⁷ screens out

72. See *Player*, *supra* note 63, at 430 and cases cited therein (unions liable for negotiating contract with provisions expressly discriminating on the basis of race, gender, national origin or religion).

73. 42 U.S.C. § 12112(b)(6) (Supp. II 1990).

74. 42 U.S.C. § 12112(b)(7) (Supp. II 1990).

75. See ADA § 102(b)(7), 42 U.S.C. § 12112(b)(7) (Supp. II 1990).

76. In an analogous situation under the Rehabilitation Act, the court held that the employer was not liable for failure to accommodate where the type of work performed, the gang assignments, and job assignments were determined by the union. See *Bento v. I.T.O. Corp.*, 599 F. Supp. 731, 745 (D.R.I. 1984). Claims relating to testing might arise as claims for failure to accommodate the disabled individual in the testing process. See *infra* notes 130-288 and accompanying text for a discussion of the accommodation duty.

77. The effect is unjustifiable if the standard or criterion is not job-related and consistent with business necessity. See ADA § 102(b)(6), 42 U.S.C. § 12112(b)(6) (Supp. II 1990). The burden of establishing job-relatedness and business necessity is on the covered entity accused of discrimination. See Evan J. Kemp, Jr. & Christopher G. Bell, *A Labor Lawyer's Guide to the Americans with Disabilities Act of 1990*, 15 *NOVA L. REV.* 31, 47 (1991) (Committee reports

employees with disabilities; then there is a stronger argument for union liability.⁷⁸ The question remains whether such liability attaches automatically by virtue of the union's agreement to the contract, or whether the union's actions with respect to the particular provision or with respect to disability discrimination in general, may absolve the union of liability.

A review of case law under Title VII is useful for comparative analysis. There are two lines of cases dealing with the issue of union liability under Title VII for discrimination caused by the provisions of a collective bargaining agreement. One line of cases holds the union liable solely on the basis that it is a party to the collective bargaining agreement. In *Jackson v. Seaboard Coast Line Railroad Company*,⁷⁹ the United States Court of Appeals for the Eleventh Circuit held that the union violated Title VII because the promotion system contained in the collective bargaining agreement had a racially discriminatory impact on the plaintiffs. The court rejected the union's argument that the employer had sole responsibility for promotions, stating that the promotion system "is contained in the collective bargaining agreement negotiated in 1967, and, therefore, the Brotherhood as well as the railroad can be held liable for its discriminatory impact."⁸⁰ The court's opinion merely quoted *Parson v. Kaiser Aluminum & Chemical Corp.*⁸¹ without further analysis. In *Parson*, the United States Court of Appeals for the Fifth Circuit similarly held a union jointly liable for discrimination caused by the provisions of a collective bargaining agreement. The court's brief rationale noted that it would be "difficult" to impose liability for discrimination caused by an agreement on one party to the agreement and not the other.⁸² The court also pointed out that as representative of the black employees, the union had a duty to protect them from invidious treatment.⁸³

In *Macklin v. Spector Freight Systems*,⁸⁴ the United States Court of Appeals for the District of Columbia Circuit cited this duty to protect the

indicate that the burden of proof is placed as it is in the regulations implementing Section 504, which expressly require employers to justify challenged selection criteria).

78. The EEOC suggests that a collective bargaining agreement imposing physical requirements that screen out qualified applicants with disabilities could be challenged as discriminatory. See Technical Assistance Manual, *supra* note 35, § 7.11(a), 8 Lab. Rel. Rep. (BNA) 405:7050.

79. 678 F.2d 992 (11th Cir. 1982). The union, Brotherhood of Railway Carmen, was also a defendant.

80. 678 F.2d at 1016.

81. 575 F.2d 1374 (5th Cir. 1978).

82. *Id.* at 1389.

83. *Id.*

84. 478 F.2d 979 (D.C. Cir. 1973).

interests of employees disadvantaged by discrimination in reversing the district court's dismissal of a Title VII action against a union co-defendant. The court described a union's duty as "broader than simply refusing to sign overtly discriminatory agreements."⁸⁵ Albeit in dicta,⁸⁶ the court stated that where the union has not negotiated protection against discrimination for the employees and there is "solid evidence of employer discrimination . . . , it would undermine Title VII's attempt to impose responsibility on both unions and employers to hold that union passivity at the negotiating table in such circumstances cannot constitute a violation of the Act."⁸⁷

Even those cases that apply a lesser standard of liability effectively impose on the union a duty to oppose discriminatory provisions in the collective bargaining agreement. Some courts utilize an "efforts" test, excusing the union from liability for contract provisions with discriminatory effects where it actively opposed the relevant provisions.⁸⁸ Under this test, the union must make all reasonable efforts to eliminate the discriminatory provisions in order to avoid liability.⁸⁹

This duty appears to emanate from the union's duty of fair representation,⁹⁰ a judicially created duty derived from the union's right to exclusive representation under the NLRA.⁹¹ The duty of fair representation requires the union to represent the interests of all employees in the

85. *Id.* at 989.

86. The court of appeals reversed the district court's dismissal on the basis of timeliness and estoppel, and remanded for further proceedings. *Id.* at 985, 997.

87. *Id.* at 989. The United States Court of Appeals for the Fourth Circuit relied on this duty to impose liability on a union for a discriminatory contract provision in *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir. 1976).

88. See, e.g., *Waker v. Republic Steel Corp.*, 675 F.2d 91, 93 (5th Cir. 1982); *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120-21 (5th Cir. 1981), *cert. granted and judgment vacated on other grounds sub nom. Int'l Molders & Allied Workers Union Local 342 v. Terrell*, 456 U.S. 968 (1982). The union's efforts may result in the conclusion that it did not violate the statute, or in the imposition of injunctive relief only, with no liability for monetary damages. See *Martinez v. Oakland Scavenger Co.*, 680 F. Supp. 1377, 1397-98 (N.D. Cal. 1987); *Burwell v. Eastern Air Lines, Inc.*, 458 F. Supp. 474, 503 (E.D. Va. 1978), *aff'd in part, rev'd in part*, 633 F.2d 361 (4th Cir. 1980).

89. See *Howard v. Int'l Molders & Allied Workers Local 100*, 779 F.2d 1546, 1548 (11th Cir. 1986) (union did not take every reasonable step to insure compliance with Title VII); *Waker*, 675 F.2d at 93 (the union made every reasonable effort to insure compliance, since the union's efforts need not include a strike over the issue in order to be reasonable). In *Robinson v. Lorillard Corp.*, 444 F.2d 791 (1971), however, the Fourth Circuit suggested otherwise. The court, in rejecting the employer's defense that avoidance of union pressure was a legitimate business purpose justifying the adverse racial impact of an employment practice, stated: "Title VII requires that union and employer represent and protect the best interest of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainer will be held liable." *Id.* at 799 (footnote omitted).

90. *Simon*, *supra* note 43, at 969.

91. See *id.* at 963-64. The same duty is imposed by the Railway Labor Act. *Id.*

bargaining unit without discrimination or arbitrary treatment.⁹² Critics of the imposition of such a duty under Title VII point out the differences between Title VII and the NLRA, and further note that Title VII expressly bars the union from causing or attempting to cause the employer to discriminate.⁹³ This language does not suggest a duty on the part of the union to prevent employer discrimination.⁹⁴ Accordingly, the union should not be liable for discrimination caused by the collective bargaining agreement unless a causal connection between the union's actions and the discrimination exists. This approach considers the reality of the union's role in negotiations.

The contrary argument, for imposing liability where the contract results in discrimination regardless of the union's role, posits that a strict liability standard will force the union to oppose discriminatory provisions more stringently, even to the point of striking.⁹⁵ It is suggested that such an approach will further Title VII's goal of eliminating discrimination.⁹⁶ Advocates of this approach reconcile it with the causation requirement in Title VII by arguing that the union binds the employer to discriminate by acquiescing to a discriminatory contract, thus causing discrimination.⁹⁷

Analysis of union liability under the ADA is not limited by language regarding causation of employer discrimination. The language of the ADA differs from Title VII in that it imposes the same requirements on unions and employers. Inclusion of the union as a covered entity directly prohibited from using employment criteria with a disparate impact supports liability based on agreement to a contract clause providing for use of discriminatory criteria. On the other hand, one might argue that only the employer "uses" qualification standards or other selection criteria when the employer administers the standards mandated by the collective bargaining agreement. Thus, only the employer should be liable when it applies the criteria and selects employees based on whether the criteria are met. The statutory language and regulations

92. *Id.* at 964.

93. *See id.* at 971-72.

94. The Supreme Court's decision in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), casts doubt on the persuasive value of this argument to the courts. There the Court found the union liable for race discrimination for refusing to file grievances alleging race discrimination, despite the fact that there was no racial animus on the part of the union. *Id.* at 669. In addition, the Court rejected the union's argument that the only basis for liability was § 703(c)(3) which requires causation of employer discrimination. The Court based its finding of liability on § 703(c)(1) which bars the union from otherwise discriminating. *Id.* at 667.

95. *See Note, Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702, 704-07 (1980).

96. *Id.* at 706-07.

97. *Id.* at 705.

arguably support limiting liability to the employer, for they make clear that the imposition of liability on the covered entity is only for discrimination against the covered entity's own employees; a covered entity has no liability for the actions of the other party to the contract towards its employees.⁹⁸ Thus, the union would have no responsibility for discrimination against the employees of the employer resulting from the collective bargaining agreement.

Such an approach, however, ignores the role of the union in negotiating the contract provision that results in discrimination. Clearly the employer cannot defend against its own liability on the basis that use of the selection criteria is required by the collective bargaining agreement.⁹⁹ Yet the union still may be liable for a discriminatory contract provision by virtue of its role as representative of the employees.¹⁰⁰

The union may have insisted that a discriminatory provision be included in the agreement or acquiesced to the employer's insistence on inclusion, either with indifference or after a struggle based on either the union's opposition to inclusion or a desire to obtain a concession from the employer in exchange for inclusion. In addition, the union's opposition to inclusion of the clause at issue may have been based on the discriminatory impact of the provision or upon some reason wholly unrelated to discrimination.

Given the realities of the union's role in negotiating contracts,¹⁰¹ it seems intuitively correct that the union's liability should be determined by its actions, rather than merely by its signature on the contract. The union simply has no power to compel agreement to provisions that the employees refuse to strike to obtain.¹⁰² The only alternatives available to the union are capitulation to the provisions or refusal to agree, leaving all employees without the protection and benefits of the collectively bargained agreement. Nevertheless, the efforts test, properly applied, has the virtue of encouraging unions to police agreements for provisions that

98. See ADA § 102(b)(2), 42 U.S.C. § 12112(b)(2) (Supp. II 1990); 29 C.F.R. § 1630.6 (1992).

99. See ADA § 102(b)(2), 42 U.S.C. § 12112(b)(2) (Supp. II 1990).

100. The issue of union liability should arise only when the individual files an EEOC charge and subsequent lawsuit against the union. The Supreme Court held in *Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 96-97 (1981), that employers have no right to contribution from unions that allegedly have partial responsibility for violations of Title VII. Since the ADA contains no express right of contribution and the enforcement and remedial provisions are patterned after Title VII, the same conclusion regarding the right to contribution should obtain.

101. See *supra* notes 45-60 and accompanying text.

102. See *Burwell v. Eastern Air Lines, Inc.*, 458 F. Supp. 474, 503 (E.D. Va. 1978), *aff'd in part, rev'd in part*, 633 F.2d 361 (4th Cir. 1980) (union found guilty of discrimination based on contract, but because the union was virtually powerless to alter the company's unilaterally imposed policy, to which it acquiesced under protest, union not liable for back pay).

might have a discriminatory impact, to place their negotiating strength behind elimination of discrimination, and to attempt to convince their membership to support the rights of the disabled.¹⁰³

The difficulty with a liability rule based on the union's efforts to achieve nondiscrimination is in its application by the courts. The National Labor Relations Board ("NLRB"), despite its presumed expertise in labor relations issues, has problems evaluating the conduct of parties in contract negotiations and determining whether they have bargained in good faith.¹⁰⁴ It may be equally difficult for courts to decide whether a union's efforts in negotiations are sufficient to relieve it of liability for a discriminatory contract provision. A rule imputing automatic liability would be far easier to apply.

There are several factors, however, that courts could use to assist them in determining union responsibility for discriminatory contract provisions. First, if the union actively sought or agreed without hesitation to a clause prohibiting discrimination on the basis of disability, that action should mitigate against union liability.¹⁰⁵ Second, if the union proposed and supported nondiscriminatory selection criteria or actively opposed discriminatory selection criteria, even short of a strike or major economic concessions, such action supports the conclusion that the union is not liable.¹⁰⁶ Third, union efforts to challenge discrimination through the grievance procedure or through the administrative and judicial processes, particularly a challenge to contract language agreed to under protest, would support the conclusion that the union's resistance to discrimination was more than perfunctory.¹⁰⁷ Presence of each of

103. The rule advantages larger unions with sophisticated legal resources. Smaller, less sophisticated unions may not anticipate potential disability issues and respond to them effectively.

104. See Gorman, *supra* note 52, at 481-84, and cases cited therein.

105. See *Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973) (where the union has not proposed nondiscrimination language and has remained silent in negotiations in the face of strong evidence of employer discrimination, the union violates Title VII). Generally one would not expect active employer opposition to confirming its nondiscrimination obligation under the ADA in the collective bargaining agreement. See Hardin, *supra* note 48, at 901 ("Elimination of invidious forms of discrimination in the bargaining unit is a mandatory subject of bargaining and contract provisions prohibiting discrimination on invidious bases have become commonplace in labor agreements." (citations omitted)). Employer opposition to such a clause might further support imposing full liability on the employer for discrimination, while excusing the union from responsibility.

106. Cf. *Waker v. Republic Steel Corp.*, 675 F.2d 91, 93 (5th Cir. 1982) (union efforts to negotiate changes in discriminatory practices relieve it of liability even though it refused to strike over the issue); *Dickerson v. United States Steel Corp.*, 472 F. Supp. 1304, 1354 (E.D. Pa. 1979) (no union liability where union attempted to limit use of discriminatory tests in negotiations, succeeding in part, filed grievances over the use of the tests and pursued them to arbitration, and opposed the use of the tests in court).

107. See *Burwell v. Eastern Air Lines, Inc.*, 458 F. Supp. 474, 503 (E.D. Va. 1978), *aff'd in part, rev'd in part*, 633 F.2d 361 (4th Cir. 1980), where the court declined to assess back pay

these three factors should relieve the union of liability.¹⁰⁸

Furthermore, the courts should use discretion to determine whether it is appropriate to absolve the union of liability where the union's conduct indicates active opposition to discrimination although none of the three factors are present.¹⁰⁹ There is significant pressure on the union to achieve a collective bargaining agreement to protect employees. Not only does failure to reach an agreement leave employees unprotected in many ways,¹¹⁰ but it leaves the union vulnerable to decertification.¹¹¹ Where a union capitulates to what turns out to be a discriminatory provision in order to reach an agreement, the union should not be held liable unless its resistance to the provision was merely token.¹¹²

against the union which had begun to "whittle away" at discriminatory practices "in a logical progression," initiating "the only bona fide efforts to secure for women flight attendants the right to continue working during pregnancy." *Id.* Efforts by the particular union in support of the ADA might be considered as well. See *Waker*, 675 F.2d at 93-94 (union's active and persistent efforts to increase job opportunities for black employees supports decision against liability); *Dickerson*, 472 F. Supp. at 1354 (union's opposition to discriminatory tests in court cases, including filing an *amicus* brief in *Griggs*, supports conclusion that union is not liable).

108. This test for liability imposes on the union an arguably unjustified affirmative duty to seek nondiscriminatory contract provisions, see *Simon*, *supra* note 43, at 981, but the inclusion of the union as a covered entity subject to all the nondiscrimination provisions of the ADA supports such a test.

109. For example, the union may agree to a provision regarding examinations that is later revealed to have discriminatory effects. If the union either proposes a reasonable accommodation that would eliminate the discriminatory effects, or grieves the employer's discriminatory application of the provision, the union should be absolved of liability despite its initial agreement to the contract provision with unanticipated discriminatory effects.

110. During negotiations, unilateral changes in terms and conditions of employment are unlawful even where they benefit the employees. *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). Thus, the employees cannot receive any pay increases or additional benefits until either a contract or an impasse is reached. *Id.* at 745. After an impasse, the employer can implement its last offer to the union, which may increase or decrease pay and benefits. *Id.* at 745. If the contract is a first contract, the employees will have no existing grievance and arbitration procedure with which to challenge employer actions and no protection against unjust discipline. Even if an expired contract contains such protections, the employer is not obligated to arbitrate many issues after contract expiration, further eroding the employees' protection. See *Litton Fin. Printing Div. v. NLRB*, — U.S. —, 111 S. Ct. 2215, 2224 (1991). A strike, of course, leaves the employees vulnerable to permanent replacement. See *supra* note 50.

111. A petition for decertification, or certification of another union, can be filed during the window period ninety to sixty days before expiration of a contract or after contract expiration if no new agreement has been reached. See *Leonard Wholesale Meats Co.*, 136 N.L.R.B. 1000 (1962). In addition, a newly certified union has a one year period in which to reach agreement. After expiration of the certification year, if no agreement has been reached, a petition for decertification or certification of another union can be filed. See *Brooks v. NLRB*, 348 U.S. 96, 97 (1954).

112. If the costs of failing to agree were not so high, and the sanctions for unlawful refusals to bargain more effective, a different rule might be appropriate. Under current law, however, the employer could obstruct agreement by insistence on contractual provisions that would have a discriminatory impact on the disabled, with virtually no consequences under the NLRA. A charge of bargaining in bad faith could take years to litigate and the only remedy is an order to bargain, starting the process over again. *Hardin*, *supra* note 48, at 1844. In the meantime, the union would be left with the choice of remaining without a contract, leaving the employees unprotected and the

Of course, the court should give the union credit only for sincere efforts to oppose discrimination. Courts can assess the genuineness of the union's opposition to discrimination both by the importance that the union places on nondiscriminatory contract provisions in negotiations¹¹³ and by the nature of the discriminatory provision. Most of the cases under Title VII imposing liability on the union based on the collective bargaining agreement have involved seniority systems, contract provisions likely to have resulted from union demands.¹¹⁴ When a testing or other selection criterion is involved, it is more likely to have resulted from employer demands. In such a case, the court should more reluctantly assess union liability, absent clear evidence of the union's role as a discriminatory actor. As is the case under Title VII,¹¹⁵ the courts in these cases should determine whether the union's anti-discrimination efforts warrant relief from liability, or merely relief from monetary damages.

A final argument, unique to the ADA, that might support union liability is that the union has a duty to accommodate employees or applicants with disabilities.¹¹⁶ This duty arguably includes either modifying a contract with discriminatory effects or waiving compliance with con-

union vulnerable to decertification, or agreeing to a discriminatory provision that would impose liability under the ADA. See Stephen I. Schlossberg & John Silard, *The Need for A Compensatory Remedy in Refusal-To-Bargain Cases*, 14 WAYNE L. REV. 1059 (1968) and Arnold Ordman, *The National Labor Relations Act: Current Developments*, Proceedings of New York University Twenty-Fourth Annual Conference on Labor 115, 126-28 (1972) for discussions of the delay and remedial problems under the NLRA. The statute has not been amended to deal with the problems discussed since that time. See Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 432-33 (1992).

There is unlikely to be collusion between the company and the union under the efforts test because only the union escapes liability. Thus the company will not allow the union to orchestrate a scenario where it appears to support nondiscrimination, but does so ineffectively. Such a strategy would increase the employer's potential liability, while absolving the union.

113. Importance can be determined by the frequency of discussion, the length of time the proposal remains on the table, and what the union is willing to give up to obtain the proposal. *But see* Thomas H. Christopher & Charles M. Rice, *The Americans with Disabilities Act: An Overview of the Employment Provisions*, 33 S. TEX. L. REV. 759, 782 (1992), for an argument that neither party should be required to make concessions in negotiations to obtain compliance with the ADA. The courts should take care not to require more on the part of the union than is reasonable, because the union is limited by the desires of its membership. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) ("The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group."); *Strick Corp.*, 241 N.L.R.B. 210, 220 (1979) (union did not breach its duty of fair representation by agreement which favored interests of only group in a position to "impose economic restraints upon the Employer in the event of impasse" and impaired interests of group that was not).

114. *See* Simon, *supra* note 43, at 984.

115. *See supra* note 88.

116. *See* discussion *infra* notes 134-37 and accompanying text regarding whether the union has a duty of accommodation.

tractual provisions that cause discrimination.¹¹⁷ The duty to accommodate applies to "known" physical or mental limitations, however, so that the duty to accommodate does not arise until the employee requests accommodation or the union and employer otherwise become aware of the need for accommodation.¹¹⁸ Thus, even if the duty to accommodate requires contract modification or waiver, the duty would not arise until the union actually knew of the discrimination caused by the contractual provision. Furthermore, if the union could establish undue hardship, no accommodation would be required.¹¹⁹ Accordingly, the efforts test is the most appropriate measure of union liability for contract provisions with discriminatory effects.

E. *The Union as a Grievance Representative*

A union's duty of fair representation arises not only in the context of negotiation of the collective bargaining agreement, but also in its enforcement.¹²⁰ Under Title VII and section 1981,¹²¹ unions have been held liable for discrimination in handling grievances.¹²² Since access to the grievance procedure is a term, condition or privilege of employment which is controlled by the union, discriminatory refusal to pursue a grievance based on the grievant's disability violates the ADA.¹²³ It is not unusual for a contractual grievance to involve an issue relating to the employee's disability.¹²⁴ For example, an employee's own physician might release the employee to work after an illness or injury, while the

117. While neither contractual modification nor waiver is mentioned in the statutory list of accommodations, the list is not exclusive. Moreover, the accommodations listed might well require contract modification since job descriptions, work schedules, job assignments, and training programs may be incorporated into collective bargaining agreements. See further discussion of the issues posed by conflict between accommodations and the collective bargaining agreement *infra* notes 138-288 and accompanying text.

118. ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990); S. REP. No. 116, *supra* note 2, at 34; H.R. REP. No. 485 (II), *supra* note 17, at 65, reprinted in 1990 U.S.C.C.A.N. 303, 347.

119. ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990). See *infra* notes 134-288 and accompanying text for more extensive discussion of the application of the accommodation duty to unions and the circumstances under which liability would attach.

120. See *Vaca v. Sipes*, 386 U.S. 171 (1967).

121. 42 U.S.C. § 1981 (1988 & Supp. III 1991). Section 1981 prohibits discrimination on the basis of race.

122. See, e.g., *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (union violated Title VII and § 1981 by failing to process grievances asserting racial discrimination.) Unions are frequently accused of failing to pursue a grievance because of the race, gender or ethnicity of the grievant. See Gorman, *supra* note 52, at 705-07 and cases cited therein.

123. See ADA § 102(a), 42 U.S.C. § 12112(a) (Supp. II 1990).

124. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 187 (1967) (suit for breach of contract against the employer and breach of the duty of fair representation against the union based on dispute over the discharge of an employee with high blood pressure for alleged inability to work). Disability related issues under the collective bargaining agreement might also arise with respect to medical

employer's physician might find the employee unable to perform contractual duties.¹²⁵ If the employee grieved the employer's refusal of reinstatement and the union decided not to pursue the grievance, the employee might charge both the union and the employer with disability discrimination.

If the court found that the employer discriminated against the employee under the ADA, would the union also be liable for its decision to drop the grievance? Based on analogy to Title VII, the employee would have to show that the union engaged in intentional discrimination based on the employee's disability.¹²⁶ If the union proffers evidence of a legitimate nondiscriminatory reason for its action, e.g., a belief that it would not prevail on the merits, then the employee would have to establish that the reason was a pretext for discrimination.¹²⁷ In the absence of statements indicating hostility toward the employee or other employees with disabilities, or evidence that employees in similar circumstances without disabilities were treated more favorably, proof of pretext would be difficult.¹²⁸ If, however, the union fails to make efforts to remedy the employer's disability discrimination that is prohibited by the collective bargaining agreement, then the union may also be liable for disability discrimination.¹²⁹ Most courts, however, would require a pattern of such refusals to establish the requisite intentional discrimination.

Other issues relating to the duty of fair representation are significantly intertwined with the duty of reasonable accommodation established by the ADA and will be discussed in the following section.

or dependent care leaves, discipline for absenteeism, light duty for injured employees, and benefits such as health insurance and pensions.

125. *See id.* at 174.

126. *See SCHLEI & GROSSMAN, supra* note 39, at 629-30 and cases cited therein (complaints of discrimination in grievance handling are based on disparate treatment theory and require proof of intentional discrimination).

127. Loretta K. Haggard, *Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans With Disabilities Act*, 43 WASH. U. J. URB. & CONTEMP. L. 343, 351 (1993). As Haggard notes, however, at least one court has held that the defendant has a burden of proof rather than production once the plaintiff establishes a prima facie case. *See Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372, 1387 (10th Cir. 1981).

128. Alternatively, the employee might be able to establish disparate treatment between disabilities. For example, an employee with a particularly feared disease, such as AIDS, or who is even merely HIV+, might be treated less favorably than an employee with heart disease, thus establishing disability discrimination.

129. *Cf. Goodman v. Lukens Steel Co.*, 482 U.S. 656, 668 (1987) (union that declined to pursue racial discrimination grievances against employer liable despite lack of animus and otherwise nondiscriminatory treatment of African-Americans). If the union has no vehicle for challenging disability discrimination under the collective bargaining agreement, it may be absolved from this risk of liability. But failure to negotiate a nondiscrimination clause may subject the union to a greater risk of liability for discrimination caused by provisions of the contract. *See supra* notes 72-119 and accompanying text.

F. *The Union and the Duty of Reasonable Accommodation*

Perhaps the most significant aspect of the employment provisions of the ADA is the duty of reasonable accommodation.¹³⁰ In passing the ADA, Congress viewed the primary problem as one of barrier discrimination, discrimination based on indifference and thoughtlessness rather than hostility.¹³¹ Thus the ADA requires covered entities to make reasonable accommodations that will enable a disabled employee to work. The statute contains a nonexclusive list of reasonable accommodations which includes making facilities accessible, job restructuring, modifying work schedules, reassignment to vacant positions, acquiring or modifying equipment, modifying tests and training programs, providing readers and interpreters, or other similar accommodations.¹³² An accommodation need not be made, however, if it would result in undue hardship "on the operation of the business of the covered entity."¹³³

The inclusion of unions in the definition of "covered entity" suggests that the union, like the employer, has a duty of reasonable accommodation. Yet the language regarding undue hardship suggests that only employers are covered, since unions do not operate businesses. The EEOC's *Technical Assistance Manual* states that unions have an accommodation obligation,¹³⁴ but there is no reference to such an obligation in the Regulations.¹³⁵ By analogy, Title VII also supports imposing a duty to accommodate on the union. Title VII requires reasonable accommodation of an employee's religious observance or practice.¹³⁶ Although the statutory requirement refers only to employers, courts and the EEOC have interpreted the law to mandate accommodation by unions as well.¹³⁷ Given the incorporation of unions as covered entities in the ADA and this interpretation of Title VII, the more persuasive argument is that the accommodation obligation applies to unions.

The primary context in which the accommodation issue would arise

130. See H.R. REP. NO. 485(II), *supra* note 17, at 33, reprinted in 1990 U.S.C.C.A.N. 303, 349. ("Reasonable accommodation is a key requirement of the Rehabilitation Act and of this Act.")

131. Ervin, *supra* note 38, at 962.

132. See ADA § 101(9), 42 U.S.C. § 12111(9) (Supp. II 1990).

133. See ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990).

134. See Technical Assistance Manual, *supra* note 35, at §§ 3.9, 7.11(a), 8 Lab. Rel. Rep. (BNA) 405:7007, 405:7050.

135. In its Overview of the Regulations, the EEOC indicated the "collective bargaining agreement matters" were so complex that they required extensive research and analysis and further consideration. Accordingly, the Commission decided to leave such matters for "in depth" discussion in "future Compliance Manual sections and policy guidances". 56 Fed. Reg. 35727 (July 26, 1991).

136. 42 U.S.C. § 701(j) (1988).

137. See *infra* note 163 and cases cited therein; *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 35 (6th Cir. 1982); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1241 (9th Cir. 1981); 29 C.F.R. § 1605.2(d) (1992).

for the union would be where one or more possible accommodations would either conflict with the collective bargaining agreement or impact terms and conditions of employment, thereby requiring negotiation with the union. For example, a disabled employee might desire to transfer to a vacant position with duties that the employee could perform, but might have insufficient seniority to obtain the position under the collective bargaining agreement. Alternatively, an employee might request restructuring of a position, the duties of which are defined in a collective bargaining agreement or fixed by past practice.¹³⁸

The regulations address the issue briefly, but provide no definitive guidance, merely noting in the Appendix that the terms of a collective bargaining agreement "may be relevant" to determining whether an accommodation would be unduly disruptive to the employees or the business.¹³⁹ Such disruption would constitute undue hardship which eliminates the accommodation obligation.¹⁴⁰ The *Technical Assistance Manual* takes a similar approach, and provides additional "advice" to avoid the problem.¹⁴¹ The *Manual* suggests that the employer should consult with the union to work out an accommodation, and further advises that to avoid continuing conflicts with the collective bargaining agreement, "employers" should seek a contract clause permitting them to take all action necessary to comply with the ADA.¹⁴²

Setting aside for the moment the EEOC's recommendations regarding avoidance of conflict, it is useful to look at cases applying the accommodation obligations under the Rehabilitation Act and Title VII in the context of a conflicting collective bargaining agreement in order to analyze the possible results under the ADA.

1. THE REHABILITATION ACT CASES

As noted previously, the legislative history clearly indicates that the

138. A past practice can become a binding term and condition of employment even where it is not expressly embodied in the collective bargaining agreement. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 437 (4th ed. 1985). Many other possible accommodations that impact terms and conditions of employment are readily apparent. Having a supervisor perform nonessential functions of a disabled employee's position might violate a contractual prohibition on supervisors performing bargaining unit work. A disabled employee might require breaks in excess of those specified in the agreement. An employee with a disability might need medical leave in excess of that permitted by the agreement.

139. See 29 C.F.R. § 1630.15(d), app. (1992). Notably this section refers to proof by the employer of undue hardship.

140. See ADA § 102(b)(5)(A), 42 U.S.C. § 12112(b)(5)(A) (Supp. II 1990).

141. See *Technical Assistance Manual*, *supra* note 35, at § 3.9, 8 Lab. Rel. Rep. (BNA) 405:7007.

142. See *id.* This suggestion was also made by Congress. See S. REP. No. 116, *supra* note 2, at 32; H.R. REP. No. 485 (II), *supra* note 17, at 63, reprinted in 1990 U.S.C.C.A.N. 303, 346. This recommendation is discussed *infra* notes 240-47 and accompanying text.

ADA is patterned after the Rehabilitation Act and its regulations. Federal courts faced with Rehabilitation Act claims for accommodation of a disabled employee that conflict with the requirements of a collective bargaining agreement have uniformly held that such accommodation is not required.¹⁴³ *Shea v. Tisch*¹⁴⁴ is a typical case. In *Shea*, the employee argued that he should have been reassigned to a position that would be

143. The only decision to the contrary was made by a special panel certified by the Merit Systems Protection Board, which deferred to the EEOC holding that the employer must consider reassignment as a reasonable accommodation, despite the contrary provisions of the collective bargaining agreement. See *Ignacio v. United States Postal Serv.*, 30 M.S.P.R. 471, 486-87 (Spec. Pan. 1986). The courts considering the decision have not found it persuasive. See *Carter v. Tisch*, 822 F.2d 465, 468 (4th Cir. 1987) ("The position taken by the EEOC and deferred to by the Special Panel in *Ignacio* has been firmly rejected by the courts which have considered it." (citations omitted)).

In a later decision, *Konieczko v. United States Postal Serv.*, 47 M.S.P.R. 509 (MSPB 1991), the Merit Systems Protection Board cited three unpublished EEOC decisions holding that "where an agency demonstrates that its nondiscriminatory collective bargaining agreement precludes it from reassigning an individual with a handicap to another position, such evidence is sufficient to establish that the reassignment would place an undue hardship on the agency." *Id.* at 514-15. Noting that the holding was a departure from *Ignacio*, the Board deferred to the EEOC's position because it was an interpretation of discrimination law which was not "so unreasonable as to violate civil service law." *Id.* at 515. The Board went on to state that "[t]he Board's prior decisions which held that the provisions of a collective bargaining agreement cannot override the agency's obligations under the Rehabilitation Act are modified consistent with this Opinion and Order." *Id.* The Board held, however, that *Konieczko* was entitled to reassignment since it was not precluded by the collective bargaining agreement, which merely accorded a preference to employees in another job classification. *Id.* at 515. The Board followed *Konieczko* in *Podrazik v. United States Postal Serv.*, 54 M.S.P.R. 380, 384 (M.S.P.B. 1992), holding that the employer demonstrated undue hardship where the collective bargaining agreement precluded the reassignment sought as an accommodation.

In a July 1993 decision, the United States Court of Appeals for the Ninth Circuit held that a memorandum of understanding that was part of the collective bargaining agreement did not preclude transferring an employee as an accommodation because the memorandum did not prohibit transfers of employees with less than one year of seniority. See *Buckingham v. United States Postal Serv.*, No. 91-56236, 1993 U.S. App. LEXIS 17225 (9th Cir. July 13, 1993). In *Buckingham*, the agreement reserved one of every four positions for transfers with at least one year of seniority. *Id.* at *15. The agreement also expressly allowed EEO factors to be considered in filling the positions and further permitted the transfer preference to be overridden "in the most unusual of circumstances." *Id.* at *15, *16. The Ninth Circuit affirmed the district court's conclusion that the transfer of Buckingham, who only had five months seniority, was not barred by the agreement. *Id.* at *17. The court distinguished the case from other cases under the Rehabilitation Act because the transfer to accommodate Buckingham's disability "would not 'usurp the legitimate rights of other employees under a collective bargaining agreement.'" *Id.* at *16 (quoting *Carter v. Tisch*, 822 F.2d 465, 467 (4th Cir. 1987)).

The EEOC recently promulgated a regulation under Section 501 of the Rehabilitation Act requiring federal employers to reassign nonprobationary employees unable to perform the essential functions of their existing positions to vacant positions in which they can perform the essential functions, unless the employer can show undue hardship. See 29 C.F.R. § 1614.203(g) (1992). The regulation exempts the Postal Service from reassignment inconsistent with the terms of a collective bargaining agreement. *Id.* See further discussion of this regulation *infra* note 179.

144. 870 F.2d 786 (1st Cir. 1989).

closer to his home and require only weekday work.¹⁴⁵ The employer did not dispute that his disability required such an assignment, but argued that it could not provide the plaintiff with such a position because it would violate the collective bargaining agreement's requirement that jobs be awarded on the basis of seniority.¹⁴⁶ The court concluded that the employer "was not required to accommodate plaintiff further by placing him in a different position since to do so would violate the rights of other employees under the collective bargaining agreement."¹⁴⁷ The Fourth,¹⁴⁸ Sixth¹⁴⁹ and Tenth¹⁵⁰ Circuits, along with a number of district courts,¹⁵¹ have reached similar conclusions.

The cases so deciding do not contain extensive rationales.¹⁵² Since most cases simply reason that overriding the collective bargaining agreement would adversely impact the rights of other employees secured by the agreement, it appears that the courts have concluded that the existence of a conflicting collective bargaining agreement renders the accommodation unreasonable or constitutes undue hardship.¹⁵³ A few cases

145. *Id.* at 789.

146. *Id.*

147. *Id.* at 790.

148. *See* *Carter v. Tisch*, 822 F.2d 465, 467-68 (4th Cir. 1987) (reassignment not required accommodation unless it would be available under the employer's existing policies, and here, the collective bargaining agreement barred reassignment to light duty for employees with less than five years seniority). *See also* *Bates v. Long Island R.R. Co.*, No. 92-9308, 1993 U.S. App. LEXIS 16259 (2d Cir. July 2, 1993) (while employer not obligated to reassign disabled employee, the employer "cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies"). *Id.* at *22.

149. *See* *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1251-52 (6th Cir. 1985) (even if employee was a qualified disabled individual, he was not entitled to reassignment or job restructuring which would violate the rights of other employees under the collective bargaining agreement).

150. *See* *Daubert v. United States Postal Serv.*, 733 F.2d 1367, 1370 (10th Cir. 1984) (where collective bargaining agreement barred both job restructuring and reassignment to permanent light duty position, employer's contractual obligations to union and employees provide legitimate business reason for discharging employee who could not perform the job for which she was hired).

151. *See, e.g.,* *Davis v. United States Postal Serv.*, 675 F. Supp. 225, 233 (M.D. Pa. 1987); *Hurst v. United States Postal Serv.*, 653 F. Supp. 259, 261 (N.D. Ga. 1986); *Carty v. Carlin*, 623 F. Supp. 1181, 1189 (D. Md. 1985); *Bey v. Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982).

152. *See* Kenneth Allen Greene, *Burdens of Proving Handicap Discrimination Using Federal Employment Discrimination Law: Rational Basis or Undue Burden*, 3 DET. C.L. REV. 1053, 1089-1103 (1989) for a general criticism of the courts for failing to analyze cases under the Rehabilitation Act adequately, and a specific critique of the analyses in the cases involving collective bargaining agreements and accommodation.

153. *See, e.g.,* *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) ("To give plaintiff such a new position would violate the collective bargaining rights of other employees . . ."); *Carter*, 822 F.2d at 467 ("Reassigning Carter to permanent light duty, when he was not entitled to one of a limited number of light duty positions, might have interfered with the rights of other employees under the collective bargaining agreement."); *Jasany*, 755 F.2d at 1251-52 ("An employer cannot be required to accommodate a handicapped employee by restructuring a job in a manner which

contain additional analysis. In *Hurst v. United States Postal Service*,¹⁵⁴ the United States District Court for the Northern District of Georgia not only relied on the impact on other employees, but also held that Congress intended to incorporate in the Rehabilitation Act the protection for bona fide seniority systems contained in Title VII.¹⁵⁵ Thus, the Rehabilitation Act, like Title VII, required that the rights under the seniority system, which was not created with the intent to discriminate, prevail over the right of reasonable accommodation.¹⁵⁶

In *Bey v. Bolger*,¹⁵⁷ the United States District Court for the Eastern District of Pennsylvania found that an accommodation that violated the collective bargaining agreement would cause undue hardship for the employer. The court analyzed the relevant provision of the collective bargaining agreement, which restricted light duty assignments to employees with five years of service, and found that it was reasonable and substantially related to the legitimate government purpose of accommodating employees while maintaining a high level of efficiency at a

would usurp the legitimate rights of other employees in a collective bargaining agreement.”); *Daubert*, 733 F.2d at 1370 (“USPS’s contractual obligations to its employees and their union under the collective bargaining agreement clearly articulates [sic] a legitimate business reason for Daubert’s discharge [for inability to perform the duties of her position due to her disability].”); *Carty*, 623 F. Supp. at 1189 (employer not required to reassign an employee as a reasonable accommodation where it might violate the rights of other employees secured by a collective bargaining agreement).

As the United States Court of Appeals for the District of Columbia Circuit recently noted, the concepts of reasonable accommodation and undue hardship merge at times and the distinction between them may not be altogether clear. *See Barth v. Gelb*, 2 F.3d 1180, 1187 (D.C. Cir. 1993) (“As a general matter, a reasonable accommodation is one employing a method of accommodation that is reasonable in the run of cases, whereas the undue hardship inquiry focuses on the hardships imposed by the plaintiff’s preferred accommodation in the context of the particular agency’s operations.”). While the distinction may not be significant in many cases, it may be important in cases involving allocation of the burdens of proof. *See id.*

154. 653 F. Supp. 259 (N.D. Ga. 1986).

155. *Id.* at 262. Section 703(h) of Title VII states:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .

42 U.S.C. § 2000e-2h (1988). In *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353 (1977), the Supreme Court held that it was not unlawful to utilize a seniority system that did not have its genesis in discrimination, despite the fact that the system perpetuated pre-Act discrimination.

In incorporating § 703(h) into the Rehabilitation Act, the court relied on *Skillem v. Bolger*, 725 F.2d 1121 (7th Cir. 1984), where the court read Title VII’s provisions regarding conflicts with veteran’s preference laws into the Rehabilitation Act to further the intent of Congress. *Id.* at 1123.

156. *Hurst v. United States Postal Serv.*, 653 F. Supp. 259, 263 (N.D. Ga. 1986).

157. 540 F. Supp. 910 (E.D. Pa. 1982).

reasonable cost.¹⁵⁸ According to this court's analysis, it is not merely the existence of the conflict, but the legitimacy of the provision's purpose that is relevant.¹⁵⁹

In *Davis v. United States Postal Service*,¹⁶⁰ another Pennsylvania district court used a somewhat different analysis to reach the same result. The *Davis* court held that the statute did not require the employer to reassign an employee as an accommodation unless the employer had a policy of reassignment that was discriminatorily denied to the plaintiff.¹⁶¹ Since the collective bargaining agreement required the employer to fill job vacancies by seniority, the employer was not required to reassign Davis to a position to which he was not entitled on the basis of seniority.¹⁶²

2. TITLE VII AND ACCOMMODATION

Accommodation cases under Title VII provide further useful information for analytical purposes. Title VII's only accommodation requirement is for religious beliefs and practices.¹⁶³ The United States Supreme Court addressed this provision in *TWA v. Hardison*.¹⁶⁴ The employee in *Hardison* sought an accommodation permitting him to refrain from working on the Sabbath, which was Saturday in his religion.¹⁶⁵ Hardison did not have sufficient seniority to avoid Saturday work, and the union was unwilling to agree to any violation of the agree-

158. *Id.* at 927. The court noted that it was necessary for efficiency and productivity to limit the number of light duty assignments. *Id.*

159. The *Carter* court, in stating that a duty to reassign would not defeat the requirements of a collective bargaining agreement unless the agreement had the effect or intent of discrimination, may have been suggesting a similar limitation. 822 F.2d at 469.

160. 675 F. Supp. 225 (M.D. Pa. 1987).

161. *Id.* at 235. The court in *Carty v. Carlin*, 623 F. Supp. 1181, 1188 (D. Md. 1985), also noted the absence of a duty to reassign in finding that accommodation was not required.

162. *Davis*, 675 F. Supp. at 235. The court found it unnecessary to determine whether the collective bargaining agreement prevailed over the Rehabilitation Act. *Id.* at 235 n.9. The court also rejected the plaintiff's argument that the employer's statutory affirmative action obligation mandated reassignment. *Id.* at 235.

163. 42 U.S.C. § 2000e(j) (1988). While Title VII expressly requires religious accommodation only by the employer, *see* 42 U.S.C. § 2000e(j) (1988), the courts have interpreted the statute to require accommodation by unions as well. *See, e.g.,* *EEOC v. Caribe Hilton Int'l*, 597 F. Supp. 1007, 1013 (D.P.R. 1984); *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 884 (9th Cir. 1980); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 404 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). In assessing the union's liability, courts have found the union liable for intentional actions that prevent or obstruct accommodation by the employer. *See* *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 487 (2d Cir. 1985), *aff'd*, 479 U.S. 60 (1986); *Hardison v. Trans World Air Lines, Inc.*, 527 F.2d 33, 42-43 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977).

164. 432 U.S. 63 (1977).

165. *Id.* at 68.

ment's seniority provisions. TWA declined to take unilateral action in violation of the collective bargaining agreement.

The Court found that the duty to accommodate did not require the employer to take action inconsistent with the agreement, noting that "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others"¹⁶⁶ The Court further stated that section 703(h) of the statute, which affords special protection for seniority systems, supported this conclusion.¹⁶⁷ The Court overruled the appellate court's conclusion that the seniority system did not limit accommodation, stating that that ruling was "plainly inconsistent" with section 703(h).¹⁶⁸ The Court in *Hardison* additionally ruled that any greater than *de minimis* accommodation cost to the employer constituted undue hardship, relieving the employer of the accommodation obligation.¹⁶⁹

While it might be inferred from the language of the Court in *Hardison* that the existence of a valid¹⁷⁰ conflicting bargaining agreement alone constitutes undue hardship,¹⁷¹ the lower courts have not interpreted *Hardison* to so hold. Where the collective bargaining agreement conflicts, however, and the conflicting provisions provide significant rights to other employees that might be infringed by accommodation, courts generally have excused both the union and the employer from accommodation on grounds of undue hardship.¹⁷² Where no significant impact on the rights of other employees results, courts have required accommodation in violation of the collective bargaining agreement.¹⁷³

166. *Id.* at 81.

167. *Id.* at 81-82.

168. *Id.* at 82.

169. *Id.* at 84.

170. In order to be valid, the collective bargaining agreement must not be adopted with discriminatory intent. 42 U.S.C. §§ 2000e-2(a)(1)(c) (1988).

171. The Court stated: "We agree that neither a collective bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement." *Hardison*, 432 U.S. at 79 (footnote omitted).

172. See, e.g., *Cook v. Chrysler Corp.*, 981 F.2d 336, 338 (8th Cir. 1992), *cert. denied*, — U.S. —, 61 U.S.L.W. 3834 (1993); *Dickson v. International Longshoremen's Union Local 40*, 38 FEP Cases (BNA) 1253, 1255 (D. Ore. 1985); *EEOC v. Caribe Hilton Int'l*, 597 F. Supp. 1007, 1010 (D.P.R. 1984); *McDonald v. McDonnell Douglas Corp.*, 35 FEP Cases (BNA) 1661, 1665-66 (N.D. Okla. 1984). Cf. *Boomsma v. Greyhound Food Management*, 639 F. Supp. 1448, 1454-55 (W.D. Mich. 1986) (employer not required to alter facially neutral scheduling system mandated by collective bargaining agreement where such alteration would adversely affect other employees, but employer violated Title VII by disciplining employee without determining whether voluntary substitution was possible).

173. See, e.g., *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445, 452 (7th Cir.

The cases finding a duty to accommodate despite a conflicting contract have been primarily cases where the employee objects on religious grounds to the contractual requirement of paying union dues.¹⁷⁴ The courts have distinguished these cases from those denying accommodation, noting that where the objecting employee is required to make a charitable contribution, no employee is denied express contractual rights and all employees suffer the same economic loss.¹⁷⁵ The courts have required evidence of deprivation of other employees' rights to find undue hardship, rejecting as insufficient generalizations about adverse impact on employee morale.¹⁷⁶

3. ACCOMMODATION UNDER THE ADA

If courts follow the analysis of the Rehabilitation Act cases, refusal to accommodate in violation of a collective bargaining agreement will be permissible, at least in situations that implicate contractual rights or expectations of other employees. Given the Congressional emphasis on the Rehabilitation Act's provisions,¹⁷⁷ one may advance a persuasive argument that the same result should obtain under the ADA. Congress clearly knew of both the statute and its judicial interpretations when it enacted the ADA, and expressly contemplated that the Rehabilitation Act would provide precedent for interpreting the "undue hardship" provision.¹⁷⁸ The analysis of the Rehabilitation Act cases may be even more persuasive in interpreting the ADA because they involved not only a nondiscrimination obligation under Section 504, but also an affirmative action obligation under Section 501, which is absent from the

1981); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981); *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403, 406 (9th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

174. See *supra* cases cited at note 173.

175. See *Tooley v. Martin-Marietta Corp.*, 648 F.2d at 1243; *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 38 (6th Cir. 1982). A more cynical view would suggest that the courts are interested in protecting the rights of employees and employers, but not of unions.

176. See *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 615 (9th Cir. 1988) (quoting *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978)) (proof of coworkers' unhappiness with accommodation is not undue hardship); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978), *cert. denied sub nom. International Ass'n of Machinists v. Anderson*, 442 U.S. 921 (1979) (general sentiment in opposition to free riders, and proof that other employees would grumble about accommodation that allowed employee to pay union dues to charity not sufficient to establish undue hardship). Cf. *Lambert v. Condor Mfg., Inc.*, 768 F. Supp. 600, 604 (E.D. Mich. 1991) (court denied summary judgment, finding triable issue of fact regarding impact on morale of employees that would result from requested accommodation.).

177. See H.R. REP. NO. 485(II), *supra* note 17, at 67, *reprinted in* 1990 U.S.C.C.A.N. 303, 349 (interpreting undue hardship consistently with regulations under Sections 501 and 504); S. REP. NO. 116, *supra* note 2, at 36 (same).

178. See *supra* note 177.

ADA.¹⁷⁹ On the other side of the argument, however, the legislative history does not cite to any of the cases dealing with accommodation in violation of a collective bargaining agreement, and many of the references to the Rehabilitation Act's precedential value cite only the regulations, which formed the basis for much of the language of the ADA but do not address the issue of accommodation and collective bargaining agreements.¹⁸⁰

Cases under the religious accommodation provisions of Title VII further support interpreting the ADA to allow refusal to accommodate in violation of a collective bargaining agreement.¹⁸¹ In addition, the legis-

179. See Greene, *supra* note 152, at 1060-62 for a description of the obligations of federal employers under Sections 501 and 504. Greene suggests that the affirmative action obligations under Section 501 support imposing upon federal employers both more stringent burdens of proof and a higher standard for reasonable accommodation. *Id.* at 1064-65, 1092, 1096-99. Cf. Jeffrey O. Cooper, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans With Disabilities Act*, 139 U. PA. L. REV. 1423, 1436-41 (1991) (arguing that reasonable accommodation requirements under Sections 501 and 504 are virtually identical). Cases regarding accommodation and collective bargaining agreements do not appear to distinguish between Sections 501 and 504. See, e.g., *Shea v. Tisch*, 870 F.2d 786 (1st Cir. 1989) (no reference to section); *Carter v. Tisch*, 822 F.2d 465 (4th Cir. 1987) (Section 504); *Daubert v. United States Postal Serv.*, 733 F.2d 1367 (10th Cir. 1984) (Sections 501 and 504); *Bey v. Bolger*, 540 F. Supp. 910 (E.D. Pa. 1982) (Sections 501 and 504). The EEOC, however, has distinguished between the requirements of Sections 501 and 504, and has recently issued a regulation pursuant to Section 501. This new regulation requires federal employers to reassign disabled employees to vacant positions when they are unable to perform the essential functions of their jobs. See 29 C.F.R. § 1614.203(g) (effective October 1, 1992); 57 Fed. Reg. 12637 (April 10, 1992). The EEOC rejected arguments that the regulation was inconsistent with existing case law which held that reassignment was not a required accommodation. The EEOC further noted that the case law frequently involved reasonable accommodation under Section 504, but not Section 501, and in any event was based, in part, on EEOC regulations. See 57 Fed. Reg. 12637 (1992). Notably, the new regulation's reassignment requirement exempts the postal service from reassignment when it would conflict with a collective bargaining agreement. 57 Fed. Reg. 12638 (1992).

180. See *supra* note 177; S. REP. No. 116, *supra* note 2, at 10, 25, 31, 32, 36; H.R. REP. No. 485(II), *supra* note 17, at 23, 54, 55, 61, 63, 64-65, 67, 70, 71, 72, reprinted in 1990 U.S.C.C.A.N. 303, 304, 336, 37, 343, 345, 346-47, 349, 352, 353, 354. But see S. REP. No. 116, *supra* note 2, at 31, 62.

181. See *supra* notes 163-76 and accompanying text. The union dues cases do not require a different conclusion since they rest on the distinction that there is no interference with the rights of other employees. See *supra* notes 173-75 and accompanying text. As indicated by the legislative history of the ADA, Congress did not intend the interpretation of undue hardship enunciated in *TWA v. Hardison* to apply to the ADA. Both the House and Senate reports suggest that the ADA rejects the *Hardison* Court's definition of undue hardship as anything more than a *de minimis* cost on the employer. See H.R. REP. No. 485(II), *supra* note 17, at 68, reprinted in 1990 U.S.C.C.A.N. 303, 350; S. REP. No. 116, *supra* note 2, at 36; Legislative History of Public Law 101-336, The Americans with Disabilities Act, Vol. 1, at 480 (Committee Print 1990) [hereinafter "Legislative History"]. The portion of the holding relying on the conflicting provisions of the collective bargaining agreement should still be persuasive in interpreting the ADA, however, particularly because both the House and Senate Reports state that a collective bargaining agreement is relevant to the determination of the reasonableness of an accommodation. See H.R. REP. No. 485(II), *supra* note 17, at 63, reprinted in 1990 U.S.C.C.A.N. 303, 345; S. REP. No. 116, *supra* note 2, at

lative history of the ADA unequivocally states that an employer is not required to "bump" an employee from a job in order to create a vacancy for reassignment of a disabled individual.¹⁸² This language suggests that an employee entitled to a vacancy under the seniority provisions of the collective bargaining agreement should not be "bumped" from the entitlement in order to accommodate a disabled employee.¹⁸³ With respect to reassignment issues, one can argue that a disabled individual does not qualify for a position if he or she does not have the requisite seniority to obtain the position under the collective bargaining agreement.¹⁸⁴

As additional support for the argument that accommodation in violation of a collective bargaining agreement is not required, "it may be a defense to a charge of discrimination that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part."¹⁸⁵ This section of the regulations could excuse accommodation that conflicts with a collective bargaining agreement, since section 301 of the NLRA requires compliance with such agreements.¹⁸⁶

Yet support for a different interpretation of the ADA exists as well. Both Congress and the EEOC suggest that a conflicting collective bargaining agreement is merely relevant to the determination of undue hardship.¹⁸⁷ While it might be argued that this simply provides the flex-

32. Nevertheless, the statement by both houses of Congress that "[t]he Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA v. Hardison*, 432 U.S. 63 (1977), are not applicable to this legislation" may be viewed as supporting a general rejection of *Hardison*. See H.R. REP. NO. 485(II), *supra* note 17, at 68, reprinted in 1990 U.S.C.C.A.N. 303, 350; S. REP. NO. 116, *supra* note 2, at 36.

182. See H.R. REP. NO. 485(II), *supra* note 17, at 63, reprinted in 1990 U.S.C.C.A.N. 303, 345; S. REP. NO. 116, *supra* note 2, at 32.

183. Joyce E. Margulies, *Practical Considerations Regarding the Collective Bargaining Relationship Under the Americans with Disabilities Act*, EMPLOYER COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT 49 (Practicing Law Institute, 1990). Another way of phrasing this argument is that a position is not vacant if another employee is entitled to the position under a seniority agreement. See Jules L. Smith, *Accommodating the Americans with Disabilities Act to Collective Bargaining Obligations Under the NLRA*, 18 EMPLOYEE REL. L.J. 273, 282 (1992).

184. See Bales, *supra* note 2, at 185. Such an argument prevails only when use of seniority as a criterion is lawful under the disparate impact provisions of the statute. *Id.* at 186.

185. See 29 C.F.R. § 1630.15(e) (1992).

186. See *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 450 (1957). The comments to both the regulation and the section of the House Report cited therein, however, refer to medical standards and safety requirements, a category of laws which does not apply to the NLRA. See 29 C.F.R. § 1630.15(e), app. (1992) (citing H.R. REP. NO. 485(II), *supra* note 17, at 74, reprinted in 1990 U.S.C.C.A.N. 303, 356). Accordingly, a court may not interpret this section to provide a defense based on compliance with the NLRA.

187. See *supra* notes 139-42 and accompanying text; H.R. REP. NO. 485(II), *supra* note 17, at 63; S. REP. NO. 116, *supra* note 2, at 32. The statute itself enumerates certain factors to consider in determining undue hardship, but does not list as a factor the provisions of a collective bargaining agreement. ADA § 101(10)(B), 42 U.S.C. § 12111(10)(B) (Supp. II 1990).

ibility to deny undue hardship where no other employees' rights are affected, the Senate Report specifically cites the seniority versus disability conflict in job assignment as an example of a situation where the collective bargaining agreement "may be considered as a factor" in determining whether to require an accommodation.¹⁸⁸ Similarly, the EEOC suggests that it *may be* an undue hardship to reassign a disabled employee to a position to which another employee is entitled on the basis of the seniority provisions of the collective bargaining agreement.¹⁸⁹ The EEOC further suggests that since the employer and the union have a duty to provide reasonable accommodation, they should work together to reach an acceptable accommodation.¹⁹⁰ These statements by Congress and the EEOC suggest that a conflicting collective bargaining agreement is not a complete defense.

The differing provisions of the Rehabilitation Act and the ADA further support the argument that the accommodation obligation in the two acts differs. Unlike the Rehabilitation Act, the ADA lists reassignment as a specific required accommodation.¹⁹¹ Most of the Rehabilitation Act cases declining to require accommodation in violation of a collective bargaining agreement involved reassignment.¹⁹² The inclusion of reassignment as an ADA accommodation might indicate Congressional intent to require reassignment despite any agreement.¹⁹³ While the absence of a statutory reassignment requirement under the Rehabilitation Act played a role in some judicial decisions denying accommodations in conflict with collective bargaining agreements,¹⁹⁴

188. See Thomas H. Barnard, *The Americans With Disabilities Act: Nightmare for Employers and Dream for Lawyers?*, 64 ST. JOHN'S L. REV. 229, 251 (1990) (citing S. REP. NO. 116, 101st Cong., 2d Sess. 32 (1989)). The House Report suggests a similar position and further states that the collective bargaining agreement is not determinative. See Legislative History, *supra* note 181, at 336.

189. See Technical Assistance Manual, *supra* note 35, at § 3.9, 8 Lab. Rel. Rep. (BNA) 405:7007.

190. *Id.*

191. See ADA § 101(9)(b), 42 U.S.C. § 12111(9)(b) (Supp. II 1990).

192. See cases cited *supra* notes 143-62 and accompanying text.

193. When one statute is based on another's provisions, principles of statutory interpretation suggest that, where the language differs, Congress intended a different interpretation. See *National Labor Relations Board v. United States Postal Serv.*, 833 F.2d 1195, 1199 (6th Cir. 1987).

194. The EEOC has revised its regulations under Section 501 and now requires reassignment for disabled employees under certain circumstances as a part of the federal employer's affirmative action obligations. See 29 C.F.R. § 1614.203(g) (1992). Interestingly, however, the EEOC exempted the postal service from the requirement where reassignment would conflict with any applicable collective bargaining agreement. *Id.* The EEOC reasoned that postal service employees, whose collective bargaining rights are governed by the National Labor Relations Act, have legitimate expectations based on seniority, while other federal employees, whose rights are governed by the Civil Service Reform Act, do not. See 57 Fed. Reg. 12638 (1992). This rationale

most of the decisions did not consider this a determinative factor.¹⁹⁵ Indeed, several courts reached the same result where the collective bargaining agreement prohibited job restructuring.¹⁹⁶ Others suggested that the decision would be the same even if the statute specified reassignment as a permissible accommodation.¹⁹⁷

The ADA contains an additional statutory difference: it renders unlawful participation in a contractual arrangement that causes discrimination.¹⁹⁸ The ADA's legislative history confirms Congressional intent to bar the employer from using a collective bargaining agreement to avoid the discrimination prohibitions.¹⁹⁹ This provision does not establish Congress's intent that the accommodation obligation prevail over a conflicting collective bargaining agreement, however. Congress modeled the statutory provision after the Rehabilitation Act regulations²⁰⁰ and, as noted, courts have uniformly construed the Rehabilitation Act as not requiring accommodation in conflict with a collective bargaining agreement.²⁰¹

A further argument based on the statutory distinction between the Rehabilitation Act and the ADA is that the Rehabilitation Act does not cover unions, while the ADA imposes an accommodation obligation on

supports enforcing the legitimate expectations of private employees also governed by the NLRA by denying accommodations that conflict with seniority rights.

195. See *supra* notes 144-59 and accompanying text.

196. See, e.g., *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1250 (6th Cir. 1985); *Daubert v. United States Postal Serv.*, 733 F.2d 1367, 1369 (10th Cir. 1984).

197. See, e.g., *Carter v. Tisch*, 822 F.2d 465, 469 (4th Cir. 1987) ("even were there a duty to reassign in some cases, such a duty would not defeat the provisions of a collective bargaining agreement unless it could be shown that the agreement had the effect or the intent of discrimination"); *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) (favorably citing the rationale of the *Carter* court).

198. See ADA § 102(b)(2), 42 U.S.C. § 12112(b)(2) (Supplement II 1990).

199. See *Smith*, *supra* note 183, at 279 (citing Legislative History, *supra* note 181, at 130); Legislative History, *supra* note 181, at 336.

200. See Legislative History, *supra* note 181, at 336 (citing 45 C.F.R. § 84.11(c)). See also 28 C.F.R. § 41.52(d) (1978) (revised, 1992) (Department of Justice Guidelines for federal agencies implementing Section 504 of the Rehabilitation Act); 29 C.F.R. § 32.12(a)(3) (1980) (Department of Labor Regulations); 34 C.F.R. § 104.11(a)(4) (1980) (Department of Education Regulations). The Department of Human Services promulgated the regulation cited by Congress. The Department of Justice now has responsibility for coordinating programs subject to Section 504 and has adopted the same regulation cited above. See *Greene*, *supra* note 152, at 1061 n.27.

201. See *supra* notes 143-62 and accompanying text. The force of this argument may be somewhat diluted by the fact that the language is not contained in the EEOC regulations governing federal agencies because all of the cases arose in federal agencies. See 29 C.F.R. § 1613.701 *et seq.* [superseded]. The EEOC regulations were, however, promulgated pursuant to Section 501, 29 U.S.C. § 791. *Id.* Federal employees are also covered by Section 504 regulations, which do contain the cited language. See *supra* note 200. See *supra* note 179 for a discussion of the relevant Rehabilitation Act cases and the statutory sections cited therein.

the union as well as the employer.²⁰² By enacting a union accommodation obligation, Congress may have intended to eliminate the virtual automatic invocation of conflicting collective bargaining agreements as undue hardship. The legislative history does not suggest that such a consideration, rather than a general desire to promote employment of, and eliminate discrimination against, individuals with disabilities, motivated Congress to include labor organizations as covered entities, however. The presence of both parties to a collective bargaining agreement as defendants in a lawsuit under the ADA may facilitate the fashioning of relief that requires overriding the agreement.²⁰³ In cases under the Rehabilitation Act and Title VII, however, courts have not articulated the absence of the union as a defendant, or in the case of the Rehabilitation Act, the absence of a cause of action against the union, as a reason for holding that the collective bargaining agreement relieved the accommodation obligation. Instead, the courts focused on the expectations of other employees created by the agreement. These same expectations exist in ADA cases, raising the same issue, which argues for the same solution—a holding that the collective bargaining agreement prevails.

The Supreme Court in *Hardison* cited Title VII's exemption for bona fide seniority systems, Section 703(h),²⁰⁴ to support the conclusion that the seniority rights under the collective bargaining agreement should prevail over the requested religious accommodation.²⁰⁵ The ADA contains no such protection for seniority systems. The absence of such language may suggest a Congressional intent that accommodation obligations prevail under the ADA.²⁰⁶ While Section 703(h) was cited as support for the Court's conclusion in *Hardison*,²⁰⁷ a close reading of the opinion indicates that the rights of other employees, which were created in part by the collective bargaining agreement, were the linchpin of

202. See *supra* notes 134-37 and accompanying text for discussion on the issue of whether the ADA requires unions to accommodate disabled employees.

203. See *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983). There, the Supreme Court required the employer to comply with an arbitration award despite its claim that it was required to violate the contract by a conciliation agreement under Title VII. The employer had entered into a conciliation agreement under Title VII that conflicted with its obligations under the seniority provisions of the collective bargaining agreement. According to the Court, the employer and the EEOC could not alter the collective bargaining agreement without the consent of the union, which was not a party to the conciliation agreement. *Id.* at 770.

204. 42 U.S.C. § 2000e-2(h) (1988).

205. See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977). The special protection for seniority systems has provided a defense in other Title VII cases as well. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 353 (1977) (seniority system that perpetuates pre-Act discrimination is not unlawful unless it had its roots in discriminatory intent).

206. See *Ervin*, *supra* note 38, at 960-62.

207. *Hardison*, 432 U.S. at 81 ("Our conclusion is supported by the fact that seniority systems are afforded special treatment under Title VII itself.").

the holding.²⁰⁸ Furthermore, the Rehabilitation Act cases reach the same result despite the absence of special statutory protection of seniority systems.²⁰⁹ Thus, the omission of such statutory protection is not dispositive of the issue.

A final argument in support of according precedence to accommodation rights over conflicting collective bargaining agreements is based on Section 501 of the ADA, which states:

(a) . . . Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790, et. seq.) or the regulations issued by federal agencies pursuant to such title.

(b) Relationship with other laws. Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any federal law or law of any state or political subdivision of any state or jurisdiction that provides greater or equal protection for the

208. See *id.*; *supra* notes 164-76 and accompanying text. *Hardison* can be distinguished in that it relied, in part, on the religious rights of the majority that are protected by Title VII. *Hardison*, 432 U.S. at 81. The ADA does not protect the rights of the able. See 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability . . ."). See Eric H.J. Stahlhut, *Playing the Trump Card: May an Employer Refuse to Reasonably Accommodate under the ADA by Claiming a Collective Bargaining Obligation*, 9 LAB. LAW. 71, 89 n.167 (1993). *Hardison* also relied on the contractual rights of other employees, however, regardless of whether the employees' exercise of those rights was based on religious practices. *Hardison*, 432 U.S. at 64. Furthermore, while the able are not protected by the ADA, Congress expressly disclaimed any intent to prefer disabled employees over equally qualified able employees. See H. REP. NO. 485(II), *supra* note 17, at 55, 56, 1990 U.S.C.C.A.N. 303, 337, 338. A more senior employee entitled to a position under the collective bargaining agreement is arguably more qualified for the position than a disabled employee, and the employer would be entitled to accord the more senior employee the position as required by the agreement. As noted *supra*, the Rehabilitation Act cases find that a federal sector employer need not accommodate a disabled employee where such an accommodation conflicts with the provisions of a collective bargaining agreement, despite the fact that the statute does not protect the rights of the able and mandates affirmative action. See, e.g., *Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir. 1989) (Postal Service not required to accommodate disabled employee where reassigning him as requested would violate the collective bargaining rights of other employees). The Rehabilitation Act requires the Postal Service to engage in affirmative action for hiring, placement and advancement of disabled individuals. See 29 U.S.C. § 791(b) (1988).

The *Hardison* decision also may have been influenced by a concern for the Establishment Clause of the First Amendment. While the religious accommodation requirement of Section 701(j) has been upheld as constitutional by several courts, see, e.g., *EEOC v. Ithaca Indus., Inc.*, 849 F.2d 116, 119 (4th Cir. 1988) (en banc), *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1246 (9th Cir.), *cert. denied*, 454 U.S. 1098 (1981), the Supreme Court, after *Hardison*, struck down as unconstitutional a Connecticut statute requiring employers to allow employees to refuse to work on their Sabbath. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). Justice O'Connor's concurrence distinguished the statute from Section 701(j) on the basis that 701(j) required reasonable rather than absolute accommodation. *Id.* at 711.

209. Indeed, at least one case reads § 703(h) into the Rehabilitation Act. See *Hurst v. United States Postal Service*, 653 F. Supp. 259, 262-63 (N.D. Ga. 1986). See discussion of *Hurst supra* notes 154-56 and accompanying text.

rights of individuals with disabilities than afforded in this Act.²¹⁰

The argument that Congress intended this Section to preempt the NLRA and agreements negotiated pursuant thereto is without merit, however.²¹¹ The ADA's statutory language and legislative history clearly indicate the intent to coordinate the ADA with other statutes protecting individuals with disabilities, insuring that the ADA does not reduce existing protections against discrimination.²¹² Interpreting the ADA to permit findings of undue hardship based on conflicts with collective bargaining agreements would be consistent with Section 501 since it would apply the standard of protection applied under the Rehabilitation Act.²¹³

4. PROBLEMS CREATED BY THE UNCERTAIN STATUS OF THE ADA ACCOMMODATION OBLIGATION

The uncertainty regarding accommodation in the face of a conflicting collective bargaining agreement creates difficulty for unions and employers deciding how to proceed in the face of accommodation requests. The EEOC suggests that when an employee initiates a request for accommodation, the employer and employee should seek a joint determination of the appropriate accommodation.²¹⁴ Problems immediately surface for both the union and the employer, however. The NLRA prohibits bargaining with an individual employee about terms and conditions of employment where a union represents employees.²¹⁵ Thus, the employer is faced with conflicting obligations of two statutes. Including the union in the accommodation process might resolve the problem with individual bargaining, but the confidentiality provisions of the ADA may prohibit the employer from sharing with the union information about the employee's disability.²¹⁶ Unless the employee chooses to disclose such information,²¹⁷ a joint decision on accommodation by all

210. ADA § 501, 42 U.S.C. § 12201 (Supp. II 1990).

211. See Smith, *supra* note 183, at 280.

212. See *id.* (citing H.R. REP. No. 485, pt. 1, 101st Cong., 2d Sess. (1990) at 44, *reprinted in* 1990 U.S.C.C.A.N. 267, 288-89).

213. See *supra* notes 143-62 and 177-80 and accompanying text.

214. See 29 C.F.R. § 1630.2(o)(3) (1992). This regulation is based on the legislative history. See H.R. REP. No. 485(II), *supra* note 17, at 65-66, *reprinted in* 1990 U.S.C.C.A.N. 303, 347-48; S. REP. No. 116, *supra* note 2, at 34.

215. See, e.g., Allied-Signal Inc., 307 N.L.R.B. 118 (1992); White-Evans Serv. Co., 285 N.L.R.B. 81 (1987); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944). See also Wood v. National Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987).

216. See 42 U.S.C. §§ 12112(c)(3)(B), 12112(c)(4)(C) (Supp. II 1990); James G. Frierson, *An Employer's Dilemma: The ADA's Provisions on Reasonable Accommodation and Confidentiality*, 43 LAB. L.J. 308 (1992) (discussing the problems that the confidentiality provisions create in accommodating the disabled employee). For more extensive discussion of the confidentiality requirements see *infra* notes 248-67 and accompanying text.

217. Even a suggestion by the employer to the employee that an accommodation would be

three parties might be impossible.

Further, the employer would violate the NLRA if it unilaterally changed the collective bargaining agreement to accommodate the employee.²¹⁸ In addition, if the accommodation required violation of the contract, the employer's breach would be subject to the grievance and arbitration procedure and ultimately to a suit for enforcement under Section 301.²¹⁹ Moreover, the confidentiality provisions of the ADA may directly conflict with the NLRA, which requires the employer to furnish to the union information that is relevant and necessary to the union's representational duties.²²⁰ Thus, compliance with the ADA may subject the employer to charges for violating the NLRA and vice versa.

The union is equally on the horns of a dilemma. Under the NLRA, the union has no duty to bargain about or agree to any midterm modification of a collective bargaining agreement.²²¹ Indeed, if it does so, it is

impossible unless information about the disability is revealed to the union might be unlawful under the ADA. See 42 U.S.C. § 12203 (Supp. II 1990) ("It shall be unlawful to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, . . . any right granted or protected by this Chapter."). The union has a duty to represent the employee as a member of the bargaining unit, however, and the confidentiality provisions do not prevent voluntary disclosure by the employee to the union.

218. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Murphy Oil USA, Inc.*, 286 N.L.R.B. 1039, 1041 (1987). While the NLRA would allow a unilateral change if the contract violated the ADA, it is likely that most provisions at issue in accommodation cases will be neutral provisions that conflict with a specific requested accommodation rather than unlawful contract provisions. See *Standard Candy Co.*, 147 N.L.R.B. 1070, 1073 (1964) (employer did not violate the NLRA by unilaterally raising wage rates to comply with new minimum wages established by the Fair Labor Standards Act, but did violate the NLRA by unilaterally granting pay increases above the required minimum wage.); see also *EEOC v. American Tel. & Tel. Co.*, 364 F. Supp. 1105, 1129 (E.D. Pa. 1973). The NLRB General Counsel's Memorandum to Field Personnel on Potential Conflicts Raised by Americans With Disabilities Act concludes that "it seems unlikely that an employer would be privileged to unilaterally change working conditions to achieve compliance with the ADA without giving a union any notice or opportunity to bargain." Memorandum GC-9 (August 7, 1992), 158 Daily Lab. Rep. (BNA) B-15 (August 14, 1992) [hereinafter General Counsel's Memorandum].

219. See Hardin, *supra* note 48, at 1419.

220. See *NLRB v. Truitt Mfg.*, 351 U.S. 149, 153 (1956); *NLRB v. Acme Industrial*, 385 U.S. 432, 435-36 (1967). The need for confidentiality may provide a defense for a refusal to provide information, but the need for the information is balanced against the need for confidentiality to determine whether the employer's refusal is lawful. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314-15 (1982); *Minnesota Mining & Mfg. Co.*, 261 N.L.R.B. 27, 32 (1982), *enf'd*, 711 F.2d 348 (D.C. Cir. 1983). See also General Counsel's Memorandum, *supra* note 218, at D. Recently, the General Counsel of the NLRB issued a complaint against an employer which ceased its prior practice of providing the union with copies of call-in logs that indicated absences from work, including sick leave. See *NLRB Charges Stemming from Conflicts with ADA Remain Low*, *Hunter Reports*, 150 Daily Lab. Rep. (BNA) d15 (Aug. 6, 1993). The General Counsel rejected the employer's argument that the logs were protected by the confidentiality provisions of the ADA. *Id.*

221. See 29 U.S.C. § 158(d) (1988). If the contract provision is unlawful under the ADA, however, the union may be engaged in unlawful discrimination by refusing to agree to a change. See *NLRB General Counsel Jerry M. Hunter's Speech on Relationship Between Americans With*

subject to challenge for breach of the duty of fair representation by employees who object to the change.²²² While the union will not be liable unless it acts arbitrarily, discriminatorily or in bad faith,²²³ such a lawsuit is costly to defend and the standards for liability are sufficiently flexible to pose a risk for the union.²²⁴

A request for accommodation that requires waiver of a provision of the collective bargaining agreement raises similar issues.²²⁵ If the union agrees, any employee disadvantaged by the agreement may file a grievance for breach of the contract. A charge for breach of duty of fair representation may follow if the union fails to pursue the grievance.²²⁶ The problem is exacerbated if the union is unable to explain its actions because of the ADA's confidentiality provisions.²²⁷ The union's agreement to a contract breach that violates the rights of able employees without sufficient information to establish that it is required by the ADA may be challenged as arbitrary.²²⁸

While compliance with the ADA may provide a defense to a fair representation action, the case law suggests that the union has a duty to investigate and act on facts, not mere representations by the employer that the particular accommodation is necessary.²²⁹ For example, under

Disabilities Act and National Labor Relations Act Delivered at American Bar Association Meeting, San Francisco, Aug. 11, 1992, 158 Daily Lab. Rep. (BNA) D-1, D-2 (August 14, 1992) [hereinafter Hunter Speech] ("A party would have no right under the NLRA to insist on adherence to contract terms that are, on their face, violative of the ADA.").

222. See *Air Line Pilots Ass'n Int'l v. O'Neill*, 111 S. Ct. 1127, 1135 (1991).

223. *Id.* at 1130.

224. See *Carter v. United Food and Commercial Workers Local 789*, 963 F.2d 1078, 1082-83 (8th Cir. 1992) (although contract fell within wide range of reasonableness, summary judgment for union reversed where allegations of plaintiffs regarding 1) provisions of contract, 2) union's conduct during negotiations which failed to protect predominantly female wrapper jobs, and 3) biased remarks by union officials and male meat cutters evidenced discrimination against women in contract negotiations).

225. An example of such a request would be a waiver of seniority to allow a less senior disabled employee to take a job to which another employee would be entitled under the agreement, or a restructuring of a job which assigned some marginal tasks to a different contractual job classification.

226. A charge for breach of the duty of fair representation may result in an unfair labor practice within the jurisdiction of the National Labor Relations Board. See *Miranda Fuel Co.*, 140 N.L.R.B. 181, 186 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). The availability of an unfair labor practice remedy does not preclude the aggrieved employee from bringing suit in federal court for breach of contractual rights by the employer and breach of the duty of fair representation by the union. See *Vaca v. Sipes*, 386 U.S. 171, 179-80 (1967).

227. Employees without a rational explanation for the union's refusal to pursue a grievance are more likely to file an action for breach of the duty of fair representation. The union's reliance on confidentiality may be viewed by the employee as a cover-up for an unlawful motive.

228. See *Vaca*, 386 U.S. at 190, 193 (a union breaches its duty of fair representation if its conduct is arbitrary, discriminatory, or in bad faith). For a discussion of the varying standards applied by lower courts using the *Vaca* standards, see Malin, *supra* note 62, at 136-44.

229. See *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 559, 559 n.4 (1976) (court of

the ADA, reassignment generally is not required unless no other accommodation is possible.²³⁰ To preserve any defense based on the ADA in a possible duty of fair representation action, the union should insure that no other accommodation is possible before agreeing to violate the contractual rights of other employees. If the employer adheres to the confidentiality provisions of the ADA, however, such a precaution may be impossible. The union can seek to obtain the necessary information through the NLRA's unfair labor practice provisions.²³¹ The legal procedures required to do so, however, may significantly delay agreement to the requested accommodation, creating a further dilemma for the employer needing to effectuate an accommodation but reluctant to turn over confidential information in violation of the ADA. Furthermore, the union has an incentive to decline to agree to an accommodation without information about the disability, for it has a duty to accommodate only known disabilities and *may* escape liability under the ADA while avoiding a duty of fair representation action.²³²

If the union pursues a grievance for an employee disadvantaged by an accommodation made to a disabled employee that violates the collective bargaining agreement, the union may be charged with discrimination or retaliation under the ADA.²³³ In addition, the union could be

appeals relied, *inter alia*, on the union's failure to investigate the grievance to find "sufficient facts from which bad faith or arbitrary conduct on the part of the local Union could be inferred."). The Supreme Court did not rule on this portion of the Court of Appeals' ruling. *See also* Miller v. Gateway Transp. Co., 616 F.2d 272, 277 (7th Cir. 1980); Tatum v. Frisco Transp. Co., 626 F.2d 55, 59 (8th Cir. 1980); Newport News Shipbuilding & Dry Dock Co., 236 N.L.R.B. 1470, 1471 (1978), *enforced in part*, 631 F.2d 263 (4th Cir. 1980); Beverly Manor Convalescent Ctr., 229 N.L.R.B. 692, 696 (1977). Recent Supreme Court cases suggest that mere negligence does not breach the duty of fair representation, however. *See* Air Line Pilots Ass'n v. O'Neill, 111 S. Ct. 1127, 1135 (1991); United Steelworkers of Am. v. Rawson, 495 U.S. 362, 372-73 (1990) and discussion of those cases in Hardin, *supra* note 48, at 1449-51.

230. The comments to the EEOC regulations state that "[i]n general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship." 29 C.F.R. § 1630.2(o), app. (1992). In addition, reassignment is available to current employees only, not to applicants. *Id.*

231. *See supra* note 220 and accompanying text.

232. The disabled employee might argue that a request by the employer that the union agree to an accommodation in conflict with the agreement would give the union sufficient knowledge of the employee's limitations.

233. A discrimination charge could be based on the union's failure to accommodate. *See supra* notes 134-37 and accompanying text. *See also supra* note 163. The union might also be charged with retaliating against the disabled individual for opposing discrimination. *See* 42 U.S.C. § 12203(a) (Supp. II 1990). In addition, the union could be charged with breach of the duty of fair representation owed to the disabled employee. *See* Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1253 (8th Cir. 1980). The union might argue that the claim under the ADA is preempted by the NLRA. *See* Rabin, *supra* note 2, at 244-47 (noting that some courts have found state laws barring discrimination against the disabled to be preempted by the NLRA where the claims are dependent on an analysis of the collective bargaining agreement). Rabin suggests that the ADA is unclear on this issue. In light of the Supreme Court's decision in *Gardner-Denver*, it seems

accused of interfering with the disabled individual's exercise of rights under the Act.²³⁴ A pattern of pursuing grievances in an effort to overturn accommodations might be construed as intentional discrimination against the disabled.

Furthermore, the union may be politically damaged by inexplicably favoring one employee over others who have clear contract rights. Such damage may impair the union's ability to represent all of the employees effectively, for a divided union may lack sufficient power to negotiate a favorable agreement. The employer also may be adversely affected by the increase in both grievances and ADA claims.

The EEOC and the NLRB are aware of the potentially conflicting obligations under the two statutes, but have provided little guidance.²³⁵ The two agencies recently reached agreement on a procedure coordinating enforcement of the ADA and the NLRA, which provides for consultation between the agencies when charges implicating both statutes are filed, but provides no substantive guidance for the employers, unions and employees.²³⁶ The EEOC's substantive guidance, as discussed ear-

unlikely that this argument will prevail. *See infra* notes 292-302 and accompanying text for discussion of *Gardner-Denver*. Rabin's suggestion that these cases should be resolved in one forum, arbitration, deserves serious consideration, however. *See* Rabin, *supra* note 2, at 249-363. Notably, even if the preemption argument succeeded, the union would still face the duty of fair representation claim; the employer would face a breach of contract claim. *See* *Miller v. Publishers Paper Co.*, 131 L.R.R.M. 2578, 2581-85 (D. Or. 1986). In one of the first NLRB cases raising an ADA issue, a disabled employee charged that the union breached its duty of fair representation by refusing to support a transfer for accommodation purposes which would conflict with the provisions of the collective bargaining agreement. *See* *Local 876, United Food & Commercial Workers*, 1993 W.L. 257550 (N.L.R.B. G.C. June 23, 1993). The General Counsel refused to issue a complaint, finding that the union's adherence to the contract was neither motivated by discrimination, nor was it arbitrary. *Id.* at 3. The General Counsel decided that the union had a rational basis for subordinating the interests of the disabled employee to those of other members of the bargaining unit who would be adversely affected by the transfer. *Id.* The union had agreed to other proposed accommodations which were rejected by the employee. *Id.*

234. *See* ADA, § 503(b), 42 U.S.C. § 12203(b) (Supp. II 1990).

235. *See* *Hunter Speech*, *supra* note 221, at D-1 through D-3; *General Counsel's Memorandum*, *supra* note 218, at B-15; *Tension Between Disabilities Act, NLRA "Starving for Guidance," EEOC Counsel Says*, 119 Daily Lab. Rep. (BNA) A-7 (June 19, 1992) [hereinafter *EEOC Counsel Speech*].

236. While early efforts by the two agencies to issue a joint memorandum of understanding failed, *see* *Disabilities Act's Conflicts Cause Problems*, 140 Lab. Rel. Rep. 537, 538-39 (Aug. 24, 1992), talks between the EEOC and NLRB continued. *See* *NLRB Charges Stemming from Conflicts With ADA Remain Low, Hunter Reports*, 150 Daily Lab. Rep. (BNA) d15 (Aug. 6, 1993). On November 16, 1993 the EEOC and the NLRB issued a Memorandum of Understanding Between the General Counsel of the National Labor Relations Board and the Equal Employment Opportunity Commission. *See* *NLRB, EEOC Memo of Understanding on Procedure for Coordinating ADA, NLRA*, 220 Daily Lab. Rep. (BNA) d24 (November 17, 1993) (available on Westlaw). The memorandum provides for consultation and sharing of information. *Id.* When a charge is filed with the NLRB alleging an unlawful refusal to bargain and resolution of the charge would require interpretation of the charged party's obligations under the ADA, the NLRB General Counsel has agreed to consult with the EEOC's Office of Legal Counsel regarding the

lier, is far short of definitive.²³⁷ Similarly, the NLRB General Counsel's memorandum to the field personnel investigating unfair labor practice charges offers little help to employers and unions attempting to conform their conduct to the law.²³⁸ Both agencies and the Congress have left the issues to be resolved through adjudication. The lack of direction leaves employers and unions at risk, unable to determine how to comply with the ADA and the NLRA.

5. RESOLUTION OF THE ACCOMMODATION DILEMMA

The best solution is a legislative one. Congress should directly address and clarify the obligations of the union and the employer when the only available reasonable accommodation conflicts with the collective bargaining agreement. Thorough consideration and resolution of the union's role under the ADA would eliminate many of the uncertainties and the conflicts with the NLRA. The required administrative processes under the ADA and the NLRA prevent disputes arising from a particular set of facts from consolidated resolution in one forum. Therefore, legislative action to clarify the relationship between the two statutes is particularly important because of the potential for conflicting decisions in the same dispute.²³⁹ Despite the desirability of Congress-

applicability of the ADA after completion of the investigation. *Id.* The same procedure will be followed when an individual without a disability files an NLRB charge alleging that an accommodation to a disabled individual violated the NLRA. *Id.* Similarly, when the EEOC receives a charge alleging discrimination that would require interpretation of the charged party's duties under the NLRA, the EEOC will consult with the NLRB's Division of Advice regarding the applicability of the NLRA after completion of the investigation. *Id.* When a duty of fair representation charge is filed with the NLRB by an individual with a disability and the individual files a discrimination charge with the EEOC based on the same conduct, the NLRB will dismiss based on preliminary investigation if possible, but if not, it will defer to the EEOC investigation for a reasonable period. *Id.* If the charge is resolved by conciliation, the NLRB will dismiss, but if not the two agencies will consult and the NLRB will decide whether to proceed with its investigation or defer for a further time period. *Id.* If the EEOC finds no cause, the NLRB will resume its processing of the charge. *Id.* If an individual files a charge with the NLRB and none with the EEOC, the NLRB will notify the person of the right to file a charge with the EEOC. *Id.* If an EEOC charge is filed, the deferral process described above will be followed. *Id.*

237. See *supra* notes 134-42 and accompanying text.

238. See General Counsel's Memorandum, *supra* note 218, at B-15 ("Due to the novel and complex issues involved, any unfair labor practice charge raising issues under the Americans with Disabilities Act must be referred to the Division of Advice for review.").

239. The existence of two forums for resolution of the same or related disputes may create difficult issues of preclusion in litigation of the claims. For discussion of preclusion in the context of administration determinations, see Marjorie A. Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims*, 65 IND. L.J. 367 (1990); Joel deJesus, *Interagency Privy and Claim Preclusion*, 67 U. CHI. L. REV. 195 (1990); Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422 (1983).

Professor Rabin's argument for arbitrating cases involving disability claims and contract rights attempts to address, in part, the multiple forum problem. See *infra* note 314. The use of

sional action, however, reconsideration of the ADA in the near future appears unlikely. Thus employers, unions, employees, and the courts and agencies involved must consider other solutions. The recommendations below are directed to these parties, but legislative adoption of the recommendations remains the best alternative.

a. The Exculpatory Clause

Congress has suggested that the employer and the union negotiate a clause in the contract authorizing the employer to take all actions necessary to comply with the ADA.²⁴⁰ The EEOC *Technical Assistance Manual* reiterates this suggestion.²⁴¹ Agreement to such a provision requires the union to cede to the employer the authority to act unilaterally in many areas. Many unions may be unwilling to surrender the right to bargain about accommodations that might require abrogation of the agreement. Cessation of the right to bargain over accommodations would permit the employer to choose the accommodation that violated the agreement, rather than another accommodation that might be equally effective. Such freedom could be an effective tool for the employer desirous of undermining the union and destroying bargaining unit solidarity. Other employers, in good faith, are likely to choose the least expensive accommodation, regardless of its impact on other employees' collectively bargained rights. Moreover, because of the confidentiality requirements, the union might be unable to verify that an employer action is taken to comply with the statute, thereby increasing the union's reluctance to agree to such a provision.²⁴²

Furthermore, removing the union from the process of determining appropriate accommodations²⁴³ might limit the range of possible accom-

arbitration would not necessarily encompass any claims under the NLRA that arose out of the dispute, however. The NLRB has a policy of deferring to the arbitration procedure cases where the unfair labor practice claim overlaps with a contractual claim subject to arbitration. See *Hardin*, *supra* note 48, at 1012-82. If a case met the NLRB's standards for deferral, then it might be resolved in the arbitration process as well. See *id.* for discussion of the standards for deferral.

240. See H.R. REP. NO. 485(II), *supra* note 17, at 63, reprinted in 1990 U.S.C.C.A.N. 303, 345; S. REP. NO. 116, *supra* note 2, at 32.

241. See *Technical Assistance Manual*, *supra* note 35, at §§ 3.9, 7.11(a), 8 Lab. Rel. Rep. (BNA) 405:7007, 405:7050.

242. Union agreement to such a provision could eliminate the argument that the union is entitled to information about the disability in order to comply with the statute's requirements. See *infra* notes 248-67 and accompanying text for an argument regarding union entitlement to information despite the confidentiality provisions.

243. As noted *supra* notes 215 and 218 and accompanying text, the NLRA requires the employer to bargain with the union over any changes in terms and conditions of employment. If the union has clearly and unequivocally waived the right to bargain, however, the employer can make changes unilaterally. See *Rockwell Int'l Corp.*, 260 N.L.R.B. 1346, 1347 (1982). The suggested contract provision appears to be a broad waiver of the right to bargain over accommodations to the disabled.

modations considered and impede acceptance of the chosen accommodation by able members of the bargaining unit. Where the union participates in the process of finding the appropriate accommodation, it has a greater chance of convincing any disgruntled members of the bargaining unit of the need for the accommodation.

A union unconcerned about agreement to such a provision, or willing to agree to it in exchange for certain concessions,²⁴⁴ may still confront grievances from members of the bargaining unit disadvantaged by particular accommodations.²⁴⁵ The union must be prepared to respond to such grievances, perhaps uninformed of the reason for the employer's action. Duty of fair representation charges and political problems may be generated. On the other hand, where such a clause is contained in the agreement, the union can avoid liability for any discriminatory action by the employer taken pursuant to the agreement.²⁴⁶ The union would risk liability only for intentionally discriminatory actions by the union.²⁴⁷

b. The Confidentiality Issue

If no exculpatory clause is negotiated, the employer and union must deal with the impact of the confidentiality provisions.²⁴⁸ The confidentiality requirements present obstacles to negotiation of any accommodation by the union, the employer, and the disabled employee. They hinder the union's ability to comply with the ADA and fairly represent all employees as required by the NLRA. Additionally, the requirements impose an obligation on the employer that may conflict with the obligation under the NLRA to provide the union with information relevant to its bargaining duties.²⁴⁹ This conflict could be minimized by a change in the regulations allowing the employer to disclose to the union, and to

244. Courts should not find failure to agree to such a provision to be unlawful discrimination or even evidence of unlawful discrimination. *See supra* notes 101-15 and accompanying text. The union should not be required to sacrifice its representation rights or the collectively bargained rights of the employees that it represents to avoid liability for discrimination. Such a finding would negate the rights Congress provided in the NLRA.

245. Such grievances could come from able employees adversely affected by an accommodation or from disabled employees alleging discriminatory treatment.

246. *See supra* notes 75-76 and accompanying text.

247. For example, if the employer refused to accommodate the employee, and the union refused to process a grievance over that failure *because* of the employee's disability, then liability should attach.

248. While the existence of some disabilities is obvious, a disability requiring use of a wheelchair, for example, other disabilities may not be apparent. *See* Frierson, *supra* note 216, at 310. Frierson highlights a number of the potential problems with the confidentiality provisions. As Frierson notes, insuring that disabled individuals maintain as much privacy as they desire about their disability is a laudable goal. *Id.* at 310. For individuals with AIDS, where widespread fear and discrimination are a reality, nondisclosure may be essential. *See* Ron Stodghill, II, *Managing AIDS*, Bus. Wk., February 1, 1993, at 48.

249. *See supra* note 220 and accompanying text.

employees affected by any accommodation, sufficient information to insure both effective negotiation and appropriate accommodation.

In most cases, disclosure to the union will be advantageous to the disabled employee. The union, which has a duty to represent the disabled employee, can most effectively accomplish that representation if it is aware of the specific nature of the disability. Furthermore, if the union takes action adverse to the disabled individual, establishing discrimination will be extraordinarily difficult if the individual cannot prove the union's knowledge of the disability. In addition, disclosure is required in order to trigger the union's accommodation obligation under the statute, for a covered entity must accommodate only "known physical or mental limitations".²⁵⁰ For these reasons, the employee may choose to disclose the disability to the union.

In the absence of voluntary disclosure, the statute specifically authorizes the covered entity to disclose medical information only to supervisors and managers, first aid and safety personnel, and government officials investigating compliance with the ADA.²⁵¹ The EEOC regulation additionally authorizes release of information to state workers' compensation offices or second injury funds.²⁵² The comments emphasize that such disclosure serves purposes that do not conflict with the ADA.²⁵³ Similarly, disclosure to union officials in order to enable negotiation of reasonable accommodations does not conflict with the ADA, but furthers its purposes. Allowing disclosure would enable the employer and the union to comply with both the NLRA and the ADA.²⁵⁴

Complete disclosure of all aspects of an employee's disability generally will be unnecessary. Like supervisors and managers, the union

250. See *supra* notes 117-19 and accompanying text (citing 42 U.S.C. § 12112(b)(5)(A)).

251. See ADA §§ 102(c)(3)(B), 102(c)(4)(C), 42 U.S.C. §§ 12112(c)(3)(B), 12112(c)(4)(C) (Supp. II 1990).

252. See 29 C.F.R. § 1630.14(b), app. (1992).

253. *Id.*

254. Authorization of disclosure does not resolve all of the potential conflicts, but would assist in reconciling the two statutes. In discussing the statutory conflicts, the NLRB General Counsel cites a provision in the EEOC regulations stating "it may be a defense to a charge of discrimination that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part." See *Hunter Speech*, *supra* note 221, at D-2 (quoting 29 C.F.R. § 1630.15(e)). That section could be interpreted both to excuse accommodation which conflicts with a collective bargaining agreement, because Section 301 of the NLRA has been interpreted to require compliance with such agreements, and to allow disclosure when required by the NLRA. In addition, an employer or union could argue, as a defense to a discrimination action based on a contract provision that is not clearly unlawful, that unilateral change in the collective bargaining agreement is prohibited by the NLRA. Because both the comments to the regulation and the section of the House Report cited therein refer to medical standards and safety requirements, this section may not be interpreted to provide a defense based on compliance with the NLRA. See *supra* notes 185-86 and accompanying text.

needs to know only the limitations that affect the employee's job, not the cause of the disability.²⁵⁵ For example, it should be sufficient that the union knows that the employee has a disability that requires frequent rest breaks, not whether the disability results from AIDS, cancer, arthritis or some other cause. Before a duty to accommodate attaches, however, the union is entitled to verification that the employee is a qualified individual with a disability in need of accommodation.²⁵⁶ Limited disclosure will provide some protection for employees with the legitimate concern that disclosure of a disability would cause stigma and discrimination.

Authorization of limited disclosure²⁵⁷ to employees affected by any accommodation also would resolve some of the statutory problems. Employees aware of the need for accommodation will be less likely to grieve any contract violation resulting from the accommodation, and less likely to charge the union with a failure of the fair representation duty.²⁵⁸ Indeed, an employee might volunteer to change shifts, exchange job duties, or take other accommodating action if he or she is aware that the action is necessary to allow a disabled colleague to remain employed.²⁵⁹ At a minimum, when the union declines to process the grievance, it should be able to disclose to the able employee the basis for its decision. This would avoid unnecessary litigation.

The EEOC should amend the regulation to permit the same disclosure to unions and to affected employees that is authorized for supervisors and managers. While the regulation might be challenged as contrary to the statute, which lists specific exceptions to the disclosure prohibition, the regulation should be upheld as consistent with the statutory purpose and necessary to enable the union's compliance with its duty of reasonable accommodation.²⁶⁰

255. The statute and regulations provide that "supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations." 42 U.S.C. §§ 12112(c)(3)(B)(i), 12112(c)(4)(C) (Supp. II 1990); 29 C.F.R. §§ 1630.14 (c)(1)(i), 1630.14(d)(1)(i) (1992).

256. See 29 C.F.R. § 1630.9 (app.) (1992).

257. Employees need only know that the actions taken by the employer with respect to the disabled employee constitute an accommodation under the ADA which has been discussed with and agreed to by the union.

258. See S. REP. NO. 116, *supra* note 2, at 28-29 (citing Wolfe, *Disability is No Hardship for du Pont* (study showed that "[f]ellow employees did not resent necessary accommodations made for employees with disabilities")).

259. See, e.g., Chris Fiscus, *American Expresses Its Support*, Arizona Business Gazette, July 5, 1991 at 13 (American Express has more employees than necessary who have volunteered to assist disabled employees); *Expansion of Government Leave Programs Urged*, 143 Lab. Rel. Rep. (BNA) 155 (May 31, 1993) (federal government pilot programs that allow employees to donate their annual leave time to others with health problems requiring extended absence have worked well).

260. See *National Confectioners Ass'n v. Califano*, 569 F.2d 690, 693 (D.C. Cir. 1977).

Even absent amendment, the courts should interpret the statute to allow the disclosure required to make an effective accommodation.²⁶¹ If the employer²⁶² discloses only information necessary to effectuate an accommodation, a court should find no breach of the confidentiality requirements.²⁶³ Alternatively, if the employee refuses to authorize the employer to disclose to the union or affected employees the information necessary to negotiate and implement an accommodation, then the employer should prevail in a complaint for failure to accommodate.²⁶⁴ It would be an undue hardship for the employer to violate the NLRA in order to accommodate the employee. The employer would be unable to bargain with the union about the accommodation without at least limited disclosure.²⁶⁵ In order to succeed with this defense, however, the employer should be required to show both that it attempted to obtain the employee's agreement to disclosure and that no accommodation that did not require disclosure was available.²⁶⁶

The confidentiality provisions of the statute would be further limited if interpreted to apply only to information obtained in the course of a medical examination. Such an interpretation comports with the statu-

261. See Frierson, *supra* note 216, at 311.

262. The same rule should apply to the union if it discloses information to employees affected by an accommodation.

263. Information necessary to effectuate an accommodation would include telling employees who will be affected by an accommodation that the action is taken to accommodate a disabled employee. Such disclosure is necessary to prevent morale problems, grievances, and duty of fair representation complaints.

264. The employer should prevail only with respect to the particular accommodation, however. If any other reasonable accommodation is available that could be implemented without disclosure and undue hardship, the employer would be required to make such an accommodation. As the NLRB General Counsel suggests, "putting a desk on blocks, providing a ramp [or] adding braille signage" probably would not be changes in terms and conditions of employment that would require bargaining with the union. *Hunter Speech*, *supra* note 221, at D-1. Nor should such changes adversely affect other employees.

265. As noted earlier, the employer would violate the NLRA by not bargaining with the union about the accommodation, by unilaterally modifying the collective bargaining agreement, and by refusing to give the union relevant information about the accommodation. See *supra* notes 215-20 and accompanying text.

266. See Frierson, *supra* note 216, at 311; *supra* note 264. Encouraging the employer to request authorization from the employee creates a risk that the employer will coerce employees to reveal confidential information under threat of termination for inability to accommodate. *Id.* In fact, however, the statute creates the problem because knowledge is required to trigger the accommodation and nondiscrimination obligations. In situations where the only available accommodation requires agreement of, or accommodation by, the union, the employee must choose to disclose or forego the accommodation. As noted earlier, however, disclosure can be limited to what is necessary to trigger the accommodation obligation and effectuate the accommodation. Efforts to coerce unnecessary disclosure or to avoid accommodation by failing to explain to the employee the need for disclosure and the limited nature of the disclosure would constitute unlawful discrimination.

tory language.²⁶⁷ If the employer or the union obtained information about the employee's disability from other sources, the confidentiality requirements would not apply. If the employer initially learned about the disability from the examination, however, and in following up on the examination received additional information from the employee or other sources, there is a persuasive argument that all of the information should be protected as confidential. Absent the examination, the employer would not have had the medical data. This interpretation of the statute might allow the employer to reveal some data about the disability to the union or other employees for accommodation purposes without risk of violating the ADA.

Interpreting the ADA to allow the disclosure necessary to effectuate accommodations relieves some of the problems posed by the duty to accommodate in the unionized workplace. Most importantly, it allows the employer, the union, and the disabled employee to jointly achieve an appropriate accommodation that accomplishes the goals of the ADA while protecting the rights of other employees. A significant remaining issue, however, is whether accommodation is required when it conflicts with a provision of the existing collective bargaining agreement.

c. Conflicts Between Accommodations and the Collective Bargaining Agreement

Although several commentators have argued that the duty of accommodation should outweigh a conflicting provision of the collective bargaining agreement,²⁶⁸ few have considered thoroughly the problems faced by the employer and the union when confronted by the dual obligations, particularly conflicts with the NLRA.²⁶⁹ While significant weight should be given to the need for accommodation in light of

267. The statute states that "[a] covered entity may require a medical examination . . . if . . . information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record" ADA § 102(c)(3); 42 U.S.C. § 12112(c)(3) (Supp. II 1990). The provisions for medical examinations of employees are subject to the same conditions. See ADA § 102(c)(4)(C); 42 U.S.C. § 12112(c)(4)(C) (Supp. II 1990).

268. See Bales, *supra* note 2, at 203; Renee L. Cyr, Note, *The Americans With Disabilities Act: Implications for Job Reassignment and the Treatment of Hypersusceptible Employees*, 57 BROOK. L. REV. 1237, 1257-59; Barbara Kamenir Frankel, *The Impact of the Americans with Disabilities Act of 1990 on Collective Bargaining Agreements*, 22 SW. U. L. REV. 257, 283-84 (1992). Cf. Stahlhut, *supra* note 208, at 93-95 (advocating a balancing of rights); Ervin, *supra* note 38, at 971-72 (urging a balancing, but arguing for greater weight on the disabled employee's right to accommodation); David S. Doty, *The Impact of Federal Labor Policy on the Americans with Disabilities Act of 1990*, 1992 B.Y.U. L. REV. 1055, 1088-89 (1992) (suggesting that reassignment in violation of the collective bargaining agreement should be considered); Smith, *supra* note 183, at 282-83 (arguing that the collective bargaining agreement should prevail).

269. See *supra* notes 214-34 and accompanying text.

the purposes of the ADA, the NLRA and collective bargaining agreements negotiated thereunder must also weigh in the balance. The legislative history of the ADA and the language of the EEOC regulations suggest that Congress did not contemplate that a conflict with the collective bargaining agreement, without more, constitutes undue hardship. The concern raised throughout the legislative history, the regulations, and the cases under the Rehabilitation Act and Title VII is the impact of accommodation on the collectively bargained rights of other employees.

While every accommodation that conflicts with the contract violates the rights of employees protected by the agreement in a broad sense, many accommodations will not infringe directly on any employee's contractually based expectations. For example, allowing a supervisor to perform some marginal tasks within the disabled employee's job description may violate a contractual ban on supervisors engaging in bargaining unit work. The contract provision furnishes important protection for employees against erosion of bargaining unit jobs. A limited waiver of the provision to allow accommodation of a disabled employee, however, does not significantly threaten the bargaining unit, nor does it infringe on any employee's expectations about his or her own job, or a job to which the employee is entitled under the seniority provisions of the agreement. Similarly, a contractual provision for two fifteen-minute breaks and one thirty minute lunch period each day gives important rights to unit employees. Allowing a disabled employee more breaks may violate the agreement, but does not interfere with any employee's right to the rest periods guaranteed by the agreement.

While the employer should be required to bargain with the union about these accommodations, the conflict between the accommodation and the agreement should not constitute an undue hardship excusing such an accommodation. Thus, an employer or union's refusal to agree to such an accommodation would be an unlawful failure to accommodate absent unusual circumstances.²⁷⁰ Additionally, failure to process a

270. If the employer's action was part of a pattern of eroding the bargaining unit by using supervisors to perform bargaining unit work, for example, then the union's opposition to such an accommodation would not be unlawful. See *Eastern Slope Rural Tel. Ass'n*, 80 Lab. Arb. Rep. (BNA) 986 (1983) (MacLean, Arb.) and *Bell Tel. Co.*, 75 Lab. Arb. Rep. (BNA) 750 (1980) (Garrett, Arb.) for examples of arbitration cases involving use of nonmembers of the bargaining unit to do bargaining unit work.

Where one party refuses to agree to such an accommodation, the employee can file a charge for failure to accommodate with the EEOC. See ADA, § 107(a), 42 U.S.C. § 12117(a) (Supp. II 1990) (incorporating 42 U.S.C. § 706(b) (1988)). Only the objecting party should be found liable. Any other rule would penalize the union when it was willing to agree and had no way to implement the accommodation on its own. In addition, the employer willing to accommodate would be forced to choose between risking liability under the ADA or implementing the

grievance challenging the accommodation would not violate the duty of fair representation. In order to reconcile the ADA with the NLRA, which privileges refusal to negotiate about or agree to modifications of a collective bargaining agreement during its term, the rule would not apply where a reasonable accommodation was available that did not conflict with the collective bargaining agreement.²⁷¹ Thus, neither the employer nor the union would violate the ADA by refusing to agree to an accommodation that violated the agreement unless no other effective accommodation was possible.

On the other hand, an accommodation that would restructure an able employee's job, force an able employee to change shifts, or deny an able employee a job to which he or she would be entitled under the agreement significantly impacts the able employee's contractual rights.²⁷² While the employer, the union, and the disabled employee,

accommodation over the objection of the union and risking an unfair labor practice charge for unilateral change or a grievance for violating the agreement. While it is unlikely that the NLRB would find that the type of accommodations encompassed by this rule would rise to the level of an unlawful unilateral change, the employer should not be forced assume such a risk.

271. Section 8(d) of the NLRA provides that neither party is required to discuss or agree to any modification of the contract which is to become effective before the contract allows those terms and conditions to be reopened. See 29 U.S.C. § 158(d) (1988). The ADA's duty to accommodate seems to require the parties to discuss any variation in the contract terms that might be an appropriate accommodation, however, at least if no other accommodation is available. See Stephen M. Crow & Sandra J. Hartman, *ADA Versus NLRA: Is a Showdown Imminent Over Reasonable Accommodation?*, 44 Lab. L.J. 375, 378 (1993). The rule proposed here would require agreement, not to contract modification, but to a waiver of the contractual requirements for purposes of accommodation under limited circumstances. The bargaining requirement may be justified, although it requires discussion of waiver of existing contract terms, because disability discrimination is a mandatory subject of bargaining. See Hardin, *supra* note 48, at 901-02 n.302.

272. Bales suggests that since reassignment is considered only when no other reasonable accommodation is available, the disabled employee seeking reassignment should be accommodated regardless of the agreement because the alternative is discharge. See Bales, *supra* note 2, at 203. While accommodation ensuring immediate continued employment is preferable, where unavailable because of another employee's entitlement to the job, the employee with a disability could be placed on medical leave for the time necessary to obtain another position for which he or she is qualified. If the agreement limits medical leave, extension of the leave would be a violation of the agreement that would not adversely affect the rights of other employees. This is not a perfect solution if the leave is unpaid, but it provides an alternative that ensures continuing employment.

It should also be noted that these accommodations will not inevitably conflict with the collective bargaining agreement. A particular agreement might give the employer the right to change job duties unilaterally. Under other circumstances, the disabled employee might have sufficient seniority to obtain a favorable shift or job.

Courts adjudicating both Title VII and constitutional discrimination claims have a history of protecting the legitimate expectations of existing employees. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986). Where necessary to provide a remedy to identified victims of discrimination, however, courts have tolerated some interference with such expectations, particularly when the expectations were created in part by the discrimination. See *Franks v. Bowman Transp. Sys.*, 424 U.S. 747 (1976) (discriminatees entitled

might voluntarily agree to effectuate such an accommodation, the conflict with the able employee's rights under the agreement would constitute undue hardship excusing the accommodation. This test provides a clear guide for the employer and the union as to when accommodation is required, while encouraging the parties to negotiate an accommodation satisfactory to all.²⁷³

In certain types of accommodation cases, the employer and the union that fail to accommodate in violation of the agreement might invoke a second defense. If the employee requests reassignment to, or an applicant assignment to, a job that is not available under the agreement because of the disabled employee's lack of seniority or lack of experience in other jobs, then the employee is not a qualified individual with a disability under the statute.²⁷⁴ In order to prevail in such a case, the disabled employee or applicant must show that the qualification requirements that bar the individual are unlawful because they were adopted or applied with discriminatory intent²⁷⁵ or they have an unjustified discriminatory impact.²⁷⁶

Some may criticize this solution as insufficiently protecting disabled employees. The solution may, in fact, prevent accommodation of some disabled employees.²⁷⁷ Predictions of substantial adverse effects for disabled employees, however, presume union insensitivity to the

to award of seniority retroactive to the date on which the discriminatory refusal to hire occurred); *Lander v. Lujan*, 888 F.2d 153 (D.C. Cir. 1989) (bumping innocent employee permissible to remedy Title VII violation). *But cf.* *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114 (4th Cir. 1983) (bumping of innocent employee not permissible). It is clear that the ADA does not require bumping in order to accommodate. See ADA § 101(9), 42 U.S.C. § 12111(9) (Supp. II 1990).

273. Both Stahlhut and Ervin propose case by case balancing approaches that take into account the interests of the disabled employee and those of other employees who would be affected by an accommodation. See Stahlhut, *supra* note 208, at 93-5; Ervin, *supra* note 38, at 970-71. The ad hoc balancing approaches are appealing for their flexibility, but they provide far less guidance for the parties than the test advocated here and will create more litigation. The union and the employer remain free to balance the interests in each case and make an accommodation agreement, however.

274. The definition of the term "qualified individual with a disability" could be clarified in the EEOC regulations to include satisfaction of the seniority requirements for the position. Currently, the regulations define the term as "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires." See 29 C.F.R. § 1630.2(m) (1992). While the regulation as written would cover job-related seniority requirements, specific inclusion of seniority, along with skill, experience and education would clarify the issue.

275. See ADA, § 102(a), 42 U.S.C. § 12112(a) (Supp. II 1990).

276. See ADA §§ 102(b)(3), (6), (7), 42 U.S.C. §§ 12112(b)(3), (6), (7) (Supp. II 1990).

277. Interestingly, however, while the accommodation duty has been called the centerpiece of the law, only 20% of the ADA cases filed with the EEOC in 1992 alleged failure to accommodate. Statement by Christopher Bell, Acting Associate Legal Counsel, Americans with Disabilities Act Services, Equal Employment Opportunity Commission, at ALI-ABA Video Law Review, Americans with Disabilities Act (December 10, 1992).

needs of disabled employees. While the passage of the ADA and the evidence presented in support of its enactment demonstrate widespread discrimination against disabled individuals, the legislative history reflects no testimony regarding union discrimination. Indeed, unions actively supported passage of the statute.²⁷⁸ Even before passage of the ADA many unions negotiated contractual protections for disabled employees.²⁷⁹ Furthermore, seniority requirements for reassignment, the most frequently cited area of potential conflict, will not bar many disabled employees because older, longer service employees are more likely to be disabled than younger employees.²⁸⁰

278. See Sam F. Parigi et al., *Labor Law and the Future of Organized Labor under the Clinton Administration*, 44 LAB. L.J. 313, 313 (1993); Letter from Gerald W. McEntee, International President, AFSCME, to Frances M. Hart, Executive Officer, EEOC 1 (April 29, 1991) (on file with EEOC in Comments on the EEOC Proposed Regulations on Title I of the ADA); George J. Kourpias, Comments of the International Association of Machinists and Aerospace Workers on the Equal Employment Opportunity Commission's Notice of Proposed Rulemaking under the Americans with Disabilities Act 3 (April 29, 1991) (on file with the EEOC); *Unions Are Not in Conflict with ADA, Conference Attendees Told*, 92 Daily Lab. Rep. (BNA) at d7 (May 14, 1993) (unions have traditionally worked for the employment rights of employees with disabilities); *Unions Said Likely to Have to Bow to ADA in Conflicts Over Seniority*, 63 Daily Lab. Rep. (BNA) at A-8 (April 5, 1993) (unions are part of the solution to disability discrimination); *Union Contract Provisions May Conflict With Federal Disability Act Obligations*, 13 Daily Lab. Rep. (BNA) at A-5 (January 21, 1992) (labor movement was one of the groups lobbying for disability rights act).

279. See *Bey v. Bolger*, 540 F. Supp. 910, 922-23 (E.D. Pa. 1982) (collective bargaining agreement provides for reassignment to light duty status for ill or injured full-time regular or part-time flexible employee with 5 years of service, or any such employee injured on the job regardless of years of service); *Johnson v. United States Postal Serv.*, 27 M.S.P.R. 426, 428 (1985) (collective bargaining agreement requires Postal Service to reassign to light duty employees disabled by injury at work); see also *Waterous Co.*, 100 Lab. Arb. Rep. (BNA) 278, 280, 281, 284 (1993) (Reynolds, Arb.) (under contract in effect prior to effective date of ADA, arbitrator ordered employer to assign employee disabled by occupational injury to light duty work); *Iowa Elec. Light & Power Co.*, 100 Lab. Arb. Rep. (BNA) 393, 399 (1993) (Pelofsky, Arb.) (contract prohibits disability discrimination and arbitrator held that learning disabled employee was unjustly discharged for failing to pass hazardous materials test because company did not determine the nature of the disability and tailor instruction to the disability); *Madison Adult Education Dist.*, 100 Lab. Arb. Rep. (BNA) 450, 455-56 (1993) (Johnson, Arb.) (employer violated disability discrimination clause of collective bargaining agreement by failing to reasonably accommodate disabled employee with a transfer to a vacant position); *USS-Minnesota Ore Operations*, 100 Lab. Arb. Rep. (BNA) 791, 794 (1993) (agreement contained provisions authorizing the company and union to disregard seniority rights in the job placement of disabled employees by mutual agreement). The first two cases involved postal service unions. The latter four cases involved locals of the International Association of Machinists, the International Brotherhood of Electrical Workers, the American Federation of Teachers, and the United Steelworkers respectively.

For a discussion of the potential of unions in resolving discrimination issues for employees, see Stephen A. Plass, *Arbitrating, Waiving and Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 827-28 (1992).

280. A common scenario raising the issue of accommodation is placement of employees returning from medical leaves or absences due to work-related injuries. See Jane B. Stranch, *Rights and Duties of Organized Labor Under the Americans With Disabilities Act*, at 17 (unpublished manuscript on file with the author) (majority of EEOC claims in the Tennessee area

Educational efforts can further aid in accommodation. Many national unions have developed educational materials regarding employees with disabilities.²⁸¹ All employees risk becoming disabled at some point in their working lives, whether through disease or injury. Awareness of this significant possibility will help to convince employees to support both contractual protections and reasonable accommodations for disabled employees.²⁸² As a result, unions will be better able to represent the disabled members of the bargaining unit and equalize their rights with those of able employees.²⁸³

A determination, whether legislative or judicial, that an accommodation adversely affecting the collectively bargained rights of other employees creates undue hardship might discourage unions and employers from voluntarily negotiating such an accommodation. The union, however, owes a duty of fair representation to both disabled and able employees and therefore must determine, in good faith and based on the merits of the issues involved, whether to seek or agree to accommodation.²⁸⁴

Ideally, the parties should obtain the agreement of any affected employees to the accommodation. This would both obviate morale problems and eliminate grievances and duty of fair representation complaints. Absent agreement by the affected employee(s), the union and the employer should still be permitted to agree to an accommodation. The employer would be protected from a breach of contract claim by the

are coming from employees who are or have been disabled, not from applicants). Anecdotal evidence from practicing attorneys available to the author suggests that the Tennessee experience is not atypical. Those most likely to be affected adversely by seniority requirements are disabled applicants seeking jobs for which the employer does not hire at the entry level. Since applicants have no right to reassignment, those individuals would not have a claim unless the employer's requirements for the non-entry level jobs were found to be discriminatory, either intentionally or by virtue of an unjustified disparate impact.

281. See Frierson, *supra* note 216, at 311.

282. Many unions have already negotiated such protections. For example, ¶6(a) of the UAW-General Motors National Agreement states:

It is the policy of General Motors and the UAW that the provisions of this Agreement be applied to all employees covered by this Agreement without discrimination based on race, color, religion, age, sex, national origin or handicap. Any claims of violation of this policy or claims of sexual harassment may be taken up as a grievance

See *supra* note 279 for other examples of union-negotiated protections for disabled employees.

283. See Smith, *supra* note 183, at 283.

284. See *id.* at 280. Ervin suggests a number of factors that should be considered in making the decision. See Ervin, *supra* note 38, at 969. The recent decision of the NLRB General Counsel in Local 876, United Food and Commercial Workers, 1993 W.L. 257550 (N.L.R.B. G.C. June 23, 1993) recognizes that a union that decides in good faith and without discriminatory motive not to agree to an accommodation in violation of the collective bargaining agreement does not breach its duty of fair representation. See *supra* note 233.

union's agreement.²⁸⁵ The union might be vulnerable to a duty of fair representation claim from any employee adversely affected by the accommodation, however. The NLRB or the courts faced with such a claim should find for the union unless hostility or discrimination against the able employee motivated the union's action.²⁸⁶ A decision to accommodate in violation of the agreement may not be arbitrary. Similarly a decision to rely on the doctrine of undue hardship should protect both the employer and the union unless the disabled employee could demonstrate that intentional discrimination motivated the decision.²⁸⁷

The suggested interpretation of the statute may also be criticized as insufficiently protecting free collective bargaining. Effectively, the proposed solution requires violation of the negotiated agreement in certain circumstances. The interference with the agreement is limited in scope, however. Viewed as a whole, this proposal sustains the collective bargaining system by insuring an important role for the union in negotiating accommodations for disabled employees.

The proposed standards would be most effectively implemented by legislative or regulatory action, providing clear guidance to the parties. Absent clarifying legislation or rulemaking, the courts and the NLRB should interpret the ADA and the NLRA as set forth above. The interpretation is consistent with the statutory language and legislative history of the ADA and resolves many of the conflicts created by the accommodation obligation while protecting the rights of both employees with disabilities and employees without disabilities. A clearly defined standard will limit the potential floodgate of litigation over these issues under both the ADA and the NLRA, thereby reducing the burdens on the

285. The employer might lose the protection if the union were found to have violated the duty of fair representation, however. See *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 569 (1976) (where union has breached its duty of fair representation, contractual remedy against the employer is not foreclosed by failure to exhaust grievance procedure or final and binding arbitration award).

286. See *Vaca v. Sipes*, 386 U.S. 171, 193 (1967) (union breaches the duty of fair representation if its conduct is arbitrary, discriminatory or in bad faith).

287. The fact that the union and the employer negotiate in an attempt to reach agreement on an accommodation that would violate the agreement should not waive their right to assert the undue hardship defense if no agreement is reached. Such an interpretation would discourage efforts to negotiate accommodations, thereby interfering with the goals of the statute. Should the union and employer disagree, one party willing to accommodate in violation of the agreement and the other unwilling, both should be protected against any claim of discrimination by the undue hardship defense. The union, however, might be able to file a grievance under the collective bargaining agreement if the agreement contains contractual rights for the disabled employee. The arbitrator would have to determine whether the agreement's protection against disability discrimination required accommodation. The employer's only recourse, if it desires to accommodate in violation of the agreement, would be to act unilaterally and risk a grievance or unfair labor practice charge. The employer should not be privileged to act unilaterally by virtue of the union's failure to agree to a violation of the agreement that would adversely affect another employee.

administrative agencies and the courts.²⁸⁸ In addition, the standard best accommodates the policies of both statutes, prohibiting discrimination against employees with disabilities while preserving the collective bargaining system established by the NLRA.

G. *The ADA and Grievance Arbitration*

Almost all collective bargaining agreements contain a grievance procedure that culminates in binding arbitration.²⁸⁹ Typically, the arbitration procedure encompasses disputes regarding the meaning and application of the agreement.²⁹⁰ Many contracts contain provisions relating to disability; arbitrating disputes involving disability issues is not uncommon.²⁹¹ The potential for ADA liability may encourage unions to negotiate additional protections for employees with disabilities and to arbitrate more grievances over violations of these contractual provisions.²⁹² The ADA expressly encourages the use of alternative dispute resolution, including arbitration, to resolve disputes under the statute.²⁹³ The contractual grievance and arbitration procedure can provide an effective means of resolving disability issues. This avoids the necessity of a lengthy and expensive federal court action.²⁹⁴

If the union arbitrates or seeks to arbitrate an issue that is also covered by the ADA and the employee files suit under the statute, the court must determine how the arbitration decision will effect the statutory claim. Precedent under Title VII suggests that the employee is entitled to pursue the judicial action regardless of the outcome of the arbitration or the existence of an arbitral remedy.²⁹⁵ In *Alexander v. Gardner-Den-*

288. The proposals for interpretation of the statute suggested here are designed to work as a comprehensive scheme. If all of the decisionmaking bodies involved do not adopt the suggested interpretations, the goal of minimizing litigation will not be achieved and conflicting decisions will persist. In addition, the NLRB and the EEOC should continue to work together in an effort to come to agreement about treatment of these issues. The recent memorandum of understanding is a step in the right direction. See *supra* note 236. The NLRB should also consider refusing to defer to arbitration cases involving ADA issues that would otherwise be deferred until the law in this area is established by the agencies and courts. See discussion of the NLRB's deferral policy in *Hardin*, *supra* note 48, at 1012-84. On the other hand, if the parties are able to resolve the entire dispute in arbitration, deferral might be appropriate. See discussion of Rabin's proposal *infra* note 314. The General Counsel has indicated an intent to follow the normal deferral policy in cases involving ADA issues. See General Counsel's Memorandum, *supra* note 218, at n.18.

289. See *supra* note 56.

290. See 2 Collective Bargaining Negot. & Cont. (BNA) § 51:261 (Jan. 11, 1993).

291. See, e.g., cases cited *supra* note 279.

292. See *supra* notes 105-12 and accompanying text.

293. See ADA § 513, 42 U.S.C. § 12212 (Supp. II 1990).

294. See Rabin, *supra* note 2, at 248-49.

295. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). But cf. *Bender v. A.G. Edwards & Sons*, 971 F.2d 698 (11th Cir. 1992) (securities broker required to arbitrate claims of gender discrimination under Title VII pursuant to arbitration clause in broker registration

ver Company,²⁹⁶ the United States Supreme Court held that the employee was entitled to pursue an action in federal court alleging race discrimination under Title VII despite an arbitration decision finding that he was discharged for just cause.²⁹⁷ The issue of race discrimination had been raised before the arbitrator, but was not mentioned in the decision.²⁹⁸ The Court found that the employee was entitled to a trial de novo because the two proceedings differed significantly.²⁹⁹ The arbitration dealt with contractual rather than statutory issues and the arbitrator's function was to determine the intent of the parties, rather than to resolve statutory claims.³⁰⁰ Additionally, the arbitration was informal and did not contain the procedural safeguards of judicial proceedings.³⁰¹ In further support of its decision, the Court noted the union's control over the grievance procedure, which might result in subordination of the individual grievant's interest to the collective interests of the bargaining unit.³⁰²

Because the ADA adopted the enforcement procedures and remedies of Title VII,³⁰³ there is a strong argument that the *Gardner-Denver* rule should apply. Yet, the Court there noted that "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective bargaining agreements."³⁰⁴ While the ADA does not expressly mention arbitration under collective

agreement); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992) (same). Initially, the district court and the court of appeals denied Dean Witter's demand for arbitration pursuant to the agreement signed by Alford. 712 F. Supp. 547 (S.D. Tex.), *aff'd*, 905 F.2d 104 (5th Cir. 1990). The Supreme Court vacated and remanded *Alford* in light of *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991). The court of appeals remanded to the District Court, 939 F.2d 229 (5th Cir. 1991), which dismissed the plaintiff's claims with an order to arbitrate. 975 F.2d at 1161. The court of appeals affirmed the dismissal. *Id.* See also *Newton v. Southern Pac. Transp. Co.*, 141 L.R.R.M. 2477 (W.D. Tex. 1992) (arbitration under Railway Labor Act requires dismissal of Title VII claim of railroad employee); *Scott v. Farm Family Life Ins. Co.*, No. 92-12774-T, 1993 U.S. Dist. LEXIS 10255 (D.C. Mass. 1993) (insurance sales agent required to arbitrate gender discrimination claim pursuant to arbitration clause in her agent contract).

296. 415 U.S. 36 (1974).

297. 415 U.S. at 44. The Court rejected arguments that the employee had foregone his statutory claim by virtue of election of remedies or waiver. *Id.* at 49. The Court later reached the same result in cases involving statutory claims under the Fair Labor Standards Act and the Civil Rights Act of 1871, 42 U.S.C. § 1983. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

298. 415 U.S. at 42.

299. *Id.* at 52. The Court did note that the arbitration decision could be admitted into evidence and accorded the weight that the court deemed appropriate. *Id.* at 59-60.

300. *Id.* at 53. The Court noted that arbitrators are chosen for their expertise in industrial relations, not their legal expertise. *Id.* at 52.

301. *Id.* at 57-58.

302. *Id.* at 58 n.19.

303. ADA § 107(a), 42 U.S.C. § 12117(a) (Supp. II 1990).

304. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). The 1991 Civil Rights Act, which amended Title VII, added a provision encouraging alternative dispute resolution which is

bargaining agreements, it does encourage the use of arbitration "where appropriate and to the extent authorized by law."³⁰⁵

Given this express sanction of arbitration, courts could follow the approach articulated by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*³⁰⁶ In *Gilmer*, the Supreme Court held that an individual employee who had signed an arbitration agreement as a part of his application for registration with the New York Stock Exchange was bound to arbitrate a statutory claim of age discrimination.³⁰⁷ The *Gilmer* Court rejected the argument that arbitration is procedurally and substantively inadequate to resolve statutory disputes, an argument that had influenced the *Gardner-Denver* Court.³⁰⁸ The Court also distinguished *Gardner-Denver*, however, noting first that the employees there, unlike *Gilmer*, had not agreed to arbitrate statutory claims and thus, the arbitrator had no authority to resolve such claims.³⁰⁹ Second, the *Gilmer* Court noted the absence of the tension between collective and individual rights because *Gilmer* involved a nonunion workplace.³¹⁰ The final differentiating factor mentioned by the Court was that the *Gardner-Denver* case was decided under Title VII, not the Federal Arbitration Act, which "reflects a 'liberal federal policy favoring arbitration agreements.'"³¹¹

Gilmer followed the Court's recent trend favoring arbitration of statutory disputes.³¹² Nevertheless, and despite the language in the

identical to Section 513 of the ADA. See Civil Rights Act of 1991, Pub. L. 102-166, Section 118, 42 U.S.C. § 1981, note (Supp. III 1991).

305. ADA § 513, 42 U.S.C. § 12212 (Supp. II 1990).

306. 111 S. Ct. 1647 (1991).

307. *Id.* at 1650.

308. *Id.* at 1654. The Court did examine the arbitration procedures at issue, finding them satisfactory, thus suggesting that in the absence of certain protections, arbitration of statutory claims might inadequately protect statutory rights. *Id.* at 1655.

309. *Id.* at 1655-57.

310. *Id.* at 1655. The Court seemed to elevate this concern in *Gilmer*, since in *Gardner-Denver* it was relegated to a footnote. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974). In *Barrentine*, however, which followed *Gardner-Denver* but preceded *Gilmer*, the Court emphasized its concern about the potential for divergence between the interests of the union, which is required to balance individual and collective interests, and the interests of the grievant. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 742 (1981).

311. *Id.* at 1657 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985)). Commentators on *Gilmer* have speculated about whether it will be applied to require arbitration under employment agreements, since the Federal Arbitration Act states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988). See, e.g., James A. King, Jr. et al., *Agreeing to Disagree on EEO Disputes*, 9 LAB. LAW. 97, 107-14 (1993); Plass, *supra* note 279, at 792-94; James A. Burstein & Kenneth D. Schwartz, *Gilmer v. Interstate/Johnson Lane Corporation: The Supreme Court Endorses Arbitration of Age Discrimination Claims*, 17 EMP. REL. L.J. 173, 181-83 (1991); Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 753-54 (1990).

312. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989);

ADA encouraging arbitration, the *Gilmer* Court's distinction of *Gardner-Denver* suggests that arbitration of a contractual disability claim under the collective bargaining agreement should not preclude adjudication of the statutory claim.³¹³ The reasoning of the *Gardner-Denver* Court remains persuasive with respect to statutory discrimination claims.³¹⁴ Application of the *Gardner-Denver* rule to ADA claims is consistent with the legislative history, which indicates that Congress did not intend for Section 513 of the ADA to preclude litigation, even where there is a contractual agreement to arbitrate.³¹⁵

Because unions will be encouraged to negotiate contractual provisions regarding disability discrimination and to arbitrate grievances under those provisions, both to protect disabled employees and to avoid liability under the ADA, this rule may provide a disabled employee with two bites at the apple, one in arbitration and one in court. Although dual litigation will be costly to the employer and to the adjudicatory system, such a rule will further the statutory purpose of eradicating disability discrimination. Furthermore, if the employee prevails in arbitration, he or she may decline to proceed under the ADA, resulting in savings of

Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987); *Mitsubishi Motors*, 473 U.S. 614.

313. See Plass, *supra* note 279, at 779 for a suggestion that the courts may rely on language encouraging arbitration in the Civil Rights Act of 1991 to "accommodate and defer to arbitral resolution of Title VII disputes on a broad scale." See also *Arbitrators Told to Be Sensitive to Workforce Diversity, Perceptions*, 110 Daily Lab. Rep. (BNA) at d21 (June 10, 1993) (reporting on presentations at the Annual Meeting of the National Academy of Arbitrators suggesting that arbitrators will be hearing more discrimination cases); *Departing EEOC General Counsel Sees Need for New Direction At Overwhelmed Agency*, 111 Daily Lab. Rep. (BNA) at d3 (June 11, 1993) (EEOC General Counsel suggests greater use of alternative dispute resolution as one method of reducing the overload of cases at the underfunded, understaffed agency). Cf. Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993) (compulsory binding arbitration of ADA claims is inconsistent with Congressional intent and the policies underlying the ADA, and it is not required by the Federal Arbitration Act which broadly excludes employment contracts).

314. As noted by Professor Estreicher, the most persuasive reason for following the *Gardner-Denver* rule is that the union has no authority to waive or compromise the employee's statutory rights. See Estreicher, *supra* note 311, at 780-81. See also Rabin, *supra* note 2, at 227 (key for the Court in *Gardner-Denver* was that employee could not be bound by union's prospective waiver of public rights). For a recent case holding that arbitration under the Railway Labor Act does not bar judicial consideration of discrimination claims under the Rehabilitation Act, see *Bates v. Long Island R.R. Co.*, No. 92-9308, 1993 U.S. App. LEXIS 16259 (2d Cir. July 2, 1993).

Professor Rabin's article makes an appealing argument for utilizing arbitration for claims involving both public and private rights, such as cases where the right to accommodation conflicts with seniority rights under the agreement. The proposal would involve some changes in the existing arbitral system and in the scope of judicial review. See Rabin, *supra* note 2, at 242-62.

315. See Legislative History, *supra* note 181, Vol.1, at 516-17 ("The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities").

time and expense for both the parties and the administrative and judicial systems.³¹⁶

IV. CONCLUSION

Application of the Americans With Disabilities Act to the unionized workplace raises issues unique to that setting. The existing statutory and regulatory guidance for employers and unions striving to comply with ADA obligations is limited. Ideally, Congress should address the problem by clarifying the union's obligations under the ADA and resolving the conflicts between the ADA and the NLRA, two important Congressional mandates. Since Congressional revisitation of the statutes is unlikely, however, this Article suggests regulatory and judicial interpretations of the statute that would resolve much of the ambiguity and provide clearer guidance for employers, unions and disabled employees. The suggested interpretations attempt to reconcile the ADA and the NLRA without sacrificing the goals of either statute. At the same time, the proposals attempt to draw some clear lines to minimize uncertainty and therefore, litigation.

Unions can play an important role in enforcing the rights of disabled employees and in educating the entire workforce about how to accommodate the disabled. If they seize the opportunity to do so, it will be a significant step toward eradication of disability discrimination.

316. See Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 537 (1992). Arbitration is generally less expensive than litigation. *Id.* at 525. An employee who wins in arbitration may choose to litigate, however, for the statute provides remedies for intentional discrimination that are generally unavailable in arbitration, such as compensatory and punitive damages. See 42 U.S.C. § 1981(a)(2), (b) (1988 & Supp. III 1991); Summers, *supra*, at 527. Compensatory and punitive damages are not, however, available in disparate impact cases or in cases involving failure to provide reasonable accommodation where the employer can show good faith efforts to make such accommodation. See 42 U.S.C. § 1981(a)(1),(3) (1988 & Supp. III 1991).